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Vol. I

TRANSCRIPT OF RECORD

85796

Supreme Court of the United States

OCTOBER TERM, 1937

No. 84

ALABAMA POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

No. 85

ALABAMA POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

No. 86

IOWA CITY LIGHT AND POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 26, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

VOL. 2

TRANSCRIPT OF RECORD

United States Court of Appeals for the District of Columbia

APRIL TERM, 1936

No. 6579

TEXAS UTILITIES, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. [illegible], ACTING EXECUTIVE OFFICER THEREOF, ET AL.

No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN [illegible], EXECUTIVE ASSISTANT THEREOF, ET AL.

No. 6583

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

FILED [illegible]

PRINTED AUGUST [illegible], 1936

United States Court of Appeals for the District of Columbia

APRIL TERM, 1936.

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HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; ET AL.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Transcript of record, No. 6579, filed Oct. 24, 1935	1	1
Motion to remand No. 6579	37	37

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX CONTINUED.

	Original	Print
Transcript of record, No. 6580, filed Oct. 24, 1935	64	39
Motion to remand No. 6580	102	77
Transcript of record, No. 6583, filed Oct. 24, 1935	237	159
Motion to remand No. 6583	271	193
Order remanding No. 6579	304	194
Order remanding No. 6580	305	195
Per curiam memorandum in support of order remanding cause &c. No. 6580	306	196
Order remanding No. 6583	308	198
Transcript of record, Nos. 6579, 6580, and 6583 filed Aug. 18, 1936	309	199
Designation for printing and binding of records	646	503
Proceedings in United States Court of Appeals for District of Columbia		507
Minute entry of hearing		507
Opinion, Van Orsdel, J.		508
Concurring opinion, Groner, J.		515
Judgment, Case No. 6580		516
Judgment, Case No. 6583		516
Judgment, Case No. 6865		517
Order on motion for stay of mandate		518
Designation of record		519
Clerk's certificate		520
Orders allowing certiorari		522

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1937.

—9176-C

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1935

No. 6579

TEXAS UTILITIES COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DISBURSEMENTS DIVISION OF THE TREASURY OF THE UNITED STATES, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX

	Original	Print
Caption	a	1
Memoranda: Bill of complaint filed, amended bill of complaint filed	1	2
Motion to dismiss the bill of complaint as amended	2	2
Motion of defendants Henry Morgenthau, Jr., et al. to dismiss amended bill of complaint	4	4

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1935.

—7018-C

	Original	Print
Memoranda: Order for preliminary injunction filed, injunction undertaking for $5,000.00 approved and filed	5	5
Second amended bill of complaint for an injunction and other relief; fiat of Adkins, J.	6	5
Order dismissing bill of complaint	38	32
Appeal noted by plaintiff, bond for costs on appeal fixed, &c.	39	32
Order continuing injunction	40	33
Memorandum: $50 deposit in lieu of bond on appeal	41	34
Assignment of errors	42	34
Designation of record	43	35
Clerk's certificate	45	36

United States Court of Appeals for the District of Columbia

No. 6579.

TEXAS UTILITIES COMPANY, etc., Appellant,

vs.

HAROLD L. ICKES, Administrator, et als.

a Supreme Court of the District of Columbia.

In Equity.

No. 58927.

TEXAS UTILITIES COMPANY, a Corporation Organized and Existing under the Laws of the State of Texas, Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan, Acting Executive Officer thereof, et als., Defendants.

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity No. 58927.

TEXAS UTILITIES COMPANY, a Corporation Organized and Existing under the Laws of the State of Texas, Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan, Acting Executive officer thereof; F. E. Schnepfe, Director of Projects Division thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, Defendants.

Memoranda.

June 24, 1935—Bill of Complaint filed.
July 1, 1935—Amended Bill of Complaint filed.

2 *Motion to Dismiss the Bill of Complaint as Amended of the Defendants, Harold L. Ickes, as Federal Emergency Administrator of Public Works; Horatio B. Hackett, as Assistant Administrator; J. J. Madigan, as Acting Executive Officer, and F. E. Schnepfe, as Director of the Projects Division of Said Adminstration.*

Filed July 5, 1935.

* * * * * * *

Come now the said defendants, by their attorney below named, and move the Court to dismiss the bill of complaint as amended, and as grounds for said motion say:

1. The bill of complaint does not state any matter in equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

2. The bill of complaint seeks an injunction to restrain the defendants from entering into any arrangement or

agreement with the City of Plainview, Texas, for the purpose of constructing or financing the construction of an electric plant and system in said city. The said City of Plainview is an indispensable party to such a suit and is not joined

3. The said suit does not present a justiciable con-
3 troversy of which the courts of the United States or of the District of Columbia have jurisdiction.

4. The plaintiff does not allege the necessary injury or interest which entitle it to bring this action or obtain the relief prayed for.

5. The bill of complaint does not show that the acts threatened by the defendants will injure any right of the plaintiff.

6. The plaintiff's capacity as a federal taxpayer is insufficient to enable it to challenge the constitutionality of the Act referred to in the bill of complaint, viz., Title II, Secs. 20°, 203 of the National Industrial Recovery Act, or the acts of the Administrator thereunder.

7. The plaintiff's capacity as a taxpayer of said City of Plainview and of the State of Texas and other subdivisions thereof is insufficient to enable it to challenge the constitutionality of said Act, or the acts of the Administrator thereunder.

8. The power of the Congress to appropriate money is not confined to the enumerated powers expressed in Article I of the Constitution.

9. No constitutional rights of the plaintiff are impaired or destroyed by the acts alleged to be threatened by the defendants.

10. The acts alleged to be threatened by the defendants are authorized by law.

11. The bill of complaint does not in other respects apparent on the face of the bill state a cause of action cognizable in equity.

HENRY T. HUNT,

Special Assistant to the Attorney General, as Attorney for Defendants Ickes, Hackett, Madigan and Schnepfe.

Service of copy acknowledged July 5, 1935.

HOWARD C. WESTWOOD,

Atty. for Plff.

4 *Motion of Defendants Henry Morgenthau, Jr., William A. Julian and Guy Allen to Dismiss the Amended Bill of Complaint for an Injunction and Other Relief.*

Filed July 8, 1935.

* * * * * * *

Come now the defendants, Henry Morgenthau, Jr., William A. Julian, and Guy Allen, by their attorneys below named, and move the Court to dismiss the amended bill of complaint for an injunction and other relief, and as grounds for said motion say:

1. That the amended bill of complaint does not state any matter in equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

2. That the City of Plainview, Texas, is an indispensable party to said suit and is not named as a party.

3. That said suit does not present a justiciable controversy over which the courts have jurisdiction.

4. That the plaintiff does not allege the necessary injury or interest which entitles it to bring this action or obtain the relief prayed for.

5. That the bill of complaint does not show that the acts threatened by these defendants will injure any right of the plaintiff.

6. That the plaintiff's capacity as a federal taxpayer is insufficient to enable it to challenge the constitutionality of the act referred to in the bill of complaint.

5 7. That the power of Congress to appropriate money is not confined to the enumerated powers expressed in Article I of the Constitution.

8. That no constitutional rights of the plaintiff are impaired or destroyed by the acts alleged to be threatened by these defendants.

9. That the acts alleged to be threatened by these defendants are authorized by law.

10. That the statutes referred to in the bill of complaint against which plaintiff complains are not unconstitutional.

11. That the amended bill of complaint fails to allege any facts showing any legal injury to the plaintiff, threatened

or otherwise, as the basis for which it may maintain this suit.

12. That the facts alleged in the amended bill of complaint show that this is a suit against the United States, and the United States has not consented to be sued.

13. That the bill of complaint does not in other respects state a cause of action cognizable in equity.

14. And for other reasons apparent of record.

LESLIE C. GARNETT,
United States Attorney,
DAVID A. PINE,
Assistant United States Attorney,
Attorneys for Defendants,
Morgenthau, Julian and Allen.

Received copy of the above motion to dismiss, this 8th day of July, 1935.

EDWARD G. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
FONTAIN C. BRADLEY,
Attorneys for Plaintiff.

Memoranda.

August 28, 1935.—Order for Preliminary Injunction filed. Injunction undertaking for $5,000.00 approved and filed.

6 Leave to file granted. Jesse C. Adkins. Oct. 14, 1935.

Second Amended Bill of Complaint for an Injunction and Other Relief.

Filed October 14, 1935.

* * * * * * *

Now comes the plaintiff, and by leave of Court files this its second amended bill of complaint, and for its causes of action against the defendants alleges:

Paragraph I.

Plaintiff is a corporation organized and existing under the laws of the State of Texas, is a resident and citizen of

the State of Texas, and has its principal office and corporate domicile in the City of Plainview, Hale County, Texas, and sues in its own right.

Paragraph II.

The defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found
7 within said District of Columbia, are more than twenty-one years of age, and are more particularly identified as herein specifically set forth:

Harold L. Ickes is the duly appointed, qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the National Industrial Recovery Act;

Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of PWA;

J. J. Madigan is the duly appointed, qualified Acting Executive Officer of PWA;

F. E. Schnepfe is the duly appointed, qualified and Acting Director of Projects Division of PWA;

Henry Morgenthau, Jr., is the duly appointed, qualified and acting Secretary of the Treasury of the United States, and as such has general supervision and control over the disbursement of the public funds of the United States;

W. A. Julian is the duly appointed, qualified and acting Treasurer of the United States, and as such is, under the supervision of the said Secretary of the Treasury, in control of the disbursement of the public funds of the United States; and

Guy Allen is the duly appointed, qualified and acting Chief Disbursing Officer of the Treasury Department, and as such is at the head of the Division of Disbursement of the Treasury Department, and is in control of the actual drawing and issuing of checks on behalf of the United States, and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under the

pretended authority of Title II of the National Industrial Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and paragraph (a) of the President's Executive Order of June 7, 1935.

Paragraph III.

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV.

On or about the 15th day of April, 1909, the City Council of the City of Plainview, Texas, passed its Ordinance No. 23, a copy of which is hereto attached, marked Exhibit A, granting to Charles A. Malone and R. C. Malone and their associates, successors and assigns a franchise to construct, operate and maintain an electric light and power plant and distribution system in the City of Plainview, Texas, and to use the streets, alleys and public highways of said city for the purpose of such plant and system. Said franchise was granted for the period of fifty years. On or about the 17th day of November, 1915, Charles A. Malone and R. C. Malone assigned said franchise to this plaintiff. The said franchise has never been cancelled or forfeited and has at all times been and is now in full force and effect. In reliance upon said franchise the plaintiff built a large power plant and distribution system in said city, and has been and is now operating in said city under said franchise, and has been and is now engaged in the business of distributing and selling electricity to the inhabitants of said city and to the City itself.

Said business of plaintiff in said city is a part of a large electric utility business conducted by plaintiff throughout a larger region in that part of Texas wherein said city is located. Neither in Plainview nor in said larger region is plaintiff engaged in interstate commerce or in any business in any way affecting interstate commerce. It produces and sells its electricity entirely within the State of Texas,
9 and is not in any way affecting any persons engaged in or whose business in any way affects interstate commerce.

Plaintiff's Texas system is adequately designed and conducted to fit the peculiar needs of the countryside wherein

communities are scattered and spaces vast. Its equipment is modern and in excellent condition throughout, and its plants, particularly with respect to Plainview, are of the best condition and design, for service of this sort, which engineering skill has devised. Its system has spread and grown in the van of the needs of said portion of the State of Texas, and is so coordinated as to anticipate future needs and growth; it represents careful social planning and understanding of the communities. In this system the Plainview unit is one of the most important parts and its continued operation as at present is indispensable to adequate service at the present low rates for many surrounding communities, in the drive to develop which the Plainview unit has been a spearhead. The entire system represents intensive application of the economies of large-scale, integrated power development, and if the Plainview unit were to be driven to cease or substantially to curtail operations by the actions of PWA as hereinafter set forth, the result would be to destroy integration.

The total value of plaintiff's investment in Texas is approximately Ten Million Dollars ($10,000,000.00) and, while plaintiff cannot precisely allege the value properly allocated to its Plainview service, its business and investment so allocated would be at least Eight Hundred Thousand Dollars ($800,000.00) of value. This represents a plant and distribution system and general office building within Plainview, and the allocated value of a transmission system connecting the Plainview system with a central power plant near Abernathy, Texas. The value of the plaintiff's unexpired Plainview franchise alone is in excess of Twenty-Five Thousand Dollars ($25,000.00), and the gross revenue from plaintiff's operations within Plainview for the year 1934 were approximately One Hundred Fifty Thousand Dollars ($150,000.00).

Plaintiff has been and now is the only agency existing in Plainview for the distribution and sale therein of electricity. Its system was designed to be, and is, adequate to supply and distribute all the electricity at the present time required within Plainview by users thereof, and has excess facilities and capacity sufficient to supply and distribute to new users, or for additional uses, all further amounts of electricity which it may be reasonably anticipated will in the future be required by users within Plainview. The elec-

tric service furnished by plaintiff has been and will continue to be adequate, reasonable and satisfactory, and has been and will continue to be furnished at rates which are fair and reasonable, at levels which are among the lowest in the state charged by utilities, whether publicly or privately owned, for service of the character furnished by plaintiff. Pursuant to statutes of the State of Texas, and to its City Charter, Plainview has for some years regulated all rates for the service furnished by plaintiff to the inhabitants of Plainview and to the City of Plainview itself, and in all other necessary respects has regulated said service furnished by plaintiff. The service furnished by plaintiff within Plainview will continue to be adequate, reasonable and satisfactory hereafter, not only because of plaintiff's disposition so to furnish service, but because of said regulatory power lodged in the City of Plainview.

Out of a total population of eighty-eight hundred people within Plainview, plaintiff has through the years, at the risk of the private investment of funds by the holders of its various securities, built up a business which now serves twenty-two hundred customers, aside from its service to the City of Plainview itself.

11 Paragraph V.

Plaintiff is and for many years has been a taxpayer of the United States, and has paid many thousands of dollars in income and excise taxes to the United States, and is subject to the obligation of paying hereafter many thousands of dollars in such taxes, and is a purchaser and consumer of commodities subject to taxes payable to the United States. For the year 1934 the plaintiff paid or incurred liability to pay taxes to the United States, applicable to its electrical properties, operation and sales in Texas, in the sum of more than Twenty-Six Thousand Seven Hundred Fifty Dollars ($26,750.00).

Paragraph VI.

Plaintiff is and for many years has been a taxpayer of the City of Plainview, of Hale County, and of the various taxing districts located wholly or in part in Hale County, and of the State of Texas, and has paid thousands of dollars in taxes to said City, County and subdivisions, and

State, and plaintiff is subject to the obligation of paying many thousands of dollars in such taxes in the future. With respect to its electrical properties, operation and sales in Texas, plaintiff has paid, or incurred liability to pay, taxes for the year 1934 to said City in excess of the sum of Three Thousand Dollars ($3,000.00), to said County and subdivisions in excess of the sum of Nine Thousand Five Hundred Dollars ($9,500.00), and to said State in excess of the sum of Eighteen Thousand Dollars ($18,000.00).

Paragraph VII.

The PWA, under the direction of defendant Ickes, has conceived, and for some time past has been executing throughout the country a plan to fix the rates of privately owned electricity utilities at levels determined by PWA to be "socially desirable" and to promote public ownership of electricity utilities, regardless of local state policy, as a "yardstick" of electricity rates and service to
12 which privately owned electricity utilities must conform. This plan is not intended to have and, in fact, does not have any relation to interstate commerce; its intended and actual effect is control and regulation of entirely local and intrastate commerce.

The plan is effectuated by soliciting and inducing municipalities and other political subdivisions of the several states to permit PWA to institute and to carry out, as Federal Public Works Projects, the construction of electricity generating and distributing systems within such subdivisions, such systems being planned, built and financed by and under the control and direction of PWA, and being operated by PWA through its retention of absolute control over the rates to be charged for the service of such systems when completed.

Upon tentative selection of an area for such a Project, PWA usually informs existing private electricity utilities in such area that to escape being superseded by or suffering competition from such a system such private utilities must establish rates satisfactory to PWA and, in effect, consent to continuing PWA regulation of their rates under the threat of destruction. The rates so exacted are arbitrarily set by PWA, do not provide a reasonable return to such utilities upon their investment, are much less than those fixed by authorized state regulatory bodies, and are

determined without hearing such utilities and without any consideration whatever of the elements required by the due process clauses of the Fifth and Fourteenth Amendments to be considered in rate regulation. Plaintiff cannot aver with particularity the level to which such privately owned utilities are required to conform because PWA has never adopted definite criteria but acts in each case according to an arbitrary and vaguely formulated conception of "social desirability". In general, however, such level is that at which a system built and operated by PWA as aforesaid would earn enough to pay operating costs without
13 provision for Federal, state, or local taxes, and to repay over a long period of time so much of the cost of construction thereof as is represented by the pretended loan made by PWA as hereinafter described; and in many instances PWA requires a level even lower.

If the existing private utilities in such area conform to the standard so fixed by PWA, PWA usually suspends consummation of such a Federal Public Works Project for a time sufficient to enable it to be assured that such conformity is in good faith and permanent and then, if satisfied, PWA usually abandons the project. Otherwise PWA proceeds to consummate the Project, as heretofore and hereafter described, and either subjects the private utilities to rate-war to attain the rate level desired by PWA and if possible to drive such utilities out of business, or induces the state regulatory bodies to revoke the privileges of such utilities to do business.

This plan is frankly acknowledged by PWA in public press releases, in public statements of the Administrator, in instructions given to PWA agents charged with the administration of PWA functions, in negotiations with existing private utilities, and otherwise.

In deciding thus to build electricity generating and distributing systems, the sole consideration entertained by PWA is the rate level of existing privately owned utilities. The extent of unemployment in the vicinities, or elsewhere, and the relation between the employment given by such a Project and the character of workers unemployed, the dependability and economic soundness of existing private utilities, the capacity of the areas to absorb increased electricity production, and other considerations relating to the need for such a PWA electricity system are excluded en-

tirely by PWA in reaching its decision to build and operate such a Project.

To induce the necessary cooperation of municipalities and other political subdivisions in the various states
14 and to procure their consent to such Federal Public Works Projects and to the regulation of the rates of existing privately owned utilities by PWA in accordance with the aforesaid plan, PWA, by advertising and other newspaper publilicity and by circulars and direct statements ma[illegible] to municipalities by authorized agents, has represented that it would authorize and direct the construction, as Federal Public Works Projects, of electricity generating and distributing systems, to become the property of such municipalities. The representations have been that approximately thirty per cent of the cost of the Project would be an outright gift, the balance of the cost to be repaid to PWA, if at all, out of the revenue of the system; and that thus no risk would be incurred by the municipality. When the municipality consents to such a Project and PWA decides to threaten existing utilities with its consummation, a so-called loan and grant arrangement is entered into similar to the so-called agreements between PWA and the City of Plainview, hereinafter described. Such an arrangement constitutes a pretense and sham in that it does not in fact provide for a loan but merely for the possible recapture of a part of the cost of such projects out of the earnings thereof, and imposes no obligations upon said municipalities and confers no authority upon them in the construction thereof, all as more specifically hereinafter set forth.

All the acts of the defendants hereinafter complained of are done or threatened in pursuance of the plan hereinbefore alleged.

Paragraph VIII.

During the year 1933 PWA and the defendant Ickes, in pursuance of the plan hereinabove alleged, began negotiations which have continued to this day with said City of Plainview looking to the construction in said City as a Federal Public Works Project authorized and directed
15 by PWA and financed by funds of the United States Government, of an individual, diesel engine-oper-

ated, municipal electricity generating and distribution plant, wherewith to furnish said City and its inhabitants with electric service, the same in character, and intended to serve the same parties as that now and heretofore furnished by plaintiff within Plainview, and as would hereafter otherwise be furnished by plaintiff. All such negotiations have been conducted out of the presence of plaintiff and its representatives, and all papers recording such negotiations have been withheld from plaintiff at the direction of PWA, defendant Ickes, his agents and employees. Plaintiff has repeatedly requested of PWA, of defendant Ickes, and of the City of Plainview, access to such papers, and particularly to those portions which have become public documents, but such requests have been refused. There is no other source, so far as plaintiff is able to learn after diligent search and inquiry, from which the content of such negotiations and papers can be learned.

However, on or about March 1, 1935, plaintiff's attorneys and representatives called upon Mr. Otto M. Rau, then Chairman of PWA Power Board of Review, to confer with said Rau concerning such negotiations between PWA and the City of Plainview. In the course of said conference said Rau informed the plaintiff's representatives that the only matter considered relevant by PWA in deciding whether to authorize the project proposed in Plainview was the matter of plaintiff's rates, that all other considerations were immaterial, that PWA's policy was to authorize and proceed with such projects if rates charged by existing private utilities were higher than PWA thought proper and to refuse to do so if such existing rates were deemed proper by PWA. Said Rau then stated that plaintiff's rates were "too high". After further discussion said Rau formally proposed and offered on the part of PWA that if plaintiff would reduce and adjust its rates in a specified manner PWA would disapprove the said project
16 because said rates would be thoroughly satisfactory to PWA and because the City plant could not hope effectually to compete with such rates. Plaintiff promptly accepted such offer and on or about March 4, 1935, delivered to said Rau written notification that such rate reduction and adjustment would be instituted on April 1, 1935. Said reduction and adjustment, in the manner specified by said Rau, were made at that time in reliance upon such

offer by PWA, and said reduced rates continue to be and will in the future be in full force and effect for all plaintiff's service in Plainview.

The aforesaid offer on the part of PWA by said Rau was made pursuant to a procedure regularly established by PWA in the administration of its public works campaign, whereby said Rau was authorized thus to bargain with existing electricity utilities in localities wherein competing projects were contemplated by PWA, and to bind PWA to abandon such projects if the existing utilities would reduce their rates to a level found by said Rau to be that deemed by PWA to be "socially desirable". This procedure as above outlined was designed to carry out the plan of regulating the intrastate electricity rates of the utilities of the country as hereinabove in Paragraph VII alleged.

Despite the binding commitment of PWA, through said Rau, to abandon said Plainview project, and pursuant to the aforesaid plan of regulating and controlling intrastate rates, here applied to secure rates still lower than those sought by PWA in other cases, defendant Ickes, on or about April 18, 1935, notified the City of Plainview, and announced in the public press, that Four Hundred Twenty-Three Thousand Three Hundred Forty-Six Dollars and Four Cents ($423,346.04) of Federal funds had been allocated and would be employed to construct and finance a municipal electricity plant and distribution system in Plainview, to compete with plaintiff as aforesaid. Plaintiff is informed and believes, and so alleges, that of such sum

17 an amount equal to 30 per cent of the cost of labor and materials employed in the construction of such plant and system will constitute an outright gift from the Federal Government to the City of Plainview, and that the balance thereof will be repaid, if at all, only out of the earnings of such project.

Plaintiff is informed and believes and so alleges that PWA and defendant Ickes, with the connivance of and in conspiracy with the City of Plainview, have made said allotment and will proceed with the construction and operation of said plant solely for the purpose of driving down the rates of the plaintiff and so injuring plaintiff's business; that there is no difference between the plaintiff and other privately owned electricity companies justifying the effort which will be made to force plaintiff to reduce its

rates below the level now in effect pursuant to the proposal of said Rau, which effort is not made in other localities against other privately owned utilities in plaintiff's position when such other utilities acquiesce and agree to the rate proposed by said Rau or by a PWA representative performing the functions which were performed by said Rau in this instance. This effort of PWA, and the arrangement with the City of Plainview hereinafter set forth, are pursuant to and in furtherance of the plan heretofore described to control the electricity rates of privately owned utilities throughout the country, and are here directed to secure rates, as will appear from said arrangement, twenty-five per cent lower than those which are, in other cases, sought and enforced by PWA.

While the procedure pursued by PWA, defendant Ickes and his agents, in making such allotment, does not provide for a hearing from those whose property and rights will be injured or destroyed through the financing and construction of such a municipal plant and system, plaintiff has repeatedly requested and sought a hearing before the various organs of PWA, but has constantly been denied the privilege of such hearing. Nevertheless, plaintiff has prepared and filed with PWA a protest in writing
18 against said allotment and against such financing and construction of such plant and system, which protest sets forth in substance and elaborates upon the facts heretofore and hereafter alleged in this bill, but plaintiff is informed, believes and alleges that said protest has been treated as immaterial and has not been considered by PWA. There is no other board, agency or official of the United States to whom plaintiff may apply to prevent the consummation of such proposed financing and construction. Consequently plaintiff has exhausted all administrative remedies which it could possibly have from such threatened action.

Paragraph IX.

Plaintiff is informed, believes and so alleges that the City of Plainview, induced and persuaded by the offer of PWA to give it outright a grant of thirty percent of the cost of construction of an electricity generating and distributing system and by the PWA campaign, described in Paragraph VII hereof, to construct such municipal systems,

has acquiesced in and accepted the PWA proposal to institute a Federal Public Works Project in said City and will conform in all respects to the will of PWA with respect thereto and to its purpose to drive down plaintiff's rates and injure plaintiff's business. Accordingly, the PWA and the defendants will, unless restrained immediately, make available the funds allotted for, and will construct the project, as aforesaid, under the following arrangement:

The defendant Ickes and the City of Plainview will enter into a pretended "loan and grant agreement," if indeed they have not already done so, which will, in effect, provide that the defendant Ickes and his agents shall construct said electricity plant and distribution system in said City and finance said construction by giving outright to said City 30 per cent of the cost of labor and materials employed in the construction of such plant and system, and by the pretense of lending to said City, by pretended purchase of its bonds, to be used for such financing and construction, the difference between the amount of such grant and the sum of Four Hundred Twenty-Three Thousand Three Hundred Forty-Six Dollars and Four Cents ($423,346.04).

19 The said City of Plainview will (or has) agreed in return that said funds will be made available to it upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of defendant Ickes is needed to complete the project; that the said funds shall be deposited by the City in such banks as defendant Ickes chooses; that such proceeds shall be expended by the City only as defendant Ickes consents; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of defendant Ickes; that all work on the project shall be done under the regulation of defendant Ickes; that no contractor or subcontractor shall bid for or work upon such project without the approval of defendant Ickes; that all contractors and sub-contractors shall be equipped with bonds and insurance as defendant Ickes desires; that said City shall engage in such litigation as defendant Ickes deems advisable with respect to irregularities, or defects, or illegalities in the bonds; that defendant Ickes may cancel the arrangement with the City at any time he wishes and withhold further funds from the City, if in his opinion said

City has unreasonably delayed in carrying out any of its duties; that the aforesaid funds shall be available to the City only subject to the power of defendant Ickes to withhold them if he deems the City's budgetary situation to be unsatisfactory, or if he is not satisfied that the City has complied with all provisions of the agreement; and that in other respects the will of defendant Ickes shall control the City's action, even to the extent of the naming of the project, and that such project shall in fact be named "Federal Public Works Project No. —." It is further a part of said arrangement that the defendant Ickes, or his agents, will be permitted to fix, and from time to time to change, minimum rates of pay and maximum hours for all persons employed on such construction, to enforce employment preferences in favor of ex-service men and others, to designate agencies through which workmen may be employed, to direct the use of human labor in place of machinery, to require disclosure to PWA of all information which PWA may desire with respect to such construction work, to require that all the disputes between the City of Plainview and the contractors or subcontractors, and all labor disputes arising in connection with the construction, shall be submitted to the Board of Labor Review or other agency of PWA for final determination, and in every way to direct and control the construction of such plant and distribution system. It is a part of said arrangement that the City shall undertake to obtain any other funds deemed by defendant Ickes necessary to complete such plant and system, in the manner and from sources prescribed by defendant Ickes; to operate the plant and system upon completion and furnish electricity to consumers now being served by plaintiff; never to charge rates at a level more than twenty-five per cent less than the rates now being charged in Plainview by plaintiff; to pay from the general funds of the City, at current selling rate schedules, for energy used by the City itself; to grant to PWA and its assigns a fifteen year franchise to use and occupy public thoroughfares and grounds of said City for furnishing electric service and for the operation and maintenance of such plant and system in the event the City is unable to repay the pretended loan out of the earnings of the project with the rates thereof fixed by the defendant Ickes as afore-

said; and in other ways to submit to the will and regulation of defendant Ickes with respect to the operation of such plant and system. The said pretended bonds to be issued by the City, through the purchase of which the pretended loans from PWA are to be made, are not general obligations of the City, but it is expressly understood and agreed between said City and PWA that said bonds shall not constitute an indebtedness of said City within the meaning of any provision or limitation of the laws of Texas and shall never impose a pecuniary liability upon said City or charge against its general credit. Said pretended bonds are payable solely from the revenue to be derived from said Project after provision for the cost of operation and maintenance.

Paragraph X.

Plaintiff is informed and believes, and so alleges, that the proposed municipal plant and system will be equipped to serve approximately sixty-five per cent of the present demand for electricity within the City of Plainview, and that, on the basis of past experience in cases of competing municipal and private facilities, the proposed plant and system will actually serve about half of the present demand of consumers within the City. Said municipal plant, because of existing contracts with plaintiff, will be prevented from furnishing the electricity for the city street lighting system and for the pumping of the City water supply. In any event the potential demand of the City and its inhabitants is insufficient to support two electricity utilities. Plaintiff is informed and believes, and so alleges, that the proposed plant and system are not intended to and could not serve outside said City.

The rates at which it is proposed that the service of the contemplated municipal plant and system shall be rendered will not sustain it. Even were it to charge the rates now being charged by plaintiff and even if by the end of two years it were to acquire as much as sixty per cent of the business of consumers within said City, it would still be unable to pay from plant revenues the operating costs, the principal and interest on the pretended loan from PWA, and the necessary sums to preserve and replace its property as it wears out. On the contrary, said revenues will fail by between One Hundred and Fifty Thousand Dollars

($150,000.00) and Two Hundred Thousand Dollars ($200,-
000.00) to pay such charges during the first twenty
22 years of the life of the municipal system. Plaintiff
so alleges on the assumption that the operating expenses of the municipal system will be as low as the plaintiff's are and have been; but this will not in fact be true, for the large economies and the low unit-overhead expense, incident to the plaintiff's extensive integrated system, will not be available to a small independent generating and distribu'ing system. Said municipal plant and system will not be self-liquidating.

Paragraph XI.

The threatened action of the defendants herein, pursuant to said plan of defendants and the arrangement with the City of Plainview, as aforesaid, is null and void, and without warrant in law, and the defendants are wholly without authority to perform any of the acts which said arrangement contemplates to be performed by them, and which are threatened to be performed by them, as herein alleged, because:

(1) Section 202 of the National Industrial Recovery Act as extended provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202." PWA has announced that allotments will be made before such a comprehensive program is prepared. In line with this policy, allotments have been made in the absence of the preparation of such program, no such program has ever been prepared, the allotment herein and the action of the defendants in financing and constructing the proposed plant and system are being performed in the absence of the preparation of such a program, and the City of Plainview project herein alleged has never been included in any such program. The only "program" ever prepared is the sum of the particular projects which PWA has determined to carry out; this is not the preparation
23 of a program under Section 202, but is a mere catalogue of action taken.

(2) The proposed pretended loan to the City of Plainview is in violation of the requirement of Section 203 of the

National Industrial Recovery Act as extended that such a loan by the United States be reasonably secured. Said loan is not, and cannot be, reasonably secured. As alleged heretofore, the pretended bonds, through the pretended purchase of which the alleged loan is to be made, are to be paid only from and secured only by the earnings of the proposed electricity plant and distribution system, which will be wholly insufficient and inadequate to pay the operating expense of said plant and the interest and sinking fund upon said pretended bonds, and are not general obligations of said City.

Moreover, said bonds are null and void because based upon undertakings of the City which violate the law of the State of Texas, and any payment for them by defendants is unauthorized by the National Industrial Recovery Act as extended:

(a) The City has surrendered to PWA and defendant Ickes all power and discretion with respect to plans and specifications for such plant and system, the acceptance and rejection of bids, the content and form of construction and other contracts, etc., contrary to Section 17, Article I and Articles II and III, of the Constitution of the State of Texas; contrary to Texas Revised Civil Statutes, 1925, Title 28, and contrary to Texas Revised Civil Statutes, 1925, Article 2368-a.

(b) The City has surrendered all power and discretion to PWA and defendant Ickes with respect to the deposit, disposition and disbursement of the funds for the construction of such plant and system, with respect to the character of material, labor and contractors to be employed, with respect to the manner and form of such construction, and so will be prevented from obtaining bids which will enable
24 the City absolutely to determine who are the lowest responsible bidders, and from accepting such bids, contrary to those provisions of the Constitution of the State of Texas and of its statutes set forth in subparagraph (a) above, and the Texas Revised Civil Statutes, 1925, Articles 2559-2566.

(c) The City has surrendered to PWA and defendant Ickes the power to change and increase the cost of such construction work during the course of construction after the letting and even the part performance of contracts, contrary to those parts of the Constitution of the State of

Texas and of its statutes set forth in subparagraph (a) above, and particularly in violation of Section 53, Article III, of said Constitution.

(d) The City has surrendered to PWA and the Board of Labor Review the power to determine and finally to settle all issues and controversies arising between the City and any contractor, with respect to changed economic conditions during the performance of any contract, and to determine and finally to settle all labor controversies, contrary to those parts of the Constitution of the State of Texas and its statutes set forth in subparagraph (a) above, and particularly in violation of Section 53 of Article III of said Constitution.

(e) The City has surrendered its discretion to make charges against the revenue derived from the operation of such plant and system, to provide for depreciation, retirements and replacements of depreciable parts thereof, and to preserve the integrity and operating efficiency of such plant and system, contrary to those parts of the Constitution of the State of Texas and of its statutes set forth in subparagraph (a) above and particularly in violation of Texas Revised Civil Statutes, 1925, Article 1113.

(f) The City has surrendered to PWA and defendant Ickes the power to fix rates for electric energy and service furnished by such plant and system, contrary to those parts of the Constitution of the State of Texas and of its statutes set forth in subparagraph (a) above, and particularly in violation of Texas Revised Civil Statutes, 1925, Article 1113.

(g) In other ways the City has surrendered to these defendants its non-delegable powers, in violation of the laws of Texas; and further its agents will, by the contemplated operation of the project, violate Article 1638 of the Texas Penal Code.

(3) The project herein complained of is not authorized by Section 203 of the National Industrial Recovery Act as extended because said project is not reasonably designed or capable of increasing employment quickly. Plaintiff is informed and believes, and so alleges, that of such unemployment as exists in the City of Plainview or vicinity there is virtually none among persons who can be employed on a project of this sort. The project will require almost altogether skilled workmen, of whom there are only about

ten available unemployed. The project in fact has no reasonable relation to the unemployment situation in the city or vicinity. Moreover, such project will inevitably cause permanent unemployment of many, and perhaps eventually all, of those now in plaintiff's employ.

(4) Said project is not authorized by Section 202 of the National Industrial Recovery Act as extended, because said section, by particularly enumerating, in the list of Public Works for which public moneys might be lent and granted, "development of water power" and "transmission of electrical energy," has excluded a project such as the proposed Plainview diesel engine-operated generating plant. No other provision of said section authorizes a municipal generating and distributing plant of this sort. Furthermore the authority to make a grant, such as that contemplated, expired on June 18, 1935, by virtue of Section 201 (d) of said Act, which authority is not extended by the aforesaid Emergency Relief Appropriation Act of 1935. Nor does such Act of 1935 authorize a project of this type;
26 and even if it did, such a project must at least be self-liquidating. This project will not, as heretofore alleged, be self-liquidating. Furthermore the purported loan herein is in no sense a loan, but is itself, in whole or in greater part, a grant and gift; for it can never be repaid, due to the incapacity of the project to earn its way and due to the invalidity of the City's obligation as hereinbefore alleged.

(5) Said project is not authorized by Title II of the National Industrial Recovery Act as extended because it is wholly useless and wasteful, in that it duplicates plaintiff's existing, adequate, reasonable and satisfactory system, and because it is uneconomic and foolish in that an independent generating and distribution system cannot be maintained save at rates far above those now charged, if at all, due to the small number of possible customers. The project can result only in disastrous rate wars, destructive of both plaintiff's facilities and the project itself. The small demand in said City can, as heretofore alleged, support only one utility. The additional project will be not only useless but predatory; its effect will be to decrease, instead of to promote, the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

(6) Said project is not authorized by Title II of the National Industrial Recovery Act as extended because the undertakings exacted from the City by PWA and defendant Ickes and the proposed construction and operation of the electricity plant and system will violate the law of the State of Texas. Such undertakings constitute an unlawful delegation to foreign agents, these defendants, of the obligations of said City under the law of Texas as alleged, in subparagraph (2) hereof, and otherwise. Furthermore, the law of the State of Texas is violated in that the grant and loan by PWA is, for reasons heretofore and hereafter set out, invalid, and therefore the City will be obligated
27 immediately to refund to PWA the amount of the grant and loan so illegally made and accepted by it, and the City will thereby become indebted to PWA, in violation of statutory provisions of the State of Texas with respect to the manner and amounts of indebtedness which may be legally incurred by the City.

(7) Said project herein complained of is without warrant in said National Industrial Recovery Act as extended or in any law of or in the Constitution of the United States, but the action of the defendants in furthering said project is in violation of the Tenth Amendment to the Constitution of the United States, because:

(a) Said project is undertaken by the defendants solely for the express purpose of and pursuant to a publicly announced policy of controlling and lowering electricity rates within each State of the United States, as heretofore alleged in Paragraphs VII and VIII. Specifically, the project threatened, as herein alleged, is designed solely to afford consumers within the City of Plainview with electricity rates at levels deemed by defendant Ickes and PWA to be "socially desirable." Such action will in no manner affect interstate commerce; its effect is confined altogether to the inhabitants of said city, wholly within the State of Texas.

(b) Said project is undertaken by the defendants solely for the purpose of furthering a policy of public ownership of electricity systems within each State of the United States, and specifically is designed merely to afford said City of Plainview an opportunity to erect a municipally owned electricity system to serve as a "yardstick" for the demonstration of conceptions of "social planning" and rate regulation entertained by PWA and defendant Ickes and will in

no manner affect interstate commerce; its effect is confined altogether to the inhabitants of the said city, wholly within the State of Texas.

(c) Said project is to be constructed and operated
28 under the absolute direction and control of the defendants, even to its most minute details, in matters having no relation to interstate commerce, and in a manner constituting usurpation of the local authority of the said City and assumption of control over its own affairs.

(8) Said project herein complained of is without warrant in said National Industrial Recovery Act as extended or in any law of or in the Constitution of the United States, but the action of the defendants in furthering said project is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, because said defendants are arbitrarily and without warrant singling out this plaintiff as the subject of competition from such project under circumstances wherein others situated precisely similarly to plaintiff are and would be immunized from such competition. Whereas such others are and would be left free of such competition when they agree to institute rates at a level below which a competing public plant would not be self-liquidating, this plaintiff, despite such a reduction by it, induced by said Otto M. Rau, as alleged in Paragraph VIII hereof, is nevertheless arbitrarily threatened with a more stringent application of the aforesaid policy of PWA to control intrastate rates.

(9) In so far as said National Industrial Recovery Act as extended purports to confer upon said defendants, as officers of the United States, power to do any of the acts herein complained of, said Act and said purported power are void and without warrant in the Constitution of the United States, but are in violation thereof because:

(a) Neither Title II of said National Industrial Recovery Act nor the Emergency Relief Appropriation Act of 1935 extending said Title indicates any adequate legislative standard to guide the officers charged with the administration of said Title, but on the contrary seeks to
29 delegate legislative power to the President and to such administrative officers, in violation of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1, of the Constitution.

(b) The funds of the United States available and to be used for the project herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution, which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said project will not promote the general welfare of the United States, but is exclusively for the local and private welfare of the consumers of electricity in said city. Said project will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary or incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(c) Neither Title II of said National Industrial Recovery Act as extended nor any administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by action of the defendants may be given an opportunity for full and adequate hearing; nor has this plaintiff been afforded any such opportunity, although the defendants herein threaten to take its property by virtue of unlawful and destructive competition and the threat thereof. Such denial of a hearing constitutes a violation of the due process clause of the Fifth Amendment of the Constitution.

(10) If it be that these defendants seek and find some purported authority in the Emergency Relief Appropria-

tion Act of 1935 further than that granted in paragraph (a) of the President's Executive Order of June 7, 1935, any such further authority is baseless and void for the reasons set out in this Paragraph XI.

(11) These defendants are estopped and barred from consummating said project herein complained of because of the agreement between PWA and this plaintiff as more particularly elaborated in Paragraphs VII and VIII hereof.

Paragraph XII.

Action by these defendants carrying out said arrangement with said City will aid and abet the City of Plainview in violating the law and Constitution of the State of Texas, as herein more particularly alleged in Paragraph XI, subparagraphs (2) and (6), and will therefore be unlawful and void.

Paragraph XIII.

Plaintiff is informed and believes, and therefore alleges, that the said City of Plainview and the said defendants herein are, in accordance with the aforesaid unlawful arrangement between defendant Ickes and the City, combining and conspiring together and with each other to consummate their joint project of constructing and operating said electricity plant and distributing system and to injure the plaintiff, and will, unless restrained by this Court, immediately proceed so to do. Pursuant to such combination and conspiracy, PWA and defendant Ickes have entered into or are about to enter into the aforesaid pretended loan and grant agreement with said City and the other details
31 of said arrangement. Said City will immediately present to defendant Ickes, or one or more of the defendants, officers of PWA, or their agents, initial requisitions of money to be furnished pursuant to said agreement, and said defendants, or one of them, will, unless restrained by this Court, make such funds available for the construction of said project by withdrawing such funds from the Treasury of the United States and paying such funds out as provided in said agreement, and will immediately direct and proceed with said construction in pursuance of said unlawful plan and arrangement to construct and operate such project in cooperation with said City. Each and all of the foregoing threatened acts of said defendants will re-

sult in immediate and irreparable injury, loss and damage to plaintiff, as hereinafter more specifically alleged.

Paragraph XIV.

If the defendants, or any of them, shall carry out the provisions of the said arrangement with the City, or do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to enjoy its franchise free from injurious competition brought about by unlawful means and to conduct its business and charge rates free from interference and domination by an agency of the federal government will immediately be invaded and destroyed; the value of the franchise and business of plaintiff in said city and of the tangible and intangible property acquired and used therein, and of the private funds invested and risked therein, represented by the capital stock and bonds of plaintiff, will immediately be greatly damaged and impaired, and may finally be rendered utterly worthless. It will immediately be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but, on the contrary, plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced altogether to retire from business; furthermore, by reason of said unlawful project, it
32 will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste. The plaintiff as a taxpayer to the United State will be specially injured as in this paragraph set forth, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose without warrant in law or in the Constitution and in violation thereof. The right of the plaintiff, as a taxpayer to said City, that its municipal corporation shall not be forced to violate the law of the State of Texas, and shall not enter into and be forced to carry out a relationship with others, specifically these defendants and PWA, who are without authority to enter into such a relationship, will be violated. By reason of all the foregoing allegations, the plaintiff, through unlawful interference with, injury to, and deprivation of its franchise, through unlawful deprivation of its property by taxation, and through unlawful deprivation and violation of its right that its municipality shall not be

forced to violate the law of Texas and shall not enter into and be forced to carry out relationships with others who are unauthorized to enter into them, will suffer loss of its property without that due process of law guaranteed it by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has, and can have no adequate remedy at law.

Paragraph XV.

In so far as plaintiff sues as a taxpayer of the United States, of the State of Texas, of the County of Hale, or its subdivisions, or of the City of Plainview, it sues for all those persons similarly situated.

Paragraph XVI.

The said City of Plainview and the members of its governing body are not made parties defendant hereto
33 because they are without the jurisdiction of this Court, and service of process cannot be had upon them in the District of Columbia. Plaintiff instituted suit against the City in the District Court of the United States for the Northern District of Texas, setting up the lack of authority on the part of these defendants substantially as alleged herein, and praying that the City be enjoined from entering into the arrangement with defendants herein complained of. Plaintiff notified defendant Ickes of such suit in order to give him an opportunity to make himself a party. Said Ickes did not do so, but sent a communication to the City Attorney directing the filing of a motion to dismiss on the ground that he, the said Ickes, was an indispensable party. This communication was read to the Court, such a motion was filed by the City Attorney, and the Court did, in the latter part of June of this year, dismiss plaintiff's bill, without prejudice, stating orally, in substance, that the dismissal was based on the fact that plaintiff's real quarrel was with said Ickes and that said Ickes was the indispensable party. That proceeding thereupon ended.

Paragraph XVII.

Plaintiff alleges that it is futile to ask the said City to rescind its unlawful arrangement with defendant Ickes and

PWA; plaintiff has repeatedly and constantly protested to the City the invalidity of the arrangement, substantially on the grounds herein set forth, but the City persists in its determination to consummate the said arrangement and the project.

Paragraph XVIII.

The said City of Plainview has, as hereinbefore alleged, announced its intention to join with the defendants as officers of the PWA in the immediate consummation of the said project, and plaintiff is informed and believes, and therefore alleges, that unless the defendants are immediately restrained from doing so, they will at once perform the acts alleged in Paragraph XIII herein; plaintiff
34 is further informed and believes, and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said acts would do all the mischief complained of by the plaintiff herein and would result in immediate and irreparable injury, loss and damage to the plaintiff, whereas restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

Wherefore, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this Court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office, from doing any act or thing to carry out any of the provisions of said unlawful arrangement with said City, and from, in any manner, aiding in the construction, or from financing the construction, of said electricity generating and distributing system in said City of Plainview; and, more specifically, from entering into any arrangement or agreement with the City of Plainview for the purpose of constructing or financing the construction of said electricity plant and system in said city, from honoring any requisition and from transferring, lending, giving or disbursing to the City of Plainview any funds whatsoever

for said purpose, and from taking any step whatever or doing any act or thing designed to aid or facilitate the financing or construction of said plant and system; such restraining order to be effective only until the matter of plaintiff's application for preliminary injunction shall be disposed of.

35 (3) That after notice and hearing, the Court enter a preliminary injunction to the same effect.

(4) And that upon final hearing, this Court enter a final order and decree to the same effect.

(5) And for such other and further relief as to the Court may seem meet.

TEXAS UTILITIES COMPANY,
By HOWARD C. WESTWOOD,
Attorney.

EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
Solicitors for the Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

Howard C. Westwood being duly sworn, deposes and says that he is one of the attorneys for Texas Utilities Company; that Texas Utilities Company is a corporation organized under the laws of the State of Texas and that said corporation and its officers are absent from the District of Columbia; that he is informed that the statements made in this bill as of the personal knowledge of said plaintiff are within the personal knowledge of the corporation and its officers, and that the statements made therein as upon information and belief are facts of which said officers have been informed and believe, and from information obtained from said corporation and its officers he verily believes the facts stated in the bill of complaint to be true.

HOWARD C. WESTWOOD.

Subscribed and sworn to before me, this 15th day of October, 1935.

[SEAL.] MILDRED C. HENNINGER,
Notary Public, D. C.

My commission expires Nov. 16, 1939.

36 EXHIBIT A.

April 15th, 1909.

Ordinance No. 28.

An Ordinance Granting to Chas. A. Malone, R. C. Malone, and Their Associates the Right to Construct, Operate, and Maintain an Electric Light and Power Plant in the City of Plainview, Texas.

Be it ordained by the City Council of the City of Plainview, Texas:

Section 1. That Chas. A. Malone, R. C. Malone, their associates, successors and assigns, be and they are hereby granted the right to construct and operate and maintain over, along and across all the streets, alleys and public highways of the City of Plainview, Texas, in accordance with all reasonable ordinances of said City, now in force and hereafter to be passed by the City Council of said City, an electric light and power plant.

Section 2. The plant shall be constructed so as to not interfere with the free use of the public of all streets and alleys and public highways. Any damage done to the streets, alleys and public highways shall be properly repaired by the said Chas. A. Malone, R. C. Malone, and their associates or at their expense.

Section 3. This franchise is granted for the period of 50 years. The said Chas. A. Malone, R. C. Malone, for themselves and their associates and assigns, have consented, in consideration of said grant, that the City of Plainview may place a system of fire alarm wire and fixtures on all of their poles belonging to said Electric Light and Power Plant, the same to be attached under the supervision of said owners of said plant at such places as they think best, but at the expense of the City and the same shall be maintained by the City at its expense.

Section 4. This franchise shall lapse and be of no
37 force and effect unless construction begins within sixty (60) days *and* from the passage of this ordinance and the plant shall be in operation within six months from the time of the commencement of the construction.

Section 5. The failure of the grantees herein to comply with any one or part of any one of said above sections shall operate as a forfeiture of this franchise.

Section 6. The conditions requiring the passage of this ordinance create an emergency and imperative public necessity exists, the rule requiring the ordinance to be read on three several days be suspended and that this ordinance take effect and be in force from and after its passage and it is so enacted.

Passed and approved at a called session of the City Council of the City of Plainview, Texas, this 15th day of April 1909.

(Signed) JAS. R. DELAY,
Mayor.

Attest:
(Signed) J. F. BANDER,
City Secretary.

[SEAL.]

38 *Order Dismissing Bill of Complaint.*

Filed October 15, 1935.

* * * * * * *

This cause came on to be heard on the defendants' motion to dismiss the bill of complaint for want of equity, and the plaintiff having been granted in open court leave to file a second amended bill of complaint, and said bill having been filed and the parties having agreed that the said motion to dismiss should stand as to all the defendants against the second amended bill, and this court having heard the argument of the parties thereon, and being fully advised in the premises,

Now, therefore, on motion of the defendants, it
39 is this 14th day of October, 1935,

Adjudged, ordered and decreed that the motion of the defendants to dismiss the second amended bill of complaint be, and the same is hereby granted; and it is further

Adjudged, ordered and decreed that the second amended bill of complaint be and the same is hereby dismissed; and it is further

Adjudged, ordered and decreed that the preliminary injunction heretofore in this cause entered is dissolved.

Presented by
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

No objection as to form.
DEAN ACHESON,
Attorney for Plaintiff.

JESSE C. ADKINS,
Justice.

From the foregoing decree the plaintiff, by its attorney, in open court, notes an appeal to the United States Court of Appeals for the District of Columbia, and the cost bond on appeal is hereby fixed at one hundred dollars or in lieu thereof a cash deposit of fifty dollars.

JESSE C. ADKINS,
Justice.

40 *Order Continuing Injunction.*

Filed October 15, 1935.

* * * * * * *

This cause having come on to be heard on the defendants' motion to dismiss the second amended bill of complaint herein, and the said motion having been granted and the said bill having been dismissed, and the preliminary injunction heretofore entered having been dissolved, and a decree entered, and the plaintiff having in open court noted an appeal from such decree, thereupon, in open court, the plaintiff moved the court to restore the preliminary injunction during the pendency of the appeal and the defendants having represented that said injunction should be modified;

Now, therefore, it is this 15th day of October, 1935, ordered that during the pendency of the aforesaid
41 appeal the defendants, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan, Acting Executive Officer thereof; F. E. Schnepfe, Director of Projects Division

thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, and each of them, their agents and all persons acting in aid of them and their successors in office, be, and they are hereby, restrained from constructing or in any manner aiding in the construction of an electricity generating and distributing system in the City of Plainview, State of Texas, or from transferring, lending, giving or disbursing to the said City any funds whatsoever of the United States for the purpose of constructing or financing the construction by the said City of an electricity generating and distributing system and from doing any act or thing for the purpose of effecting or bringing about the transfer, loan, gift or disbursement to said City of any funds whatsoever for the said purpose; provided, that nothing in this order contained shall be construed to restrain said defendants or their agents, pending this appeal, from negotiating and entering into a new contract with said municipality of Plainview, terminating any existing agreement with said municipality and from making any new offer to said municipality.

By the Court.

JESSE C. ADKINS,
Justice.

Memorandum.

October 19, 1935.—$50 deposit in lieu of bond on appeal.

42 *Assignment of Errors.*

Filed October 21, 1935.

* * * * * * *

Now comes the plaintiff, and in its capacity as the owner of an electricity business with appendant franchise rights in the City of Plainview, Texas, and as a taxpayer of the United States, as a taxpayer of the said City of Plainview, of the County of Hale and of the State of Texas, assigns as error the action of the Court in the following matters:

1. The Court erred in sustaining the motion of the defendants to dismiss the second amended bill of complaint.

2. The Court erred in dismissing the second amended bill of complaint.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
Attorneys for Plaintiff.

Received a copy of the foregoing assignment of errors this — day of October, 1935.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

43 *Designation of Record.*

Filed October 21, 1935.

* * * * * * *

The Clerk will please prepare the record on appeal in the above entitled cause and include therein the following:

1. Memorandum: Bill of complaint, filed June 24, 1935.

2. Memorandum: Amended bill of complaint, filed July 1, 1935.

3. Motion of defendant Ickes and others to dismiss amended bill of complaint, filed July 5, 1935, in full, but excluding points and authorities.

4. Motion of defendants Morgenthau and others to dismiss amended bill of complaint, filed July 8, 1935, but excluding points and authorities.

5. Memorandum: Order granting preliminary injunction, August 28, 1935. Undertaking, Five Thousand Dollars ($5,000.00), approved.

6. Second amended bill of complaint, filed October 14, 1935, as amended, in full. Fiat.

44 7. Final decree entered October 14, 1935, in full, including notation of appeal and order fixing cost bond on appeal.

8. Order continuing injunction pending appeal and modifying same, October 14, 1935, in full.

9. Memorandum of deposit of Fifty Dollars ($50.00) in lieu of bond on appeal.
10. Assignment of errors.
11. This designation.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
Attorneys for Plaintiff.

The defendants have no additional designation.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

45 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 58927 in Equity, wherein Texas Utilities Company, a corporation organized and existing under the laws of the State of Texas, is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of October, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,
By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6579. Texas Utilities Company, etc., Appellant, vs. Harold L. Ickes, Administrator, et al. United States Court of Appeals for the District of Columbia. Filed Oct. 24, 1935. Henry W. Hodges, Clerk.

37 Endorsed on Cover: United States Court of Appeals for the District of Columbia. Filed Dec 17 1935. Henry W Hodges Clerk.

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38 In the United States Court of Appeals for the District of Columbia

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No. 6579.

TEXAS UTILITIES COMPANY, *Appellant.*

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, ET AL., *Appellees*

Motion

Now come the appellees and respectfully show to this Court:

I

That the decree, entered herein in the Supreme Court of the District of Columbia, on October 15, 1935, and from which the present appeal was taken, dismissed the bill of complaint on the ground of insufficiency and on other similar grounds. The suit was brought to enjoin the defendants from advancing Public Works Administration funds to the City of Plainview, Texas, for the purpose of constructing an electric power plant.

For several weeks last past the City has been negotiating with the Public Works Administration, and said ne-
39 gotiations culminated on November 18, 1935, in an offer the terms of which are vitally and substantially different than is alleged in the bill of complaint. Thus the pleadings do not now represent an actually existing controversy between the parties, and it would be futile and useless to continue the litigation on the basis of them.

The facts relative to the above are as follows: On or about August 17, 1935, the Administrator and said city of

Plainview executed a loan and grant agreement, a copy of which is hereto attached, made a part hereof and marked Exhibit 1, which was in existence at the time when the bill was filed by the appellant. After the decree was entered on October 15, 1935, in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on or about November 18, 1935, the Administrator and the said City of Plainview entered into an agreement terminating the former agreement and all other understandings and agreements, if any, between the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked Exhibit 2. On December 4, 1935, there was delivered to said city by the Administrator an offer to purchase certain of the bonds of said city and to make a grant to said city of Plainview, a true copy of which offer is also attached hereto, made a part hereof, and marked Exhibit 3.

Wherefore, and for the reasons set forth in the
40 annexed memorandum, the appellees move that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts above set forth and for a trial or other disposition of the cause on such amended pleadings.

JAMES W. MORRIS,
Assistant Attorney General.
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
JOHN W. SCOTT,
Special Assistant to the Attorney General.
JEROME N. FRANK,
Counsel for the Federal Emergency Administration of Public Works.

Exhibits 1, 2, and 3 referred to in the foregoing motion are not printed at this point because they respectively appear as Exhibits D, E, and F to the stipulation between the Texas Utilities Company and the defendants herein, which stipulation appears at p. 167 of the Statement of Evidence herein, the said Exhibits respectively appearing at pp. 186, 196, and 197, thereof.

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1935

No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES, W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENTS OF THE TREASURY OF THE UNITED STATES, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	a	1
Memoranda: Bill of Complaint filed, temporary restraining order filed, bond of plaintiff for $5,000 filed	1	2
Motion of Ickes et al. to dismiss bill	2	2
Motion of Morgenthau, Jr., et al., to dismiss bill	5	4

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1935.

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	Original	Print
Memoranda: Amended bill of complaint filed, order granting preliminary injunction filed	7	5
Motion of defendants to dissolve preliminary injunction	8	6
Fiat of Adkins, J. Second amended bill of complaint for an injunction and other relief	9	6
Order dismissing bill of complaint	40	32
Appeal noted by plaintiff, bond for costs on appeal fixed, &c.	41	32
Order restoring preliminary injunction	42	33
Memorandum: $50 deposit in lieu of cost bond	43	34
Assignment of errors	44	34
Designation of record	45	35
Clerk's certificate	47	36

United States Court of Appeals for the District of Columbia

No. 6580

ALABAMA POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator, et al.

---

a Supreme Court of the District of Columbia.

In Equity.

No. 59071.

ALABAMA POWER COMPANY, a Corporation, Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof; John J. Madigan, Acting Executive Officer Thereof, et al., Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

Equity.

No. 59071.

ALABAMA POWER COMPANY, a Corporation, Plaintiff,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof; John J. Madigan, Acting Executive Officer Thereof; F. E. Schnepfe, Director of Projects Division Thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, Defendants.

Memoranda.

July 24, 1935.—Bill of Complaint filed.

July 25, 1935.—Temporary restraining order, filed. Bond of Plaintiff for $5,000, filed.

2 *Motion to Dismiss the Bill of Complaint of the Defendants Harold L. Ickes, as Federal Emergency Administrator of Public Works, Horatio B. Hackett, as Assistant Administrator, John Herrick, as Executive Assistant, J. J. Madigan, as Acting Executive Officer, and F. E. Schnepfe, as Director of the Projects Division of said Administration.*

Filed July 31, 1935.

* * * * * * *

Come now the said defendants, by their attorney below named, and move the Court to dismiss the bill of complaint, and as grounds for said motion say:

1. The bill of complaint does not state any matter in equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

2. The bill of complaint seeks an injunction to restrain the defendants from performing certain agreements entered into between the Federal Emergency Administrator of Public Works, Harold L. Ickes, and the Cities of Decatur, Florence, Sheffield and Tuscumbia, Alabama, for the purpose of constructing or financing the construction of electricity generating and distributing systems in said Cities. The said Cities are indispensable parties to such a suit and are not joined.

3. The said suit does not present a justiciable controversy of which the Courts of the United States or of the District of Columbia have jurisdiction.

4. The plaintiff does not allege the necessary injury or interest which entitle it to bring this action or obtain the relief prayed.

5. The bill of complaint does not show that the acts threatened by the defendants will injure any right of the plaintiff.

6. The plaintiff's capacity as a federal taxpayer is insufficient to enable it to challenge the constitutionality of the Act referred to in the bill of complaint, viz., Title II, Secs. 202, 203 of the National Industrial Recovery Act, or the acts of the Administrator thereunder.

7. The plaintiff's capacity as a taxpayer of each of said Cities and of the State of Alabama and other taxing districts thereof is insufficient to enable it to challenge the constitutionality of said Act or the acts of the Administrator thereunder.

8. The Constitution, Article 1, Section 8, empowers Congress to appropriate to provide for the general welfare of the United States.

9. No constitutional rights of the plaintiff are impaired or destroyed by the acts alleged to be threatened by the defendants.

10. The acts alleged to be threatened by the defendants are authorized by law.

11. The agreements challenged are authorized by the laws of Alabama and have been upheld by the Supreme Court of Alabama and the United States District Court for the Northern District of Alabama; and the decisions of said Courts are binding on this Court.

4 12. The bill of complaint does not state a cause of action cognizable in equity.

HENRY T. HUNT,
Special Assistant to the Attorney General
as Attorney for said Defendants Ickes et al.

Service acknowledged July 30, 1935.

EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
Attorneys for Plaintiff.

5 *Motion of Defendants Henry Morgenthau, Jr., W. A. Julian and Guy Allen to Dismiss Bill of Complaint.*

Filed July 31, 1935.

* * * * * * *

Come now the defendants, Henry Morgenthau, Jr., Secretary of the Treasury of the United States, W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, and move the Court to dismiss the bill of complaint; and as grounds for said motion, say:

1. That the bill of complaint does not state any matter in equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

2. That the cities of Decatur, Florence, Sheffield and Tuscumbia, Alabama, are indispensable parties to said suit, and are not named as parties thereto, nor is any of them named as party thereto.

3. That said suit does not present a justiciable controversy over which the courts have jurisdiction.

4. That the plaintiff does not allege the necessary injury or interest which entitles it to bring this action or obtain the relief prayed for.

5. That the bill of complaint does not show that the acts threatened by these defendants will injure any right of the plaintiff.

6. That the plaintiff's capacity as a Federal tax-
6 payer or as a State taxpayer is insufficient to enable it to challenge the constitutionality or illegality of the

acts of Congress, or alleged acts or alleged threatened acts of defendants referred to in the bill of complaint.

7. That the power of Congress to appropriate money is not confined to the enumerated powers expressed in Article I of the Constitution.

8. That no constitutional rights of the plaintiff are impaired or destroyed by the alleged acts or threatened acts of these defendants.

9. That the alleged acts and threatened acts are authorized by law.

10. That the statutes referred to in the bill of complaint, against which plaintiff complains, are not unconstitutional.

11. That the bill of complaint fails to allege any facts showing any legal injury to the plaintiff, threatened or otherwise, as the basis for which it may maintain this suit.

12. That the facts alleged in the bill of complaint show that this is a suit against the United States, and the United States has not consented to be sued.

13. That the bill of complaint does not in other respects state a cause of action cognizable in equity.

14. And for other reasons apparent of record.

LESLIE C. GARNETT,
United States Attorney,
DAVID A. PINE,
Assistant United States Attorney,
Attorneys for Defendants
Morgenthau, Julian and Allen.

Received copy of the above motion to dismiss this 31st day of July, 1935.

EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
Attorneys for Plaintiff.

7 *Memoranda.*

August 1, 1935.—Amended Bill of Complaint filed.

August 2, 1935.—Order granting Preliminary Injunction filed.

8 *Motion to Dissolve Preliminary Injunction and to Dismiss the Bill of Complaint of the Defendants Ickes, Hackett, Herrick, Madigan and Schnepfe.*

Filed September 20, 1935.

* * * * * * *

Come now the said defendants and move the Court to dissolve the preliminary injunction allowed herein by order dated August 2, 1935 and also move the Court to dismiss the bill of complaint herein, on the following grounds:

1. These defendants renew their motion to dismiss the bill of complaint herein on the grounds in said motion stated, which motion was by said order of August 2 continued subject to the right of any party to call up the same for hearing on notice.

HENRY T. HUNT,
Special Assistant to the Attorney General as Attorney for Defendants Ickes, Hackett, Herrick, Madigan and Schnepfe.

Service acknowledged August 28, 1935.
HOWARD C. WESTWOOD,
Attorney for Plaintiff.

9 Leave to file, granted. Jesse C. Adkins. Oct. 14", 1935.

Second Amended Bill of Complaint for an Injunction and Other Relief.

Filed October 14, 1935.

* * * * * * *

Now comes the plaintiff, and by leave of Court files this its amended bill of complaint, and for its causes of action against the defendants alleges:

Paragraph I.

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, is a resident and citizen of the State of Alabama, and has its principal office and cor-

porate domicile in the City of Attalla, Alabama, and sues in its own right.

Paragraph II.

The defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set forth:

Harold L. Ickes is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act".

Horatio B. Hackett is the duly appointed, qualified, and acting Assistant Administrator of PWA.

John Herrick is the duly appointed, qualified, and acting Executive Assistant of PWA.

John J. Madigan is the duly appointed and qualified Acting Executive Officer of PWA.

F. E. Schnepfe is the duly appointed, qualified, and acting Director of Projects Division of PWA.

Henry Morgenthau, Jr. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

Guy Allen is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United States and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under the pretended authority of Title II of the National Industrial

Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and paragraph (a) of the President's Executive Order of June 7, 1935.

11 Paragraph III.

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV.

Plaintiff alleges that by its charter it has the right to manufacture, supply and sell to the public electric energy produced either by steam or by water as a motive force, or by both, for lighting, heating, power and other purposes. Plaintiff now owns and operates electric public utility properties, serving the public in sixty-five of the sixty-seven counties of the State of Alabama. These properties consist of hydro-electric and of steam generating plants, of high tension transmission lines, of distribution lines, and all equipment and facilities necessary for use in generating, transmitting, distributing, metering and delivering electric energy to meet the demands of electricity consumers in the State of Alabama.

Plaintiff is now serving, directly, and indirectly, approximately two hundred thousand (200,000) customers within said State, and its gross electrical revenue received therefrom in 1934 was approximately Fifteen Million Dollars ($15,000,000). Plaintiff's system is an integrated whole, coordinated so as to anticipate future needs and growth of the communities in the State of Alabama, and represents intensive application of the economies of large-scale, integrated power development. The loss of substantial numbers of its customers in any particular locality would materially impair the benefits to it and its customers derived from such integration.

Plaintiff's system is modern and efficient and in all respects equipped to furnish the public in Alabama with electricity service according to the most advanced standards of electrical engineering. The capacity of its hydro-electric plants alone is, even at the lowest water levels on record, adequate to furnish nearly 40% more than the present demand upon it for electricity within said State,

12

a capacity ample to supply all additional uses and users which may reasonably be foreseen in the future.

Among other communities served by said system are the City of Decatur, County of Morgan, the City of Florence, County of Lauderdale, and the Cities of Sheffield and Tuscumbia, County of Colbert. These cities are located in close proximity to each other in the northwestern portion of the State of Alabama, and together form a vital link in the plaintiff's system in that region. The following table indicates the approximate population of each of said cities, the approximate number of customers served by plaintiff therein, and the gross revenues of plaintiff from its electrical operations therein for the twelve months ended December 31, 1934:

City	Approximate Population	Approximate No. of Customers	Gross Revenues of Plaintiff from such electric operations for year ending December 31, 1934
Decatur	15,593	3,247	$240,300.55
Florence	11,729	2,284	170,580.44
Sheffield	6,221	1,291	93,783.54
Tuscumbia	4,533	928	44,281.44
	38,076	7,750	$548,945.97

Paragraph V.

The plaintiff's system, including that portion represented by the aforesaid four cities and the customers therein, is served almost entirely by plaintiff's hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat. 1288), whereby plaintiff was granted a license to build a dam across said river, a navigable water of the United States, at the location named, for the improvement of navigation on such river and the development of the water power inherent therein; and Mitchell Dam and Jordan Dam, likewise on the Coosa River in Alabama; and Martin Dam on the Tallapoosa River in Alabama, which latter three dams were constructed
13 under licenses from the Federal Power Commission, authorized by the Federal Water Power Act (41 Stat. 1063). In granting such licenses the Federal Power Commission in each instance found:

1. That each of such dams on the Coosa River and the dam on the Tallapoosa River were necessary and conven-

ient for the development and improvement of navigation and utilization of power in the respective rivers;

2. That such dams were best adapted to a comprehensive scheme of development and utilization of such waterways for such purposes;

3. That there was a market in Alabama for the power output of such plants;

4. That such dams were justified in the public interest.

Under and by such licenses, plaintiff was required to expend large sums in preparing certain portions of the river beds for future navigation to and through such dams and in the building of piers in the streams to form ultimate navigation guides to such locks; and, in addition, so to construct such dams that locks could be erected therein as and when the United States determined to complete the navigation from one pool level to the next; by the terms of the licenses, the licensee was required to permit of discharge through its dams, free of cost to the United States, of such part of the flow of the river necessary for the purpose of such lockage and to install such lights, signals, and power for the operation of such navigation structures as might be installed in the future by the United States; and with respect to Lay Dam, the plaintiff is required to convey to the United States a right of way around the end of such dam, and by the subsequent licenses issued to the plaintiff under which Mitchell Dam was erected, the plaintiff was required to make such excavations and perform such other channel work to complete a passage way from the lock around Lay Dam to the pool level created by Mitchell Dam as might be necessary;

and in connection with all such work plaintiff spent
14 a large amount of money and has obligations in connection with the future use of such facilities and locks for navigation purposes in a sum that is not capable of present ascertainment. Under and by virtue of such licenses, plaintiff was required also to make such installations in the Coosa River projects as the Federal Power Commission should deem necessary from time to time to supply adequately the reasonable market demands of the public. Such hydro-electric projects on the Coosa and Tallapoosa were built at a cost to the plaintiff of an amount in excess of $60,000,000. The completion of such projects on the Coosa River created contiguous slack water pools of 57 miles in length, and when such pools are connected by locks

placed in the aforementioned dams such pools will afford a nine-foot depth navigation on such river for a distance of 49 miles.

Plaintiff in good faith accepted the licenses from the Federal Power Commission and built Mitchell and Jordan Dams, resulting in the creation of navigable features of the Coosa and Tallapoosa Rivers as set out above, and in the improvement of the navigable features of the Alabama River, all with the agreement and understanding under the Federal Water Power Act and the licenses issued to plaintiff thereunder that the plaintiff would secure, as the consideration moving to it for the investment in excess of $60,000,000 made under the licenses so issued, the right and privilege freely to serve the market in Alabama with electric energy.

Paragraph VI.

Plaintiff is authorized by the laws of the State of Alabama to construct, own, operate, and maintain its plant facilities and systems in each of the municipalities in which it renders electric service, including Decatur, Florence, Sheffield and Tuscumbia.

On October 16, 1919 the City of Decatur granted to plaintiff a thirty-year electric franchise, the effectiveness of which was conditioned upon plaintiff's connecting its system in such city with its hydro-electric transmission system within a period of three years. On January 27, 1920 plaintiff made this connection and on such date such franchise became effective for a period of thirty years, is now in full force and effect, and will not expire until January 27, 1950.

In the year 1902 the cities of Florence, Sheffield and Tuscumbia each granted plaintiff's predecessor in interest an electric franchise. Such franchises were validly assigned to this plaintiff in 1925. By their terms the franchises so granted by the cities of Sheffield and Tuscumbia expired in October, 1932, and that so granted by the City of Florence expired in March, 1933. Since the expiration of these franchises plaintiff has continued to supply the cities of Florence, Sheffield and Tuscumbia and the inhabitants thereof with electric service and during such period has paid to these cities annual licenses and privilege taxes for the operation of an electric utility and has sold to these cities

electric light and power for lighting the streets and public buildings and other public places therein. These three cities have given plaintiff no notice to cease the use of the streets, alleys, and other public places in supplying them and their inhabitants with electric light and power and have given no notice to plaintiff to remove its poles and wires from the streets, alleys, and other public places therein, but have continued to utilize plaintiff's facilities and to receive and avail themselves of plaintiff's service.

Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the four cities named herein and their inhabitants and is the only person, firm or corporation now able to supply electric light and power to such cities and their inhabitants.

Paragraph VII.

The plaintiff's properties, plants, lines, and other facilities are modern and efficient and the plaintiff is
16 equipped to and does render efficient and adequate electric utility service in all the municipalities and rural districts in which it operates, including the aforesaid four cities, and possesses facilities of adequate capacity to continue the rendition of such type of service for a considerable time in the future without substantial additions thereto.

The rates for sale of electric power and energy of the plaintiff and the character of its service in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission; and the rates now in effect in the territory served by the plaintiff in the State of Alabama and in the four cities aforesaid are rates approved as reasonable by, and placed in effect pursuant to order of, the Alabama Public Service Commission.

Paragraph VIII.

Plaintiff alleges that its electricity business in the aforesaid four cities is conducted pursuant to valid and subsisting franchise privileges granted to it by the Government of the United States through the Act of Congress and the licenses of the Federal Power Commission referred to in Paragraph V, and by the aforesaid four Cities, as alleged in Paragraph VI.

In reliance upon the grant of such franchise privileges, many thousands of dollars have been invested in the plaintiff's stocks and bonds, large amounts of which are held and owned by the general public, a very substantial part of its bonds and preferred stock having been sold to its customers and to other citizens and investors residing in the territory in which it operates.

Paragraph IX.

Plaintiff is a taxpayer of each of the said Cities of Decatur, Florence, Sheffield and Tuscumbia, and of the Counties in which such Cities are located, and with respect to its electrical properties and operations in each of
17 said Cities has paid to said Cities and said Counties many thousands of dollars in taxes in the past, and for the twelve months ended December 31, 1934, has paid or incurred the liability to pay such taxes as indicated in the following table:

City or Town	Tax Paid	County	Tax Paid
Decatur	$6,082.46	Morgan	$10,070.71
Florence	5,319.20	Lauderdale	4,305.52
Sheffield	5,350.60	Colbert	12,713.72
Tuscumbia	1,912.95	Colbert	12,713.72

Plaintiff is likewise a taxpayer of the State of Alabama, and with respect to its electrical properties and operations in said State has paid to said State many thousands of dollars in taxes in the past, large portions of which sums are paid back by the State to the various communities, including the four Cities aforesaid, to be expended by such communities for their municipal purposes; and for the twelve months ended December 31, 1934, plaintiff has paid, or incurred the liability to pay, such taxes to the State in excess of the sum of Nine Hundred Thousand Dollars ($900,000.00). Plaintiff has incurred the liability to pay taxes to the Cities, the counties, the State, and other political subdivisions, for the current tax year 1935, in approximately the same amounts as paid and incurred for the year 1934, as aforesaid.

Paragraph X.

Plaintiff is a taxpayer of the United States, and with respect to its electrical properties and operations in the State of Alabama, including the properties and operations

in each of the aforesaid four Cities, has paid to the United States many thousands of dollars in taxes in the past; and for the twelve months ended December 31, 1934, has paid, or incurred the liability to pay, such taxes in the sum of Two Hundred Seventy-Five Thousand Dollars ($275,000.00).

Paragraph XI.

The PWA, under the direction of defendant Ickes, has conceived, and for some time past has been executing throughout the country, a plan to fix the rates of privately owned electricity utilities at levels determined by PWA to be "socially desirable" and to promote public ownership of electricity utilities, regardless of local state policy, as a "yardstick" of electricity rates and service to which privately owned electricity utilities must conform. This plan is not intended to have and, in fact, does not have any relation to interstate commerce; its intended and actual effect is control and regulation of entirely local and intrastate commerce.

The plan is effectuated by soliciting and inducing municipalities and other political subdivisions of the several states to permit PWA to institute and to carry out, as Federal Public Works Projects, the construction of electricity generating and distributing systems within such subdivisions, such systems being planned, built and financed by and under the control and direction of PWA, and being operated by PWA through its retention of absolute control over the rates to be charged for the service of such systems when completed.

Upon tentative selection of an area for such a Project, PWA usually informs existing private electricity utilities in such area that to escape being superseded by or suffering competition from such a system such private utilities must establish rates satisfactory to PWA and, in effect, consent to continuing PWA regulation of their rates under the threat of destruction. The rates so exacted are arbitrarily set by PWA, do not provide a reasonable return to such utilities upon their investment, are much less than those fixed by authorized state regulatory bodies, and are determined without hearing such utilities and without any consideration whatever of the elements required by the due process clauses of the Fifth and Fourteenth Amendments

to be considered in rate regulation. Plaintiff cannot aver with particularity the level to which such privately owned utilities are required to conform because PWA has never adopted definite criteria but acts in each case according to an arbitrary and vaguely formulated conception of
19 "social desirability". In general, however, such level is that at which a system built and operated by PWA as aforesaid would earn enough to pay operating costs without provision for Federal, state, or local taxes, and to repay over a long period of time so much of the cost of construction thereof as is represented by the pretended loan made by PWA as hereinafter described; and in many instances PWA requires a level even lower.

If the existing private utilities in such area conform to the standard so fixed by PWA, PWA usually suspends consummation of such a Federal Public Works Project for a time sufficient to enable it to be assured that such conformity is in good faith and permanent and then, if satisfied, PWA usually abandons the project. Otherwise PWA proceeds to consummate the project, as heretofore and hereafter described, and either subjects the private utilities to rate-war to attain the rate level desired by PWA and if possible to drive such utilities out of business, or induces the state regulatory bodies to revoke the privileges of such utilities to do business.

This plan is frankly acknowledged by PWA in public press releases, in public statements of the Administrator, in instructions given to PWA agents charged with the administration of PWA functions, in negotiations with existing private utilities, and otherwise.

In deciding thus to build electricity generating and distributing systems, the sole consideration entertained by PWA is the rate level of existing privately owned utilities. The extent of unemployment in the vicinities, or elsewhere, and the relation between the employment given by such a Project and the character of workers unemployed, the dependability and economic soundness of existing private utilities, the capacity of the areas to absorb increased electricity production, and other considerations relating to the need for such a PWA electricity system are excluded entirely by PWA in reaching its decision to build and operate such a Project.

20 To induce the necessary cooperation of municipalities and other political subdivisions in the vari-

ous states and to procure their consent to such Federal Public Works Projects and to the regulation of the rates of existing privately owned utilities by PWA in accordance with the aforesaid plan, PWA, by advertising and other newspaper publicity and by circulars and direct statements made to municipalities by authorized agents, has represented that it would authorize and direct the construction, as Federal Public Works Projects, of electricity generating and distributing systems, to become the property of such municipalities. The representations have been that approximately thirty percent of the cost of the Project would be an outright gift, the balance of the cost to be repaid to PWA, if at all, out of the revenue of the system; and that thus no risk would be incurred by the municipality. When the municipality consents to such a Project and PWA decides to threaten existing utilities with its consummation, a so-called loan and grant arrangement is entered into similar to the so-called agreements between PWA and the Cities of Decatur, Florence, Sheffield and Tuscumbia, hereinafter described. Such an arrangement constitutes a pretense and sham in that it does not in fact provide for a loan but merely for the possible recapture of a part of the cost of such projects out of the earnings thereof, and imposes no obligations upon said municipalities and confers no authority upon them in the construction thereof, all as more specifically hereinafter set forth.

All the acts of the defendants hereinafter complained of are done or threatened in pursuance of the plan hereinbefore alleged; that is to say, PWA determined that plaintiff's rates in the aforesaid Cities were higher than rates determined by PWA to be socially desirable and, in this instance without affording the plaintiff the opportunity usually afforded such utilities, in accordance with the said plan, to conform to the rates determined upon by PWA in such cases, authorized the Federal Public Works
21 Projects hereinafter described solely in order to drive plaintiff out of business in the aforesaid four Cities and attain the rate level desired by PWA. The aforesaid four Cities were induced by PWA to consent to said Federal Public Works Projects and to take the steps hereinafter alleged in cooperation therewith and with PWA by the representations hereinbefore alleged.

Paragraph XII.

The aforesaid four Cities, moved by the actions and inducement alleged in Paragraph XI, through their respective mayors, filed with PWA applications for Federal Public Works Projects consisting of electric distributing systems to be owned by said Cities, respectively.

While the procedure pursued by PWA, defendant Ickes and his agents in passing upon such applications does not provide for a hearing from those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, plaintiff requested and sought a hearing before PWA relative to said applications of the aforesaid Cities. Plaintiff has, however, constantly been denied the privilege of such hearing. Nevertheless, plaintiff filed with PWA a written protest against the approval of the applications of said Cities, except in the case of the City of Florence. Such protest set out in substance the facts heretofore and hereafter alleged in this bill. There is no further board, agency or official of the United States to whom plaintiff may apply to prevent the consumation of the Projects in said Cities. Consequently, plaintiff has exhausted all administrative remedies which it could possibly have to prevent such action.

Notwithstanding plaintiff's protests of the applications aforesaid, plaintiff is informed, believes and avers that such protests were given no consideration whatsoever by PWA, but that, for no purpose other than that of driving down plaintiff's rates and destroying plaintiff's business in accordance with the plan of PWA aforesaid, *and upon findings* that the action of PWA would in fact destroy and drive out plaintiff's business in said Cities, PWA approved such Public Works Projects for said Cities, to be carried out under pretended loan and grant agreements with the Cities at the times and in the amounts set out hereafter, the funds to be used in the erection and construction, as Federal Public Works Projects under the direction and control of PWA, of complete electric distribution systems in the Cities to serve the same parties and purposes as are now served by plaintiff therein. The amounts proposed to be granted to the Cities are equal to thirty percent of the cost of labor and materials to be em-

ployed in the construction of such electric distribution systems. The pretended loans and grants plaintiff alleges, upon information and belief, to be of the approximate amounts set out as follows:

City	"Loan"	Grant
Decatur	$268,000	$82,000
Florence	336,000	100,000
Sheffield	187,000	43,000
Tuscumbia	105,000	25,000

Paragraph XIII.

Plaintiff is informed and believes and so alleges that the aforesaid plan to construct the said electric systems as Federal Public Works Projects in said Cities for the purposes and objects hereinbefore alleged will immediately be carried out by PWA and the defendants herein, unless restrained, under the following arrangement:

The defendant Ickes and the said Cities have entered into pretended "loan and grant agreements," which, in effect, provide that the defendant Ickes and his agents shall construct said electricity distribution systems in said Cities and finance said construction by granting outright to said Cities 30 per cent of the cost of labor and materials employed in the construction of such systems, and by the pretense of lending to said Cities, by pretended purchase of their bonds, to be used for such financing and con-
23 struction, the amounts heretofore alleged. Said grants will be pure gifts or bounties, designed solely to induce the Cities to enter into such arrangements and to insure the accomplishment of the wishes of PWA and these defendants with respect to the establishment of municipal facilities competing with and superseding the plaintiff. The said Cities have agreed in return that said funds will be made available to them upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of defendant Ickes is needed to complete the Projects; that the proceeds of the "loans" and grants shall be deposited by the Cities in such banks as defendant Ickes chooses; that such proceeds shall be expended by the Cities only as defendant Ickes consents; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be accord-

ing to the will of defendant Ickes; that all work on the projects shall be done under the regulation of defendant Ickes; that no contractor or subcontractor shall bid for or work upon such projects without the approval of defendant Ickes; that all contractors and subcontractors shall be equipped with bonds and insurance as defendant Ickes desires; that said Cities shall engage in such litigation as defendant Ickes deems advisable with respect to irregularities, or defects, or illegalities in the bonds; that defendant Ickes may cancel the agreements with the Cities at any time he wishes, if in his opinion said Cities have unreasonably delayed in carrying out any of their duties; that the aforesaid funds shall be available to the Cities only subject to the power of defendant Ickes to withhold them if he deems the Cities' budgetary situations to be unsatisfactory, or if he is not satisfied that the Cities have complied with all provisions of the agreements; and that in other respects the will of defendant Ickes shall control the Cities' actions, even to the extent of the naming of the projects. It is further a part of said arrangements
24 that the defendant Ickes, or his agents, will be permitted to fix, and from time to time to change, minimum rates of pay and maximum hours for all persons employed on such construction, to enforce employment preferences in favor of ex-service men and others, to designate agencies through which workmen may be employed, to direct the use of human labor in place of machinery, to require disclosure to PWA of all information which PWA may desire with respect to such construction work, to require that all the disputes between the Cities and the contractors or subcontractors, and all labor disputes arising in connection with the construction, shall be submitted to the Board of Labor Review or other agency of PWA for final determination, and in other ways to regulate the construction of such distribution systems. It is a part of said arrangements that the Cities shall undertake to obtain any other funds deemed by defendant Ickes necessary to complete such systems, in the manner and from sources prescribed by defendant Ickes; to operate the systems upon completion and furnish electricity to consumers now being served by plaintiff; never to charge rates at a level more than a level approved by defendant Ickes; to pay from the general funds of the Cities, at current selling rate sched-

ules, for energy used by the Cities themselves; and in other ways to submit to the will and regulation of defendant Ickes with respect to the operation of such systems. The said pretended bonds to be issued by the Cities, through the purchase of which the pretended loans from PWA are to be made, are not general obligations of the Cities, but it is expressly understood and agreed between said Cities, respectively, and PWA that said bonds shall not constitute an indebtedness of said Cities within the meaning of any provision or limitation of the Constitution of the State of Alabama and shall never impose a pecuniary liability upon said Cities or charge against their general credit. Said pretended bonds are payable solely from the revenue to be derived from said Projects after provision for cost of operation and maintenance.

Paragraph XIV.

While the applications of the aforesaid Cities for such Projects were pending before PWA, plaintiff undertook to negotiate with the Cities for the sale to them of its properties located therein. Plaintiff offered to sell to the City of Decatur its distribution system located therein with all its customers attached, for the sum of $359,000, which plaintiff alleges was far below what said properties and business were worth. This offer was declined by said City, said City stating that the availability of a PWA loan and grant would not make it worthwhile for the City to make such a purchase. Plaintiff likewise offered to sell to the City of Florence its distribution system therein with all its customers attached, for the sum of $195,000, which said sum was much less than the properties and business were worth. The City of Florence also declined to make such purchase because of the availability of the loan and grant from PWA.

Plaintiff offered to sell to the City of Sheffield its distribution system located therein, with all its customers attached, for the sum of One Hundred Sixty-Four Thousand Dollars ($164,000.00), which said sum is much less than such properties and business were worth. The City of Sheffield likewise declined said offer. It admitted that said offer was reasonable, but in view of the availability of the PWA grant insisted that plaintiff allow it a discount of 30 per cent of the reasonable value of such properties.

Plaintiff offered to sell to the City of Tuscumbia its distribution system located therein, with all its customers attached, at the price of One Hundred Four Thousand Dollars ($104,000.00), which said sum is much less than such properties and business were worth. The City of Tuscumbia likewise declined said offer. It admitted that said offer was reasonable, but in view of the availability of the PWA grant insisted that plaintiff allow it a discount of
26 30 per cent of the reasonable value of such properties.

Paragraph XV.

Plaintiff is informed and believes, and therefore charges, that a part of the plan for the construction of municipal electric distributing systems in the Cities of Florence, Sheffield and Tuscumbia, induced by PWA as aforesaid, is that said Cities shall when said municipal systems are completed revoke and terminate plaintiff's right to carry on its business in each of such Cities and plaintiff will be compelled to abandon entirely its business, properties and systems in such Cities. If it were not for such plan and for such inducement of PWA plaintiff would in all reasonable probability continue to enjoy the right to carry on its business in each of said Cities for many years.

If the City of Decatur obtains in pursuance of the plan hereinbefore alleged such a Public Works Project it will operate such system in competition with plaintiff, and plaintiff will be compelled either to suffer substantial and continuous losses in its operations in such city or to abandon entirely its property and system therein, as shown by the fact that, in anticipation of receiving such a Project, the City authorities, at the instigation and direction of PWA, have made a house-to-house canvass of plaintiff's customers in such City, soliciting their patronage for the proposed municipal electric plant, and have reported to PWA that more than 95% of domestic, 70% of commercial, and 75% of industrial consumers in such City will take power from the municipal plant as soon as service can be begun.

If defendants are permitted to consummate such unlawful plan and make such pretended loans and grants to the Cities of Decatur, Florence, Sheffield, and Tuscumbia, plaintiff is informed and believes and therefore states that they will authorize and construct a large number of municipal

electric plants in many other cities and towns in the State of Alabama in which plaintiff is engaged in supplying electric public utility service, to be operated in ruinous
27 competition with plaintiff.

As heretofore alleged the business of the plaintiff is made up of a combination of businesses done by it in cities, towns, and rural areas in the State of Alabama as more particularly elsewhere alleged herein, all of which are connected with its system of transmission lines and served by its hydro generating plants. Each local business enables plaintiff better to serve the others and is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the remainder of its customers. The withdrawal of a number of these local businesses would substantially impair plaintiff's ability to continue operation as a going concern in that it would destroy, make useless, and cause to lie idle much of plaintiff's modern, efficient and valuable properties, including dams, steam plant, transmission lines, and distribution systems and thereby would cripple plaintiff in the exercise of its rights, privileges and duties under its aforesaid franchises from the United States.

Paragraph XVI.

The threatened action of the defendants herein pursuant to the aforesaid arrangements with the Cities of Decatur, Florence, Sheffield and Tuscumbia, is null and void and without warrant in law, and the defendants are wholly without authority to perform any of the acts which said arrangements contemplate to be performed by them, as herein alleged, because:

(1) Section 202 of the National Industrial Recovery Act as extended provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202." PWA has announced that allotments are being and will be made before such a comprehensive program is prepared. In line with this policy, allotments have been made in the absence of the preparation of such pro-

gram, no such program has ever been prepared, the
28 allotments herein and the action of the defendants in financing and constructing the proposed plants and systems are being performed in the absence of the preparation of such a program, and the projects herein alleged for the Cities of Decatur, Florence, Sheffield and Tuscumbia, have never been included in any such program. The only program ever prepared is the sum of the particular Projects which PWA has determined to carry out; this is not the preparation of a program under Section 202, but is a mere catalogue of action taken.

(2) The proposed pretended loans to the Cities of Decatur, Florence, Sheffield and Tuscumbia are in violation of the requirement of Section 203 of the National Industrial Recovery Act as extended that such loans by the United States be reasonably secured. Such loans are not and cannot be reasonably secured, because the bonds of the Cities, on the faith of which said loans are to be made, are null and void because based upon undertakings of the Cities which violate the law of the State of Alabama, and any payment for them by the defendants is unauthorized by the National Industrial Recovery Act as extended:

(a) The Cities have surrendered to PWA and defendant Ickes absolute discretion to determine rates, rules and regulations for electric service to be furnished by such municipal electric distribution systems, to determine the depositories for their funds, the types of plants which shall be constructed, the materials to be used, the contractors and sub-contractors who shall perform the construction, the hours and wages of men working thereon, the place whence such men shall be hired, and in many other ways to determine and control the construction and operation of such plants, the costs thereof, the time within which they shall be completed, etc. Such a delegation of discretion to PWA and defendant Ickes constitutes an unlawful delegation of the sovereign duties of the aforesaid Cities to foreign agents in violation of the laws of Alabama, and constitutes a violation of the laws of Alabama with respect to competitive bidding.

29 (b) For reasons heretofore and hereafter set out, the contemplated grants and loans by PWA are invalid and therefore the Cities will be obligated immediately

to refund to PWA the amounts of the grants and loans so illegally made and accepted by them, and the Cities will thereby become indebted to PWA in violation of constitutional provisions of the State of Alabama with respect to the manner and the amounts of indebtedness which may be legally incurred by the Cities.

(c) The Cities have pledged the revenue from such municipal electricity systems to the payment of the issues of bonds and to the payment of other debts arising in connection with the construction of said systems in priority to the payment of general municipal expenses and the interest and principal on the general obligation bonds of the Cities now or hereafter outstanding, in violation of the laws of Alabama.

(3) The Projects herein complained of are not authorized by the National Industrial Recovery Act as extended because they are not reasonably designed or capable of increasing employment quickly, or relieving unemployment. Plaintiff is informed, believes and so alleges that of such unemployment as exists in the aforesaid Cities or their vicinities, there is virtually none among persons who can be employed on projects of this sort. The projects will require almost altogether skilled workmen and have no reasonable relation to the unemployment situation in the Cities or their vicinities. Moreover, they will inevitably cause permanent unemployment of many, and perhaps eventually all, of those now in plaintiff's employ in said Cities.

(4) Said Projects are not authorized by the National Industrial Recovery Act as extended because they are not of the type or character contemplated thereby. Furthermore, the authority to make grants such as those contemplated, expired on June 16, 1935, by virtue of Section 201 (d) of said Act, which authority is not extended by the aforesaid Emergency Relief Appropriation Act of 1935.

(5) Said Projects are not authorized by Title II of the National Industrial Recovery Act as extended because they are wholly useless and wasteful, in that they duplicate and destroy plaintiff's existing, adequate, reasonable and satisfactory system. The Projects can result only in disastrous rate wars, as PWA proposes and intends, destructive of both plaintiff's facilities and the projects

themselves. The small demand in said Cities can support only one utility. The additional systems will be not only useless but predatory; their effect will be to decrease, instead of to promote the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

(6) Said Projects are not authorized by Title II of the National Industrial Recovery Act as extended because the undertakings exacted from the Cities by PWA and defendant Ickes and the proposed construction and operation of the electricity systems will violate the law of the State of Alabama. Among other things, such undertakings constitute an unlawful delegation to foreign agents, these defendants, of the obligations of said Cities under the law of Alabama as alleged in Sub-paragraph (2) hereof.

(7) Said Projects herein complained of are without warrant in said National Industrial Recovery Act as extended or in any law of or in the Constitution of the United States, but the action of the defendants in furthering said projects is in violation of the Tenth Amendment to the Constitution of the United States, because:

(a) As heretofore alleged, said projects are undertaken by the defendants solely for the express purpose of and pursuant to a publicly announced policy of controlling and lowering electricity rates within each State of the United States, and of making war upon creatures of the various States. Specifically, the Projects threatened, as herein alleged, are designed solely to afford consumers within the Cities of Decatur, Florence, Sheffield and Tuscumbia
31 with electricity rates at levels deemed by defendant Ickes and PWA to be "socially desirable," and to drive the plaintiff out of such Cities in accordance with the plan described in Paragraph XI hereof. Such action will in no manner affect interstate commerce; its effect is confined altogether to the inhabitants of said Cities, wholly within the State of Alabama.

(b) Said Projects are undertaken by the defendants solely for the purpose of furthering a policy of public ownership of electricity systems within each State of the United States, and specifically are designed merely to afford said Cities of Decatur, Florence, Sheffield and Tuscumbia an

opportunity to erect municipally owned electricity systems to serve as a "yardstick" for the demonstration of conceptions of rate regulation entertained by PWA and defendant Ickes and will in no manner affect interstate commerce; their effect is confined altogether to the inhabitants of the said Cities, wholly within the State of Alabama.

(c) Said Projects are to be constructed and operated under the absolute direction and control of the defendants, even to their most minute details, in matters having no relation to interstate commerce, and in a manner constituting usurpation of the local authority of the said Cities and assumption of control over their own affairs.

(8) In so far as said National Industrial Recovery Act as extended purports to confer upon said defendants, as officers of the United States, power to do any of the acts herein complained of, said Act and said purported power are void and without warrant in the Constitution of the United States, but are in violation thereof because:

(a) Neither Title II of said National Industrial Recovery Act nor the Emergency Relief Appropriation Act of 1935 extending such Title indicates any adequate legislative standard to guide these officers charged with the administration of said Title, but on the contrary seeks to delegate legislative power to the President and to such administrative officers in violation of Article I, Section 1; Article I, Section 8, Clauses 1, 2, and 18; and Article II, Section 1 of the Constitution.

32

(b) The funds of the United States available and to be used for the Projects herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said Cities. Said projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful dupli-

cation of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(c) Neither Title II of said National Industrial Recovery Act as extended nor any administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by action of the defendants may be given an opportunity for full and adequate hearing; nor has this plaintiff been afforded any such opportunity, although the
33 defendants herein threaten to take its property by virtue of unlawful and destructive competition and the threat thereof. Such denial of a hearing constitutes a violation of the due process clause of the Fifth Amendment of the Constitution.

(9) The defendants are threatening arbitrarily and maliciously to injure and destroy the plaintiff's business and property in said Cities, have not afforded plaintiff a hearing and have refused to give plaintiff an opportunity to lower its rates to a level deemed desirable by PWA, such as is given other companies in a position the same as that occupied by plaintiff, all in contravention of the due process clause of the Fifth Amendment.

(10) If it be that these defendants seek and find some purported authority in the Emergency Relief Appropriation Act of 1935 further than that granted in paragraph (a) of the President's Executive Order of June 7, 1935, any such further authority is baseless and void for the reasons set out in this Paragraph XVI.

Paragraph XVII.

Action by these defendants carrying out said arrangements with said Cities will aid and abet the Cities of Decatur, Florence, Sheffield and Tuscumbia in violating the law and Constitution of the State of Alabama, as herein more

particularly alleged in Paragraph XVI, sub-paragraphs (2) and (6), and will therefore be unlawful and void.

Paragraph XVIII.

Plaintiff is informed and believes and therefore alleges, that the said Cities of Decatur, Florence, Sheffield and Tuscumbia and the said defendants herein are, in accordance with the aforesaid unlawful arrangements between PWA, defendant Ickes and the Cities, combining and conspiring together and with each other to consummate their joint projects of constructing and operating said electricity plants and distributing systems and to injure the
34 plaintiff, and will, unless restrained by this Court, immediately proceed so to do. Pursuant to such combination and conspiracy PWA and defendant Ickes have entered into the aforesaid loan and grant agreements with said Cities and the other details of said arrangements. Said Cities will immediately present to defendant Ickes, or one or more of the defendants, officers of PWA, or their agents, initial requisitions of money to be furnished pursuant to said agreements, and said defendants, or one of them, will, unless restrained by this Court, pay over to said Cities all or a large portion of the loan and grant of public funds of the United States as provided in said agreements, and will immediately take further steps in consummating said projects. Each and all of the foregoing threatened acts of said defendants will result in immediate and irreparable injury, loss and damage to plaintiff, as hereinafter more specifically alleged.

Paragraph XIX.

If the defendants, or any of them, shall carry out the provisions of the said arrangements with the Cities, or do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to enjoy its federal and municipal franchise free from injurious competition brought about by unlawful means and to conduct its business and charge rates free from interference and domination by any agency of the federal government will immediately be invaded and destroyed; the value of the franchises and business of plaintiff in said Cities and of the tangible and intangible property acquired and used therein, and of the private funds invested and risked therein, repre-

sented by the capital stock and bonds of plaintiff, will immediately be greatly damaged and impaired, and finally rendered utterly worthless. It will immediately be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but, on the contrary, plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced altogether to retire from business; furthermore, by reason of said unlawful projects, it will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste. The plaintiff as a taxpayer to the United States will be specially injured as in this paragraph set forth, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose without warrant in law or in the Constitution and in violation thereof. The plaintiff as a taxpayer to said Cities, Counties and State will be specially injured as in this paragraph alleged, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose and in a manner without warrant in the laws or Constitution of Alabama or in the laws or Constitution of the United States and in violation thereof, and as such taxpayer its right that its municipal corporation shall not be forced to violate the law of the State of Alabama, and shall not enter into and be forced to carry out a relationship with others, specifically these defendants and PWA, who are without authority to enter into such a relationship, will be violated. By reason of all the foregoing allegations, the plaintiff, through unlawful interference with, injury to, and deprivation of its federal and municipal franchises, through unlawful deprivation of its property by taxation, and through unlawful deprivation and violation of its right that its municipalities shall not be forced to violate the law of Alabama and shall not enter into and be forced to carry out relationships with others who are unauthorized to enter into them, will suffer loss of its property without that due process of law guaranteed it by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has, and can have no adequate remedy at law.

36 Paragraph XX.

In so far as plaintiff sues as a taxpayer of the United States, of the State of Alabama, of the Counties of Morgan, Lauderdale and Colbert, or their subdivisions, or of the Cities of Decatur, Florence, Sheffield and Tuscumbia, it sues for all those persons similarly situated.

Paragraph XXI.

The said Cities of Decatur, Florence, Sheffield and Tuscumbia and the members of their governing bodies are not made parties defendant hereto because they are without the jurisdiction of this court, and service of process cannot be had upon them in the District of Columbia.

Paragraph XXII.

Plaintiff alleges that it is futile to ask the said Cities to rescind their unlawful agreements and arrangements with defendant Ickes and PWA; plaintiff has repeatedly and constantly protested to the Cities the invalidity of such agreements and arrangements, substantially on the grounds herein set forth, but the Cities persist in their determination to consummate the said arrangements and the projects.

Paragraph XXIII.

The said Cities have, as hereinbefore alleged, announced their intention to join with the defendants in the immediate consummation of the said projects, and plaintiff is informed and believes, and therefore alleges, that unless the defendants are immediately restrained from doing so, they will at once perform the acts herein complained of; plaintiff is further informed and believes, and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said acts would do all the mischief complained of by the plaintiff herein and would result in immediate and irreparable injury, loss and damage to the plaintiff, whereas
37 restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

Wherefore, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation,

the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this Court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office, from doing any act or thing to carry out any of the provisions of said unlawful arrangement with said Cities, and from, in any manner, aiding in the construction, or from financing the construction of said electricity generating and distributing systems in said Cities of Decatur, Florence, Sheffield and Tuscumbia; and, more specifically, from taking any steps to carry out any arrangement or agreement with the said Cities for the purpose of constructing or financing the construction of said electricity plant and systems in said Cities, from honoring any requisition and from transferring, lending, giving or disbursing to the said Cities any funds whatsoever for said purpose, and from taking any step whatever designed to aid or facilitate the financing or construction of said plant and system; such restraining order to be effective only until the matter of plaintiff's application for preliminary injunction shall be disposed of.

(3) That after notice and hearing, the Court enter a preliminary injunction to the same effect.

(4) And that upon final hearing, this Court enter a
38 final order and decree to the same effect.

(5) And for such other and further relief as to the Court may seem meet.

ALABAMA POWER COMPANY,
By P. W. TURNER,
Its Vice-President.

P. W. TURNER,
Solicitor for the Plaintiff,
Birmingham, Alabama;
EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
Solicitors for the Plaintiff,
Union Trust Building,
Washington, D. C.
NEWTON D. BAKER,
Solicitor for Plaintiff,
Cleveland, Ohio.

39 DISTRICT OF COLUMBIA, *ss:*

P. W. Turner, being duly sworn, deposes and says that he is Vice-President of Alabama Power Company, a corporation organized under the laws of the State of Alabama, the plaintiff named in the above entitled cause, that he has authority to make this affidavit in behalf of said corporation, that he has read the foregoing amended bill of complaint by him subscribed and knows the contents thereof and that the statements therein made are, true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he verily believes the statements to be true.

P. W. TURNER.

Subscribed and sworn to before me this 14 day of October, 1935.

[SEAL.] T. C. MEIDINGER,
Notary Public.

40 *Order Dismissing Bill of Complaint.*

Filed October 15, 1935.

* * * * * * *

This cause came on to be heard on the defendants' motion to dismiss the bill of complaint for want of equity, and the plaintiff having been granted in open court leave to file a second amended bill of complaint, and said bill having been filed and the parties having agreed that the said motion to dismiss should stand as to all the defendants against the second amended bill, and this court having heard the argument of the parties thereon, and being fully advised in the premises,

Now, therefore, on motion of the defendants, it is this 14th day of October 1935,

41 Adjudged, ordered and decreed that the motion of the defendants to dismiss the second amended bill of complaint be, and the same is hereby granted, and it is further

Adjudged, ordered and decreed that the second amended bill of complaint be and the same is hereby dismissed, and it is further

Adjudged, ordered and decreed that the preliminary injunction heretofore in this cause entered is dissolved.

Presented by:
ALEXANDER HOLTZOFF,
Special Assistant to
the Attorney General.

No objection as to form:
DEAN ACHESON,
Attorney for Plaintiff.

(Sgd.) JESSE C. ADKINS,
Justice.

From the foregoing decree the plaintiff, by its attorney; in open court, notes an appeal to the United States Court of Appeals for the District of Columbia and the cost bond on appeal is hereby fixed at one hundred dollars or in lieu thereof a cash deposit of fifty dollars.

(Sgd.) JESSE C. ADKINS,
Justice.

42 *Order Restoring Preliminary Injunction.*

Filed October 15, 1935.

* * * * * * *

This cause having come on to be heard on the defendants' motion to dismiss the second amended bill of complaint herein, and the said motion having been granted and the said bill having been dismissed, and the preliminary injunction heretofore entered having been dissolved, and a decree entered, and the plaintiff having in open court noted an appeal from such decree, thereupon, in open court, the plaintiff moved the court to restore the preliminary injunction during the pendency of the appeal and the defendants having represented that said injunction should be modified;

Now, therefore, it is this 15th day of October, 1935, ordered that during the pendency of the aforesaid
43 appeal, the defendants, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, Horatio B. Hackett, Assistant Administrator thereof, J. J. Madigan, Acting Executive Officer thereof, F. E. Schnepfe, Director of Projects Division thereof, Henry Morgenthau, Jr., Secretary of the Treasury

of the United States, W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, and each of them, their agents and all persons acting in aid of them and their successors in office, be, and they are hereby restrained from constructing or in any manner aiding in the construction of an electricity generating and distributing system in the Cities of Decatur, Florence, Sheffield or Tuscumbia, State of Alabama, or from transferring, lending, giving or disbursing to any of said Cities any funds whatsoever of the United States for the purpose of constructing or financing the construction by the said City of an electricity generating and distributing system and from doing any act or thing for the purpose of effecting or bringing about the transfer, loan, gift or disbursement to any of said Cities of any funds whatsoever for the said purpose; provided, that nothing in this order contained shall be construed to restrain said defendants or their agents pending this appeal from negotiating and entering into new contracts with said municipalities of Decatur, Florence, Sheffield and Tuscumbia, or any of them, terminating any existing agreement with any of said municipalities and from making any new offer to any of said municipalities.

By the Court.

JESSE C. ADKINS,
Justice.

Memorandum.

October 19, 1935.—$50 deposit in lieu of cost bond.

44 *Assignment of Errors.*

Filed October 21, 1935.

* * * * * * *

Now comes the plaintiff, and in its capacity as the owner of an electricity business with appendant franchise rights in the Cities of Decatur, Florence, Sheffield and Tuscumbia in the State of Alabama, and as a taxpayer of the United States, as a taxpayer of each of said Cities, of the Counties of Morgan, Landerdale and Colbert and of the State of Alabama, and assigns as error the action of the Court in the following matters:

1. The Court erred in sustaining the motion of the defendants to dismiss the second amended bill of complaint.

2. The Court erred in dismissing the second amended bill of complaint.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
Attorneys for Plaintiff.

Received a copy of the foregoing assignment of errors this 19 day of October, 1935.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

45 *Designation of Record.*

Filed October 21, 1935.

* * * * * * *

The Clerk will please prepare the record on appeal in the above entitled cause and include therein the following:

1. Memorandum: Bill of complaint, filed July 24, 1935.

2. Memorandum: Temporary restraining order. Bond Five Thousand Dollars ($5,000.00) July 25, 1935.

3. Motions of defendants to dismiss bill of complaint, filed July 31, 1935, in full. (But excluding memorandum of points and authorities.)

4. Memorandum: Amended bill of complaint filed August 1, 1935.

5. Memorandum: Order granting preliminary injunction, August 2, 1935.

6. Motion of defendants to dissolve preliminary injunction and to dismiss bill, filed September 20, 1935, in full. (But excluding memorandum of points and authorities.)

7. Second amended bill of complaint, filed October 14, 1935, in full, and fiat.

46 8. Final decree entered October 15, 1935, in full, including notation of appeal and order fixing cost bond on appeal.

9. Order of October 15, 1935, restoring preliminary injunction pending appeal and modifying same, in full.

10. Memorandum of deposit of Fifty Dollars ($50.00) in lieu of bond on appeal.
11. Assignment of errors.
12. This designation.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
Attorneys for Plaintiff.

The defendants have no additional designation.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

47 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 46, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59071 in Equity, wherein Alabama Power Company, a corporation, is Plaintiff, and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of October, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6580. Alabama Power Company, a corporation, Appellant, vs. Harold L. Ickes, Administrator, et al. United States Court of Appeals for the District of Columbia. Filed Oct. 24, 1935. Henry W. Hodges, Clerk.

(7019-C)

102 Endorsed on Cover: United States Court of Appeals for the District of Columbia. Filed Dec. 17 1935. Henry W Hodges, Clerk.

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103 In the United States Court of Appeals for the District of Columbia

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No. 6580

ALABAMA POWER COMPANY, *Appellant*

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, *et al.*, *Appellees*

Motion

Now come the appellees and respectfuly show to this Court:

I

That the decree, entered herein in the Supreme Court of the District of Columbia, on October 15, 1935, and from which the present appeal was taken, dismissed the bill of complaint on the ground of insufficiency and on other similar grounds. The suit was brought to enjoin the defendants from advancing Public Works Administration funds to the municipalities named in the bill of complaint for the purpose of constructing an electric power plant.

For several weeks last past the municipalities have been negotiating with the Public Works Administration, and said negotiations culminated in agreements abrogat-
104 ing the existing contracts between the parties and in the execution of new contracts, the terms of which are vitally and substantially different than is alleged in the bill of complaint. Thus the pleadings do not now represent an actually existing controversy between the parties, and it would be futile and useless to continue the litigation on the basis of them. The facts relative to the execution of said contracts are as follows:

II

On or about December 28, 1934, the Federal Emergency Administrator of Public Works and the City of Sheffield executed a loan and grant agreement, a copy of which is hereto attached and made a part hereof and marked Exhibit 1, which was in existence at the time when the bill was filed by the appellant. After the decree was entered in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on December 2, 1935, the Administrator and the said City of Sheffield entered into an agreement terminating the former agreement and all other understandings and agreements, if any, between the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked Exhibit 2. Subsequently, on December 4, 1935, there was delivered to said city by the Administrator an offer to purchase
105 certain of the bonds of said city and to make a grant to said city of Sheffield, a true copy of which offer is also attached hereto, made a part hereof, and marked Exhibit 3.

On or about December 28, 1934, the Administrator and the city of Tuscumbia executed a loan and grant agreement, a copy of which is hereto attached, made a part hereof, and marked Exhibit 4, which was in existence at the time when the bill was filed by the appellant. After the decree was entered on December 15, 1935, in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on or about December 2, 1935, the Administrator and the said City of Tuscumbia entered into an agreement terminating the former agreement, and all other understandings and agreements, if any, between the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked Exhibit 5. Subsequently, on December 4, 1935, there was delivered to said city by the Administrator an offer to purchase certain of the bonds of said city and to make a grant to said city of Tuscumbia, a true copy of which offer is also attached hereto, made a part hereof, and marked Exhibit 6.

On or about December 6, 1934, the Administrator and the city of Decatur executed a loan and grant agreement, a copy

of which is hereto attached, made a part hereof, and
106 marked "Exhibit 7", which was in existence at the time when the bill was filed by the appellant. After the decree was entered on December 15, 1935, in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on or about December 2, 1935, the Administrator and the said City of Decatur, entered into an agreement terminating the former agreement, and all other understandings and agreements, if any, between the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked "Exhibit 8." Subsequently, on December 4, 1935, there was delivered to said city by the Administrator, an offer to purchase certain of the bonds of said city and to make a grant to said city of Decatur, a true copy of which offer is also attached hereto, made a part hereof, and marked "Exhibit 9."

On or about December 28, 1934, the Administrator and the city of Florence executed a loan and grant agreement, a copy of which is hereto attached, made a part hereof, and marked "Exhibit 10", which was in existence at the time when the bill was filed by the appellant. After the decree was entered on October 15, 1935, in this cause in the Supreme Court of the District of Columbia, and while this case was pending on appeal, on or about December 2, 1935, the Administrator and the said City of Florence, entered into an agreement terminating the former agreement, and all other understandings and agreements, if any, be-
107 tween the parties to that agreement relating to subject matter thereof. A true copy of said terminating agreement is attached hereto, made a part hereof, and marked "Exhibit 11." Subsequently, on December 4, 1935, there was delivered to said city by the Administrator an offer to purchase certain of the bonds of said city and to make a grant to said City of Florence, a true copy of which offer is also attached hereto, made a part hereof, and marked "Exhibit 12."

Wherefore, and for the reasons set forth in the annexed memorandum, the appellees move that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts above

set forth and for a trial or other disposition of the cause on such amended pleadings

JAMES W. MORRIS,
Assistant Attorney General.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

JOHN W. SCOTT,
Special Assistant to the Attorney General.

JEROME N. FRANK,
Counsel for the Federal Emergency Administration of Public Works.

108

EXHIBIT 1

Loan and Grant Agreement Dated as of Dec. 28, 1934, Between the City of Sheffield, Alabama (Herein Called the "Borrower") and the United States of America (Herein Called the "Government")

Docket No. 3124

Part One

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement"), the Government will, by loan and grant not exceeding in the aggregate the sum of $230,000, aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electric transmission line and distribution system, and other necessary appurtenances thereto, all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 3124, Title II of the National Industrial Recovery Act (herein called the "Act"), and the Constitution and Statutes of the State of Alabama, including particularly:

Act No. 107, General and Local Acts of Alabama, Extra Session, 1933, page 100.

2. *Description of Bonds.*—(a) *Designation.*—Electric System Bond.

(b) *Authorized Principal Amount.*—$187,000.

(c) *Type.*—Special obligation, serial, coupon bonds.

(d) *Registration.*—Registerable at the option of the holder as to principal only.

(e) *Date.*—June 1, 1934.

(f) *Interest.*—At the rate of 4 per cent per annum, payable December 1, 1934, and semiannually thereafter on June 1, and December 1 in each year.

(g) *Maturities.*—Payable on June 1, in years and
109 amounts as follows:

Year:	Amount	Year:	Amount
1937	$10,000	1946	$12,000
1938	10,000	1947	12,000
1939	10,000	1948	12,000
1940	10,000	1949	12,000
1941	10,000	1950	12,000
1942	10,000	1951	12,000
1943	10,000	1952	12,000
1944	10,000	1953	12,000
1945	11,000		

(h) *Security.*—Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

(i) *Place and Medium of Payment.*—Payable at the office of the City Treasurer, Sheffield, Alabama, or, at the option of the holder, at a bank or trust company in Borough of Manhattan, City and State of New York, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for public and private debts.

(j) *Denomination.*—$1,000.

Other provisions may be substituted for the provisions of subparagraphs (a), (b), (c), (d), (e), (f), (g), (i), and (j) of this Paragraph by the Borrower if the consent of the Federal Emergency Administrator of Public Works (herein called the "Administrator") to such substitution is obtained.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds be sold to a purchaser or purchasers other than the Government, a Grant in an amount equal to thirty per centum of the cost of the labor and materials employed upon the Project. Wherever the expres-

sion "cost of labor and materials" is used in this Agreement, such expression shall mean such cost as determined by the Administrator, and his determination thereof shall be final. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds and/or interest coupons; provided, however, that if all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money.

4. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $230,000, being the cost estimated at the time when the Application was approved by the Government, or that the Borrower will be able to obtain, through additional borrowing or otherwise, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall believe to be necessary to complete the Project;

(c) *Compliance.*—If the Borrower shall not have complied, to the satisfaction of the Administrator, with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the Project;

(e) *Representations.*—If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government

by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract, satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, and will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds;

(g) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the ordinance providing for the authorization, issuance, and sale of the Bonds, and the use of the revenue derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator.

5. *Bond Counsel and Bond Proceedings.*—When this Agreement has been executed the Borrower (unless it has already done so) shall promptly:

(a) Retain municipal bond counsel satisfactory to the Administrator to assist the Borrower in the proceedings relative to the authorization, issuance, and sale of the Bonds and to give legal opinions on such matters relative thereto as may be requested by the Administrator; and

(b) Take all the proceedings necessary for the authorization and issuance of the Bonds.

6. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the
112 Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

7. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in

form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at the Birmingham Branch of the Federal Reserve Bank of Atlanta, Birmingham, Alabama (herein called the "Reserve Bank"), or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, and all unmatured interest coupons appertaining thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the project.

8. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at the Reserve Bank or at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) Twenty-five per centum of the cost of the labor and materials shown in the Requisition to have been em-
113 ployed upon the Project if the Requisition shows that the Project has not been completed; or

(b) Thirty per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined.

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between $230,000 and the aggregate principal amount of the Bonds purchased by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds and/or interest coupons rather than by payment of money if the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

9. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and/or interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between thirty per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

10. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if, in the judgment of the Administrator, the circumstances warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of thirty per centum of the cost of the labor and materials to be employed upon the Project, as estimated
114 by the Administrator.

11. *Deposit of Bond Proceeds and Grant; Bond Fund; Special Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 9, Part One, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 8, Part One, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Special Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator. Provided, however, that interest on said Bonds accru-

ing prior to complete construction of the Project shall be paid from the proceeds of said Bonds to the extent such interest is not available from funds received as accrued interest, and, provision shall be made that, upon the delivery of said Bonds and the receipt of the proceeds, a sufficient sum, including the accrued interest received, shall be withdrawn from the proceeds and placed in said Bond Fund to pay said interest.

12. *Disbursement of Monies in Special Accounts and Bond Fund.*—The Borrower shall expend the monies in a Special Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and approved by the Administrator. Any monies remaining unexpended in any Special Account after the completion of the Project which are not required to meet unpaid obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

13. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds directly or indirectly from the Government or any agency or instrumentality thereof, other than the Loan or Grant, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

Part Two

In consideration of the grant, the borrower covenants that:

1. *Construction Work.*—All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. The following rules and regu-

lations as set out in Bulletin No. 2, revised on March 3, 1934, entitled, "P. W. A. REQUIREMENTS as to BIDS, CONTRACTOR'S BONDS, AND CONTRACT, WAGE, AND LABOR PROVISIONS AND GENERAL INSTRUCTIONS as to APPLICATIONS AND LOANS AND GRANTS", shall be incorporated verbatim (except that in all places where the term "Borrower" is used the name of the Borrower shall be inserted) in all con-
116 struction contracts for work on the Project:

"1. (a) *Convict labor.*—No convict labor shall be employed on the Project and no materials manufactured or produced by convict labor shall be used on the Project.

"(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government Engineer, no individual directly employed on the Project shall be permitted to work more than eight hours in any one day nor more than thirty hours in any one week: Provided, that this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any one week to be made up in the succeeding twenty days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rates for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done vis.:

Skilled labor	$1.00
Unskilled labor	.40

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed twelve months from the date of the contract.

"(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve
117 skilled journeyman mechanics and who are not to be termed as 'unskilled laborers.'

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the Project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the Act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government Engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, that this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of the State of Alabama to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of the State of Alabama, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Engineer In-
118 spector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called the the "Board") shall hear all labor issues arising under the operation of this contract and such issues as may result

from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in Paragraph 2 (a), (b), and (c) hereof) all contracts for work on the Project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased by an amount equal to any such decreased cost.

"(i) Engineers, architects, and other professional and subprofessional employees engaged on the Project shall receive the prevailing local rates for the various types of service to be rendered, except that in no case shall they receive less than the hourly rates set for the highest paid class of skilled labor directly employed on the Project.

"3. (a) *Labor preferences.*—Preferences shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the City of Sheffield, and/or Colbert County, Alabama, and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State of Alabama: *Provided,* That these preferences shall apply only where such labor
119 is available and qualified to perform the work to which the employment relates.

"(b) *Employment services.*—To the fullest extent possible, labor required for the Project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however,* That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through

recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of this Paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following section 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection: (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing';

"4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economic and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation Insurance.*—Every employer of labor shall provide, if permitted by the laws of the State of Alabama, adequate workmen's compensation insurance for all labor employed by him on the Project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the ben-

efit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government Engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided by which the employees may, by paying the entire amount of the premium, derive a similar protection.

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the Project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, the Borrower may withhold from the contractor so much of accrued payments as may be necessary to
121 pay to laborers or mechanics, employed on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. *Accident prevention.*—Reasonable precaution shall at all times be exercised for the safety of employees on the work, and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment, and other physical hazards, shall be guarded in accordance with the safety provisions of the "Manual of Accident Prevention in Construction" of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

"9. (a) *N. R. A. materials.*—So far as articles, materials, and supplies produced in the United States are concerned, only articles, materials, and supplies produced under codes of fair competition under Title I of the Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the Government Engineer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

"(b) *Local preference.*—So far as practicable, and subject to the provisions of section (a) of this Paragraph 9, preference shall also be given to the use of locally produced materials if such does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the Government Engineer; but there shall be no requirement providing price differentials for, or restricting the use of materials to, those produced within the Nation or State.

"10. (a) *Inspection of records.*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access
122 to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel, and such schedules of the costs of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the Engineer Inspector such reasonable facilities as he may request. In case of dispute the Government Engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the Project shall report within five days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the Project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government Engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to the Borrower, to the Government Engineer, and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government Engi-
123 neer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90% of the cost thereof to the contractor, and the remaining 10% shall be paid thirty days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend 'PUBLIC WORKS PROJECT No. 3214' shall be erected in appropriate places at the site of the Project.

"14. All reasonable rules and regulations which the Administrator may prescribe toward the effectuation of the matters covered by Paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such contractors, particularly Paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised March —, 1934.

"16. *Termination for breach.*—In the event that any of the provisions of Paragraphs 1 to 15 inclusive of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, the Borrower may, subject to the approval of the Government Engineer, and upon request of the Administrator shall terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within ten days after the serving of such notice, such violation shall cease, the contract shall, upon the expiration of said ten days, cease and terminate. In the event of any such termination the Borrower may take over the work and prosecute the same to completion or otherwise for the account and at the expense of the

contractor and/or subcontractor, and the contractor and his sureties shall be liable to the Borrower for any excess cost occasioned the Borrower in the event of any such termination, and the Borrower may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. *Definition.*—The term 'Administrator' as used herein refers to the Federal Emergency Administrator of Public Works. The term 'Act' as used herein refers to the National Industrial Recovery Act. The term 'Government Engineer' as used herein shall mean the State Engineer (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this Agreement by the Administrator. The term 'Engineer Inspector' as used refers to State Engineer Inspector, Resident and Assistant Resident Engineer Inspectors, and Supervising Engineers, appointed by the Administrator. The term 'Materials' as used herein includes, in addition to materials incorporated in the Project or used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work."

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, of Materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Government Engineer.

4. *Force Labor.*—If prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement notwithstanding, to apply to the Administrator for permission to do all or any part of the Project by day labor, upon such conditions as the Administrator may impose.

PART THREE

1. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will promptly commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, such engineering supervision and inspection as the Administrator or his representatives may require, and plans, drawings, specifications, and construction contracts which shall be satisfactory to the Administrator. Except with the prior written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage or any conditional sale or title-retention agreement.

2. *Information.*—During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction cost and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower and the project as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.*—The Bor-
126 rower represents and warrants as follows:

(a) *Litigation.*—No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the construction and operation of the Project, or the financial condition of the Borrower;

(b) *Financial Condition.*—The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of its assets or in its financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.*—No fee or commission has been or will be paid by the Borrower or any of its officers,

employees, agents, or representatives, and no agreement to pay a fee or commission has been or will be entered into by or on behalf of the Borrower, or any of its officers, employees, agents, or representatives, in order to secure the loan or Grant hereunder;

(d) *Affirmation.*—Every statement contained in this Agreement, in the Borrower's Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government by or behalf of the Borrower is correct and complete, and no relevant fact materially affecting the Bonds, the Grant, or the Project, or the obligations of the Borrower under this Agreement has been or will be omitted therefrom.

4. *Sale of Bonds by the Government.*—The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser from the Government of 25 per centum of the Bonds, information for the preparation of a bond circular in customary form, signed by 127 the proper official of the Borrower, containing such data as the Government or such purchaser may reasonably request concerning the Borrower and the Project.

5. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, and expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement, including, without limiting the generality of the foregoing, the cost of preparing, executing, or delivering the Bonds or obtaining all legal opinions requested by the Administrator.

6. *Waiver.*—Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement, if, in the opinion of the administrator, which shall be conclusive, such waiver or amendment does not substantially vary the terms of this Agreement.

7. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise therefrom.

8. *Validation.*—The Borrower hereby covenants that it will institute, prosecute and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities, and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate or advisable. The Borrower further covenants
that it will procure and furnish to the Government,
128 as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State of Alabama stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.*—Subject to the limitations herein contained, this Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed by and construed in accordance with the laws of the State of Alabama.

10. *Naming of Project.*—The Project shall not be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.*—If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties of the obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Nature of Liability.*—It is expressly understood and agreed that this Agreement does not constitute an indebtedness of the Borrower within the meaning of any provision or limitation of the Constitution of the State of Alabama, and it is hereby made a condition of this Agreement that

the covenants, agreements, representations, and warranties herein contained do not and shall never impose a pecuniary liability upon the Borrower or charge against its general credit.

13. *Construction of Agreement.*—If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the
129 validity and effectiveness of any other provision of this Agreement or the right or obligations of the parties hereto, provided, in the opinion of the Administrator, the Agreement does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF SHEFFIELD, ALABAMA, and the UNITED STATES OF AMERICA have respectively caused this Agreement to be duly executed as of the day and year first above written.

CITY OF SHEFFIELD, ALABAMA,
By W. H. RICHESON,
Chairman of City Commission.

UNITED STATES OF AMERICA,
By HAROLD L. ICKES,
Federal Emergency Administrator of Public Works.

[SEAL]
Attest:
PETER SCHAUT,
City Clerk.

130 EXHIBIT 2

Agreement Terminating the Loan and Grant Agreement Between the City of Sheffield (County of Colbert, Alabama) and the United States of America

P. W. A. Docket No. 3124

Agreement Dated as of December 2, 1935, Terminating the Loan and Grant Agreement Dated as of December 28, 1934, the Amendatory Loan Agreement Dated as of April 6, 1935, and the Amendatory Loan Agreement Dated as of June 6, 1935, Between the City of Sheffield, Colbert County, Alabama (Herein Called the "City") and the United States of America (Herein Called the "Government")

WHEREAS a Loan and Grant Agreement was entered into by and between the City and the Government dated as of December 28, 1934, and

WHEREAS said Loan and Grant Agreement was amended by an Amendatory Loan Agreement by and between the City and the Government dated as of April 6, 1935, and

WHEREAS said Loan and Grant Agreement was further amended by an Amendatory Loan Agreement by and between the City and the Government dated as of June 6, 1935, and

WHEREAS it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement and said Amendatory Loan Agreements,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the City and the Government that said Loan and Grant Agreement dated as of December 28, 1934, said Amendatory Loan Agreement dated as of April 6, 1935, and said Amendatory Loan Agreement dated as of June 6, 1935, be and the
131 same hereby are terminated.

CITY OF SHEFFIELD,
By HOYT GREEN,
Pres. of City Commission.

UNITED STATES OF AMERICA.
Federal Emergency Administrator
of Public Works.

(Sgd.) HORATIO B. HACKETT,

Exhibit 3 referred to in the foregoing motion is not printed at this point because it appears as Exhibit C to the defendants' answer to the third amended bill of complaint at p. 297 infra.

141 EXHIBIT 4

Loan and Grant Agreement Dated as of Dec. 28, 1934, Between the City of Tuscumbia, Alabama (Herein Called the "Borrower"), and the United States of America (Herein Called the "Government")

Docket No. 3125

Part One

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement"), the Government will, by loan and grant not exceeding in the aggregate the sum of $130,000, aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electric transmission line and distribution system, and other necessary appurtenances thereto, all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 3125, Title II of the National Industrial Recovery Act (herein called the "Act"), and the Constitution and Statutes of the State of Alabama, including particularly:

Act No. 107, General and Local Acts of Alabama, Extra Session 1933, page 100.

2. *Description of Bonds*—(a) *Designation.*—Electric System Bond.

(b) *Authorized Principal Amount.*—$105,000.

(c) *Type.*—Special obligation, serial, coupon bonds.

(d) *Registration.*—Registerable at the option of the holder as to principal only.

(e) *Date.*—June 1, 1934.

(f) *Interest.*—At the rate of 4 percent per annum, payable December 1, 1934, and semiannually thereafter on June 1 and December 1 in each year.

(g) *Maturities.*—Payable on June 1, in years and
142 amounts as follows:

Year:	*Amount*	Year:	*Amount*
1937	$4,000	1946	$6,000
1938	4,000	1947	6,000
1939	5,000	1948	6,000
1940	5,000	1949	7,000
1941	5,000	1950	7,000
1942	5,000	1951	7,000
1943	5,000	1952	7,000
1944	5,000	1953	8,000
1945	5,000	1954	8,000

(h) *Security.*—Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

(i) *Place and Medium of Payment.*—Payable at the office of the City Treasurer, Tuscumbia, Alabama, or, at the option of the holder, at a bank or trust company in Borough of Manhattan, City and State of New York, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for public and private debts.

(j) *Denomination.*—$1,000.

Other provisions may be substituted for the provisions of subparagraphs (a), (b), (c), (d), (e), (f), (g), (i), and (j) of this Paragraph by the Borrower if the consent of the Federal Emergency Administrator of Public Works (herein called the "Administrator") to such substitution is obtained.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds shall be sold to a purchaser or purchasers other than the Government, a Grant in an amount equal to thirty per centum of the cost of the labor and materials employed upon the Project. Wherever the expression "Cost of labor and materials" is used in this Agreement, such expression shall mean such cost as determined by the Administrator, and his determination thereof shall be final. The Government will make part of the Grant by payment of money and the remainder of the
143 Grant by cancellation of Bonds and/or interest cou-

pons; provided, however, that if all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money.

4. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $130,000, being the cost estimated at the time when the Application was approved by the Government, or that the Borrower will be able to obtain, through additional borrowing or otherwise, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall believe to be necessary to complete the Project;

(c) *Compliance.*—If the Borrower shall not have complied, to the satisfaction of the Administrator, with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the Project;

(e) *Representations.*—If any representation made
144 by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract, satisfactory to the Administrator, between the Borrower and the Tennessee

Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, and will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds;

(g) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the ordinance providing for the authorization, issuance and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator.

5. *Bond Counsel and Bond Proceedings.*—When this Agreement has been executed the Borrower (unless it has already done so) shall promptly:

(a) Retain municipal bond counsel satisfactory to the Administrator to assist the Borrower in the Proceedings relative to the authorization, issuance, and sale of the Bonds and to give legal opinions on such matters relative thereto as may be requested by the Administrator; and

(b) Take all the proceedings necessary for the authorization and issuance of the Bonds.

6. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement, the Borrower shall
145 file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

7. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment

for such Bonds shall be made at the Birmingham Branch of the Federal Reserve Bank of Atlanta, Birmingham, Alabama (herein called the "Reserve Bank"), or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, and all unmatured interest coupons appertaining thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the project.

8. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at the Reserve Bank or at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) Twenty-five per centum of the cost of the labor and materials shown in the Requisition to have been em-
146 ployed upon the Project if the Requisition shows that the Project has not been completed, or

(b) Thirty per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined;

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between $130,000 and the aggregate principal amount of the Bonds purchased by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds and/or interest coupons rather than by payment of money if the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

9. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will

cancel such Bonds and/or interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between thirty per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

10. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if, in the judgment of the Administrator, the circumstances warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of thirty per centum of the cost of the labor and materials to be employed upon the Project, as estimated
147 by the Administrator.

11. *Deposit of Bond Proceeds and Grant; Bond Fund; Special Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 9, PART ONE, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 8, PART ONE, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Special Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator. Provided, however, that interest on said Bonds accruing prior to complete construction of the Project shall be paid from the proceeds of said Bonds to the extent such interest is not available from funds received as ac-

crued interest, and, provision shall be made that, upon the delivery of said Bonds and the receipt of the proceeds, a sufficient sum, including the accrued interest received, shall be withdrawn from the proceeds and placed in said Bond Fund to pay said interest.

12. *Disbursement of Monies in Special Accounts and Bond Fund.*—The Borrower shall expend the monies in a Special Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and approved by the Administrator. Any monies remaining unexpended in any Special Account after the completion of the Project which are not required to meet
148 unpaid obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

13. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds directly or indirectly from the Government or any agency or instrumentality thereof, other than the Loan or Grant, to aid in financing the construction of the Project, to the extent that such funds are so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

Part Two

In consideration of the grant, the borrower covenants that:

1. *Construction Work.*—All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the Administration of the Act. The following rules and regulations as set out in Bulletin No. 2, revised on March 3, 1934, entitled, "P. W. A. Requirements as to Bids, Contractor's Bonds, and Contract, Wage, and Labor Provisions, and General Instructions as to Applications and Loans and

GRANTS", shall be incorporated verbatim (except that in all places where the term "Borrower" is used the name of the Borrower shall be inserted) in all construction contracts for work on the Project:

"1. (a) *Convict Labor.*--No convict labor shall be
149 employed on the Project and no materials manufactured or produced by convict labor shall be used on the Project.

"(b) *Thirty-hour Week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government Engineer, no individual directly employed on the Project shall be permitted to work more than eight hours in any one day nor more than thirty hours in any one week: Provided, that this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any one week to be made up in the succeeding twenty days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rate for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

Skilled labor	$1.00
Unskilled labor	.40

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed twelve months from the date of the contract.

"(c) The above-designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve

150 skilled journeymen mechanics and who are not to be termed as 'unskilled laborers.'

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the Project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the Act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government Engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: *Provided, however,* That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of the State of Alabama to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of the State of Alabama, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Engineer Inspector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called
151 the 'Board') shall hear all labor issues arising under the operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to charge by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in Paragraph 2 (a), (b), and (c) hereof) all contracts for work on the Project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased by an amount equal to any such decreased cost.

"(i) Engineers, architects, and other professional and subprofessional employees engaged on the Project shall receive the prevailing local rates for the various types of service to be rendered, except that in no case shall they receive less than the hourly rates set for the highest paid class of skilled labor directly employed on the Project.

"3. (a) *Labor Preferences.*—Preferences shall be given where they are qualified, the ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the City of Tuscumbia, and/or Colbert County, Alabama, and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State of Alabama: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

"(b) *Employment Services.*—To the fullest extent
152 possible, labor required for the Project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however,* that union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, how-

ever, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals, which are authorized to furnish such labor residing in the locality, within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the Labor preferences provided in section (a) of this Paragraph 3, shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following section 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection: (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing,
153 or assisting a labor organization of his own choosing.'

"4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economic and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation Insurance.*—Every employer of labor shall provide, if permitted by the laws of the State of Alabama, adequate workmen's compensation insurance for all labor employed by him on the Project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the bene-

fit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government Engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided, by which the employees may, by paying the entire amount of the premium, derive a similar protection.

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the Project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, the Borrower may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. *Accident prevention.*—Reasonable precaution
154 shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the 'Manual of Accident Prevention in Construction' of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

"9. (a) *N. R. A. materials.*—So far as articles, materials, and supplies produced in the United States are concerned, only articles, materials, and supplies produced under codes of fair competition under Title I of the Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the Government Engineer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

"(b) *Local preference.*—So far as practicable, and subject to the provisions of section (a) of this Paragraph 9, preference shall also be given to the use of locally produced materials if such does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the Government Engineer; but there shall be no requirement providing price differentials for, or restricting the use of materials to, those produced within the Nation or State.

"10. (a) *Inspection of records.*—The Administor, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator
155 through his authorized agents, the names and addresses of all personnel, and such schedules of the costs of labor, costs, and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the Engineer Inspector such reasonable facilities as he may request. In case of dispute the Government Engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the Project shall report within five days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the Project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to the furnished to the Government Engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to the Borrower, to the Government Engineer, and the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government Engineer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appli-
ances shall be paid for at least once a month to the
156 extent of 90% of the cost thereof to the contractor, and the remaining 10% shall be paid thirty days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend 'PUBLIC WORKS PROJECT No. 3125' shall be erected in appropriate places at the site of the Project.

"14. All reasonable rules and regulations which the Administrator may prescribe toward the effectuation of the matters covered by Paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such contractors, particularly Paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No, P. W. A. 61, revised March 1934.

"16. *Termination for breach.*—In the event that any of the provisions of Paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, the Borrower may, subject to the approval of the Government Engineer, and upon request of the Administrator shall, terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within ten days after the serving of such notice, such violation shall cease, the contract shall, upon the expiration of said ten days, cease and terminate. In the event of any such termination the Borrower may take over the work and prosecute the same

to completion or otherwise for the account and at the expense of the contractor and/or subcontractor, and the contractor and his sureties shall be liable to the Borrower for any excess cost occasioned the Borrower in the event of any such termination, and the Borrower may take
157 possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor. This clause shall not be construted to prevent the termination for other causes provided in the construction contract.

"17. *Definition.*—The term 'Administrator' as used herein refers to the Federal Emergency Administrator of Public Works. The term 'Act' as used herein refers to the National Industrial Recovery Act. The term 'Government Engineer' as used herein shall mean the State Engineer (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this Agreement by the Administrator. The term 'Engineer Inspector' as used refers to State Engineer Inspector, Resident and Assistant Resident Engineer Inspectors, and Supervising Engineers, appointed by the Administrator. The term 'materials' as used herein includes, in addition to materials incorporated in the Project or used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work."

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, of Material-men, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Government Engineer.

4. *Force Labor.*—If prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement

notwithstanding, to apply to the Administrator for
158 permission to do all or any part of the Project by day labor upon such conditions as the Administrator may impose.

PART THREE.

1. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will promptly commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, such engineering supervision and inspection as the Administrator or his representatives may require, and plans, drawings, specifications, and construction contracts which shall be satisfactory to the Administrator. Except with the prior written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage or any conditional sale or title retention agreement.

2. *Information.*—During the construction of the Project, the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction cost and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower and the project as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.*—The Borrower represents and warrants as follows:

(a) *Litigation.*—No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the construction and operation of the Project, or the financial condition of the Borrower;

(b) *Financial Condition.*—The character of the
159 assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's

most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of its assets or in its financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.*—No fee or commission has been or will be paid by the Borrower or any of its officers, employees, agents, or representatives, and no agreement to pay a fee or commission has been or will be entered into by or on behalf of the Borrower, or any of its officers, employees, agents, or representatives, in order to secure the Loan or Grant hereunder;

(d) *Affirmation.*—Every statement contained in this Agreement, in the Borrower's Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government by or on behalf of the Borrower is correct and complete, and no relevant fact materially affecting the Bonds, the Grant, or the Project, or the obligations of the Borrower under this Agreement has been or will be omitted therefrom.

4. *Sale of Bonds by the Government.*—The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser from the Government of 25 per centum of the Bonds, information for the preparation of a bond circular in customary form, signed by the proper official of the Borrower, containing such data as the Government or such purchaser may reasonably request concerning the Borrower and the Project.

5. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, and expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement, including, without limiting the generality of the foregoing, the costs of preparing, executing or delivering the Bonds or obtaining all legal opinions requested by the Administrator.

6. *Waiver.*—Any provision of this Agreement may be waived or amended with the consent of the Borrower and

the written approval of the Administrator, without the execution of a new or supplemental agreement, if, in the opinion of the Administrator, which shall be conclusive, such waiver or amendment does not substantially vary the terms of this Agreement.

7. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise therefrom.

8. *Validation.*—The Borrower hereby covenants that it will institute, prosecute and carry to completion in so far as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State of Alabama stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any de-
161 fects, illegalities, or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.*—Subject to the limitations herein contained, this Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed by and be construed in accordance with the laws of the State of Alabama.

10. *Naming of Project.*—The Project shall not be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.*—If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties of the obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Nature of Liability.*—It is expressly understood and agreed that this Agreement does not constitute an indebtedness of the Borrower within the meaning of any provision or limitation of the Constitution of the State of Alabama, and it is hereby made a condition of this Agreement that the covenants, agreements, representations, and warranties herein contained do not and shall never impose a pecuniary liability upon the Borrower or charge against its general credit.

13. *Construction of Agreement.*—If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the right or obligations of the parties hereto, provided, in the opinion of the Administrator, the Agreement
162 does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF TUSCUMBIA, ALABAMA, and the UNITED STATES OF AMERICA have respectively caused this Agreement to be duly executed as of the day and year first above written.

CITY OF TUSCUMBIA, ALABAMA,
By W. L. FARR, *Mayor.*

UNITED STATES OF AMERICA,
By HAROLD L. ICKES,
Federal Emergency Administration of Public Works.

[SEAL]
Attest:
J. L. HAY, *City Clerk.*

163

EXHIBIT 5

Agreement Terminating the Loan and Grant Agreement Between the City of Tuscumbia (Colbert County, Alabama) and the United States of America

P. W. A. Docket No. 3125

Agreement Dated as of December 2, 1935, Terminating the Loan and Grant Agreement Dated as of December 28, 1934, and the Amendatory Loan Agreement Dated as of March 26, 1935, Between the City of Tuscumbia, Colbert County, Alabama (Herein Called the "City"), and the United States of America (Herein Called the "Government")

WHEREAS a Loan and Grant Agreement was entered into by and between the City and the Government dated as of December 28, 1934, and

WHEREAS said Loan and Grant Agreement was amended by an Amendatory Loan Agreement by and between the City and the Government dated as of March 26, 1935, and

WHEREAS it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement and said Amendatory Loan Agreement,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the City and the Government that said Loan and Grant Agreement dated as of December 28, 1934, and said Amendatory Loan Agreement dated as of March 26, 1935, be and the same hereby are terminated.

CITY OF TUSCUMBIA, ALABAMA,

[SEAL]

By W. L. FARR, *Mayor.*

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS.

(Sgd.) HORATIO B. HACKETT,
Assistant Administrator.

Attest:
I. L. Hays,
City Clerk.

Exhibit 6 referred to in the foregoing motion is not printed at this point because it appears as Exhibit D to the defendants' answer to the third amended bill of complaint at p. 315 infra.

173 EXHIBIT 7

Loan and Grant Agreement Dated as of December 6, 1934, Between the City of Decatur, Morgan County, Alabama (Herein Called the "Borrower") and the United States of America (Herein Called the "Government")

Docket No. 6587

Part One

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement") the Government will, by loan and grant not exceeding in the aggregate the sum of $350,000 (herein called the "Allotment") aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electrical distribution system, including the low side of the substation and equipment, all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. *6587,* Title II, of the National Industrial Recovery Act (herein called the "Act") and the Constitution and Statutes of the State of Alabama (herein called the "State"), including particularly Act 107, General Acts of Alabama, approved April 6, 1933.

2. *Amount and Method of Making Loan.*—The Borrower will sell and the Government will buy, at the principal amount thereof plus accrued interest, $268,000 aggregate principal amount of the bonds described below (herein called the "Bonds") less such amount of the Bonds, if any, as the Borrower may sell to purchasers other than the Government.

(a) *Designation.*—Electric System Revenue Bond.

(b) *Authorized Amount.*—$268,000.

174 (c) *Type.*—Special obligation, serial, coupon bonds.

(d) *Registration.*—Registerable, at the option of the holder, as to principal only.

(e) *Date.*—September 1, 1934.

(f) *Interest.*—At the rate of 4 percent per annum payable on March 1, 1935, and semiannually thereafter on September 1 and March 1 in each year.

(g) *Maturities.*—Payable on September 1 in years and amounts as follows:

Year:	*Amount*	Year:	*Amount*
1937	9,000	1946	$18,000
1938	9,000	1947	18,000
1939	9,000	1948	18,000
1940	9,000	1949	18,000
1941	12,000	1950	18,000
1942	12,000	1951	18,000
1943	14,000	1952	18,000
1944	14,000	1953	18,000
1945	18,000	1954	18,000

(h) *Security.*—Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

(i) *Place and Medium of Payment.*—Payable, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for the payment of public and private debts, at the office of the City Treasurer of the City of Decatur, Decatur, Alabama, or, at the option of the holder, at a bank or trust company in Borough of Manhattan, City and State of New York.

(j) *Denomination.*—$1,000.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds are sold to purchasers other than the Government, a grant (herein called the "Grant") in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project.
175 The determination by the Federal Emergency Administrator of Public Works (herein called the "Administrator") of the cost of the labor and materials employed upon the Project shall be conclusive. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds or interest coupons or both. If all of the Bonds are sold to purchasers other than the Government, the Government

will make the entire Grant by payment of money. In no event shall the Grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $100,000.

4. *Bond Proceedings.*—When the Agreement has been executed, the Borrower (unless it has already done so) shall promptly take all proceedings necessary for the authorization and issuance of the Bonds.

5. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

6. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at a Federal Reserve Bank to be designated by the Administrator or at such other place or places as the Ad-
176 ministrator may designate, against delivery by the Borrower of such Bonds, having all unmatured interest coupons attached thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the Project.

7. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor,

a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) 25 per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) 30 per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined.

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between the Allotment and the amount paid (not including the amount paid as accrued interest) for the Bonds taken up by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds or interest coupons or both rather than by payment of money if, in the judgment of the Administrator, the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

8. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the
177 Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

9. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if in the judgment of the Administrator the circumstances so warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of 30 per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

10. *Deposit of Bond Proceeds and Grant; Bond Fund; Construction Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 8, PART ONE, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 7, PART ONE, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Construc-
178 tion Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator.

11. *Disbursement of Monies in Construction Accounts and in Bond Fund.*—The Borrower shall expend the monies in a Construction Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and approved by the Administrator. Any monies remaining unexpended in any Construction Account after the completion of the Project which are not required to meet obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

12. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds (other than those received under this Agreement) directly or indirectly from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the

extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

13. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the
179 judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $350,000, or that the Borrower will be able to obtain, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the Project;

(c) *Compliance.*—If the Administrator shall not be satisfied that the Borrower has complied with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the construction of the Project;

(e) *Representations.*—If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect.

(f) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by

the Project and the Ordinance providing for the authorization, issuance, and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Ad-
180 ministrator;

(g) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds, and to provide a reserve for new construction and contingencies, and will specifically permit the Borrower to apply and keep in effect for the first year of operation of the Project, and longer if necessary for the foregoing purposes, a surcharge of 10% on the domestic, commercial, and industrial resale rate schedule of the Tennessee Valley Authority, and for at least the three succeeding years a surcharge of 10% on the commercial and industrial resale rate schedule of the Tennessee Valley Authority.

14. *Accounts and Statements.*—So long as any of the Bonds are held by the Government, the Borrower will furnish to the Government, not later than 30 days after the close of each six months' fiscal period, complete operating and income statements of the electric system in reasonable detail covering such six months' period, and, not more than 60 days after the close of each fiscal year, complete financial statements of the electric system and the Borrower covering such fiscal year, certified by independent auditors.

Part Two

In consideration of the grant, the borrower covenants that:

1. *Construction work.*—All work on the project shall be done subject to the rules and regulations adopted by
181 the Administrator to carry out the purposes and control the administration of the Act. The follow-

ing rules and regulations as set out in Bulletin No. ., Nonfederal Projects revised March 3, 1934, entitled "P. W. A. REQUIREMENTS as to BIDS, CONTRACTORS' BONDS, AND CONTRACT, WAGE, AND LABOR PROVISIONS AND GENERAL INSTRUCTIONS as to APPLICATIONS AND LOANS AND GRANTS", shall be incorporated verbatim in all construction contracts for work on the project (in such construction contracts all blank spaces shall be filled in as provided in said Bulletin):

"1. (a) *Convict labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project.

"(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government engineer, no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week: Provided, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rates for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

Skilled labor .....
Unskilled labor .....

182 "(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

"(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as 'unskilled laborers.'

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government engineer, in the full amount accrued to each individual at the time of closing of the pay rolls, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the
183 work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the engineer inspector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called the "Board") shall hear all labor issues arising under the

operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in paragraph 2 (a), (b), and (c) hereof) all contracts for work on the project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased in an amount equal to such decreased cost.

"(i) Engineers, architects, and other professional and subprofessional employees engaged in duties normally done at the site of the project shall receive at least the prevailing rates for the various types of service to be rendered, provided that in no case shall professional employees receive less than the following weekly compensation for 40 hours or less irrespective of the number of hours employed: $36.00 in the northern zone; $33.00
184 in the central zone; and $30.00 in the southern zone. Where the working week is longer than 40 hours, weekly compensation shall be increased proportionally. Compensation under this paragraph shall be subject to the approval of the Government Engineer.

"3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivision and/or county) ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or district) ..... : Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

"(b) *Employment services.*—To the fullest extent possible, labor required for the project and services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: Provided, however, That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals,
185 the labor preferences provided in section (a) of this paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following sections, 7 (a) (1) and 7 (a) (2), of Title I of the Act shall be observed:

"'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.'

"4. *Human labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater

expense by human labor than by use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation insurance.*—Every employer of labor shall provide, if permitted by the laws of ....., adequate workmen's compensation insurance for all labor employed by him on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided by which the employees may, by paying the entire amount of the premiums, derive a similar protection.

186

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, ... may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

(The borrower)

"8. *Accident prevention.*—Reasonable precautions shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction of the Associated General Contractors of America, unless and to the extent that such provisions are

incompatible with Federal, State, or municipal laws or regulations.

"9. *N. R. A. Compliance.*—The contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement), and ..... shall have
187 (The borrower)
the right, subject to the approval of the Government engineer, to cancel this contract for failure to comply with this provision and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor. So far as articles, materials, or supplies produced in the United States are concerned, no articles, materials, or supplies shall be accepted or purchased for the performance of the work nor shall any subcontracts be entered into for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

"10. (a) *Inspection of records.*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence as, and in such form as, the Administrator, through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the engineer inspector such reasonable facilities as he may re-
188 quest. In case of dispute the Government engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the project shall report within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to ....., to
(The borrower)
the Government engineer, and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government engineer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90 percent of the cost thereof to the contractor, and the remaining 10 percent shall be paid 30 days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend Public Works Project No. ..... shall be erected in appropriate places at the site of the project.

"14. All reasonable rules and regulations which the Public Works Administration may prescribe toward the
189 effectuation of the matters covered by paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to in-

sure the fulfillment of all provisions of this contract affecting such subcontractors, particularly paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised (March 1934).

"16. *Termination for breach.*—In the event that any of the provisions of paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, ... (The borrower) may, subject to the approval of the Government engineer, and upon request of the Administrator, shall terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within 10 days after the serving of such notice such violation shall cease, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination ..... (The borrower) ..... may take over the work and prosecute the same (The borrower) to completion or otherwise for the account and at the expense of the contractor and/or such subcontractor, and the contractor and his sureties shall be liable to ..... (The borrower) ..... for any excess cost occassioned ..... (The borrower) ..... (The borrower) in the event of any such termination, and ..... (The borrower) ..... may take possession of and utilize in com- (The borrower) pleting the work, such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. *Definitions.*—The term 'Act' as used herein refers to the National Industrial Recovery Act. The term 'Government engineer' as used herein shall mean the State engineer (P. W. A. or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term 'engineer inspector' as used herein refers to State engineer inspectors, resident and assistant resident engineer inspectors, and supervising engineers,

190

appointed by the Administrator. The term 'materials' as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performances of the work."

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor nor permit any contractor to receive any bid from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, or materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Administrator.

4. *Force Account.*—All construction work on the Project shall be done under contract, provided, however, that if prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement to the contrary notwithstanding, to apply to the Administrator for permission to do all or any part of the Project on a force account basis.

191 Part Three

1. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, plans, drawings, specifications, and construction contracts which shall be satisfactory to the Administrator, and under such engineering supervision and inspection as the Administrator may require. Except with the written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage, or any conditional sale or title retention agreement.

2. *Information.*—During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost, and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.*—The Borrower represents and warrants as follows:

(a) *Litigation.*—No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the security therefor, the construction of the Project, or the financial condition of the Borrower;

(b) *Financial Condition.*—The character of the assets and the financial condition of the Borrower are as
192 favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of such assets or in such financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.*—It has not and does not intend to pay any bonus, fee, or commission in order to secure the loan or grant hereunder;

(d) *Affirmation.*—Every statement contained in this Aggreement, in the Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government is correct and complete, and no relevant fact materially affecting the Bonds, the security therefor, the Grant or the Project, or the obligations of the Borrower under this Agreement has been omitted therefrom.

Sale of Bonds by the Government.—The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser or purchasers from the Government of 25 per centum of the Bonds, information

for the preparation of a bond circular in customary form, signed by the proper official of the Borrower, containing such data as the Government or such purchaser or purchasers may reasonably request concerning the Borrower.

5. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, or expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement including, without limiting the generality of the foregoing, the cost of preparing, executing, and delivering the Bonds, and any legal, engineering, and accounting costs, charges, or expenses incurred by the Borrower.

6. *Waiver.*—Any provision of this Agreement may
193 be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement.

7. *Interest of Member of Congress.*—No Member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise thereupon.

8. *Validation.*—The Borrower hereby covenants that it will institute, prosecute, and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate, or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities, and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate, or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State, stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities, or irregularities in the proceedings of the Borrower relative

to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.*—This Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed
194 by and be construed in accordance with the laws of the State.

10. *Naming of Project.*—The Project shall never be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.*—If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties or obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Construction of Agreement.*—If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the rights or obligations of the parties hereto, provided, in the opinion of the Administrator, the Agreement does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF DECATUR, MORGAN COUNTY, ALABAMA, and the UNITED STATES OF AMERICA have respectfully caused this Agreement to be duly executed as of the day and year first above written.

CITY OF DECATUR,
By JAMES A. NELSON,
Mayor.

[SEAL]
Attest:
E. W. COLLIER,
City Clerk.

UNITED STATES OF AMERICA,
By PHILIP B. FLEMING,
Acting Deputy Federal Emergency Administrator of Public Works.

195

EXHIBIT 8

Agreement Terminating the Loan and Grant Agreement Between the City of Decatur (County of Morgan, Alabama) and the United States of America

P. W. A. Docket No. 6587

Agreement Dated as of Dec. 2, 1935, Terminating the Loan and Grant Agreement Dated as of December 6, 1934, and the Amendatory Loan Agreement Dated as of May 27, 1935, Between the City of Decatur, Morgan County, Alabama (Herein Called the "City"), and the United States of America (Herein Called the "Government")

WHEREAS a Loan and Grant Agreement was entered into by and between the City and the Government dated as of December 6, 1934, and

WHEREAS said Loan and Grant Agreement was amended by an Amendatory Loan Agreement by and between the City and the Government dated as of May 27, 1935, and

WHEREAS it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement and said Amendatory Loan Agreement,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the City and the Government that said Loan and Grant Agreement dated as of December 6, 1934, and said Amendatory Loan Agreement dated as of May 27, 1935, be and the same hereby are terminated.

CITY OF DECATUR,
[SEAL] By JAMES A. NELSON, *Mayor.*

Exhibit 9 referred to in the foregoing motion is not printed at this point because it appears as Exhibit A to the defendants' answer to the third amended bill of complaint at p. 259 infra.

City Clerk.

205

EXHIBIT 10

Loan and Grant Agreement Dated as of Dec. 28, 1934, Between the City of Florence, Alabama (Herein called the "Borrower") and the United States of America Herein Called the "Government"

P. W. 8751

Part One

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement"), the Government will, by loan and grant not exceeding in the aggregate the sum of $436,000, aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electric distribution system, including substation, an office building and warehouse therefor, and other necessary appurtenances thereto, all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 4259, Title II of the National Industrial Recovery Act (herein called the "Act"), and the Constitution and Statutes of the State of Alabama, including particularly:

Act No. 107, General and Local Acts of Alabama, Extra Session, 1933, p. 100.

2. *Description of Bonds.*—(a) *Designation.*—Electric Distribution System Bond.

(b) *Authorized Principal Amount.*—$336,000.

(c) *Type.*—Special obligation, serial, coupon bonds.

(d) *Registration.*—Registerable at the option of the holder as to principal only.

(e) *Date.*—April 1, 1934.

(f) *Interest.*—At the rate of 4 per cent per annum, payable October 1, 1934, and semiannually thereafter on April 1 and October 1 in each year.

(g) *Maturities.*—Payable on April 1, in years and 206 amounts as follows:

Year:	Amount	Year:	Amount
1938	$11,000	1949	$15,000
1939	12,000	1950	15,000
1940	13,000	1951	15,000
1941	14,000	1952	15,000
1942	14,000	1953	15,000
1943	14,000	1954	15,000
1944	14,000	1955	15,000
1945	14,000	1956	20,000
1946	15,000	1957	20,000
1947	15,000	1958	20,000
1948	15,000	1959	20,000

(h) *Security.*—Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

(i) *Place and Medium of Payment.*—Payable at the office of the City Treasurer, Florence, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for public and private debts.

(j) *Denomination.*—$1,000.

Other provisions may be substituted for the provisions of subparagraphs (a), (b), (c), (d), (e), (f), (g), (i), and (j) of this Paragraph by the Borrower if the consent of the Federal Emergency Administrator of Public Works (herein called the "Administrator") to such substitution is obtained.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds shall be sold to a purchaser or purchasers other than the Government, a Grant in an amount equal to thirty per centum of the cost of the labor and materials employed upon the Project. Wherever the expression "cost of labor and materials" is used in this Agreement, such expression shall mean such cost as
207 determined by the Administrator, and his determination thereof shall be final. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds and/or interest coupons; provided, however, that if all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money.

4. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance

its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $436,000, being the cost estimated at the time when the Application was approved by the Government, or that the Borrower will be able to obtain, through additional borrowing or otherwise, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall believe to be necessary to complete the Project;

(c) *Compliance.*—If the Borrower shall not have complied, to the satisfaction of the Administrator, with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the
208 Project;

(e) *Representations.*—If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract, satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, and will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds;

(g) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the ordinance providing for the authorization,

issuance, and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator;

(h) *Court Decision.*—If the Supreme Court of Alabama shall not have rendered a decision which satisfies the Administrator that the Borrower may legally construct the Project, authorize and sell the Bonds, make all covenants and agreements contained in the Bonds, the proceedings authorizing their issuance and sale and in this Agreement, and enter into the contract with the Tennessee Valley Authority referred to in subparagraph (f) of Paragraph 4, PART ONE, hereof.

5. *Bond Counsel and Bond Proceedings.*—When
209 this Agreement has been executed the Borrower (unless it has already done so) shall promptly:

(a) Retain municipal bond counsel satisfactory to the Administrator to assist the Borrower in the proceedings relative to the authorization, issuance, and sale of the Bonds and to give legal opinions on such matters relative thereto as may be requested by the Administrator; and

(b) Take all the proceedings necessary for the authorization and issuance of the Bonds.

6. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

7. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at the Birmingham Branch of the Federal Reserve Bank of Atlanta, Birmingham, Alabama (herein called the "Reserve Bank"), or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, and

all unmatured interest coupons appertaining thereto, together with such documents as may be requested by the Administrator. The Government shall be under no
210 obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the Project.

8. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at the Reserve Bank or at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) Twenty-five per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) Thirty per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined;

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between $436,000 and the aggregate principal amount of the Bonds purchased by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds and/or interest coupons rather than by payment of money if the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

9. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and/or interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between
211 thirty per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in

an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

10. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if, in the judgment of the Administrator, the circumstances warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of thirty per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

11. *Deposit of Bond Proceeds and Grant; Bond Fund; Special Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 9, PART ONE, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 8, PART ONE, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Special Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator. Provided, however, that interest on said Bonds accruing prior to
212 complete construction of the Project shall be paid from the proceeds of said Bonds to the extent such interest is not available from funds received as accrued interest, and, provisions shall be made that, upon the delivery of said Bonds and the receipt of the proceeds, a sufficient sum, including the accrued interest received, shall be withdrawn from the proceeds and placed in said Bond Fund to pay said interest.

12. *Disbursement of Monies in Special Accounts and Bond Fund.*—The Borrower shall expend the monies in a Special Account only for such purposes as shall have been previously specified in Requisitions filed with the Govern-

ment and approved by the Administrator. Any monies remaining unexpended in any Special Account after the completion of the Project which are not required to meet unpaid obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

13. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds directly or indirectly from the Government or any agency or instrumentality thereof, other than the Loan or Grant, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

213 Part Two

In consideration of the grant, the borrower covenants that:

1. *Construction Work.*—All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the act. The following rules and regulations as set out in Bulletin No. 2, revised on March 3, 1934, entitled, "P. W. A. Requirements as to Bids, Contractor's Bonds, and Contract, Wage, and Labor Provisions and General Instructions as to Applications and Loans and Grants", shall be incorporated verbatim (except that in all places where the term "Borrower" is used the name the Borrower shall be inserted) in all construction contracts for work on the Project:

"1. (a) *Convict labor.*—No convict labor shall be employed on the Project and no materials manufactured or produced by convict labor shall be used on the Project.

"(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government Engineer, no

individual directly employed on the Project shall be permitted to work more than eight hours in any one day nor more than thirty hours in any one week: *Provided,* That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any one week to be made up in the succeeding twenty days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.* (a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and com-
214 fort. Such wages shall in no event be less than the minimum hourly wage rate for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

Skilled labor	$1.00
Unskilled labor	.40

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rate shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed twelve months from the date of the contract.

"(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as 'unskilled laborers.'

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the Project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the Act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government Engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest

date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, that this clause shall not be construed to prohibit
the making of deductions for premiums for compen-
215 sation and medical aid insurance, in such amounts
as are authorized by the laws of the State of Alabama to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical-aid insurance authorized by the laws of the State of Alabama, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Engineer Inspector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called the 'Board') shall hear all labor issues arising under the operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in Paragraph 2 (a), (b), and (c) hereof) all contracts for work on the Project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased by an amount equal to any such decreased cost.

"(i) Engineers, architects, and other professional
216 and subprofessional employees engaged on the Proj-

ect shall receives the prevailing local rates for the various types of service to be rendered, except that in no case shall they receive less than the hourly rates set for the highest paid class of skilled labor directly employed on the Project.

"3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the City of Florence, and/or Lauderdale County, Alabama, and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State of Alabama: Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

"(b) *Employment services.*—To the fullest extent possible, labor required for the Project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: Provided, however, that union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor pref-
217 erences provided in Section (a) of this Paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following sections 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union to refrain from joining, organizing, or assisting a labor organization of his own choosing;'

"4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economic and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation Insurance.*—Every employer of labor shall provide, if permitted by the laws of the State of Alabama, adequate workmen's compensation insurance for all labor employed by him on the Project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government Engineer shall be given. Where it is not
218 permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided, by which the employees may, by paying the entire amount of the premium, derive a similar protection.

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the Project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, the Borrower may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work, the difference

between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. *Accident prevention.*—Reasonable precautions shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the 'Manual of Accident Prevention in Construction' of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

"9. (a) *N. R. A. materials.*—So far as articles, materials, and supplies produced in the United States are concerned, only articles, materials, and supplies produced under codes of fair competition under Title I of the Act, or under the President's Reemployment Agreement, shall be used in the performance of this work, except when the Government Engineer certifies that this requirement is not in the public interest or that the consequent cost is unreasonable.

219

"(b) *Local preference.*—So far as practicable, and subject to the provisions of section (a) of this Paragraph 9, preference shall also be given to the use of locally produced materials if such does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the Government Engineer; but there shall be no requirement providing price differentials for, or restricting the use of materials to, those produced within the Nation or State.

"10. (a) *Inspection of records.*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel, and such schedules of the costs of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may re-

quire. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the Engineer Inspector such reasonable facilities as he may request. In case of dispute the Government Engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the Project shall report within five days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective payrolls directly connected with the Project, the aggregate amounts of such pay rolls, and the man-hours
220 worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government Engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to the Borrower, to the Government Engineer, and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government Engineer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90% of the cost thereof to the contractor, and the remaining 10% shall be paid thirty days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend 'PUBLIC WORKS PROJECT No. 4259' shall be erected in appropriate places at the site of the Project.

"14. All reasonable rules and regulations which the Administrator may prescribe toward the effectuation of the matters covered by Paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. *Subcontractors.*—(a) Appropriate provisions shall

be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such contractors, particularly Paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcon-
221 tractor who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

"16. *Termination for breach.*—In the event that any of the provisions of Paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, the Borrower may, subject to the approval of the Government Engineer, and upon request of the Administrator shall, terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within ten days after the serving of such notice, such violation shall cease, the contract shall, upon the expiration of said ten days, cease and terminate. In the event of any such termination the Borrower may take over the work and prosecute the same to completion or otherwise for the account and at the expense of the contractor and/or subcontractor, and the contractor and his sureties shall be liable to the Borrower for any excess cost occasioned the Borrower in the event of any such termination, and the Borrower may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. *Definition.*—The term 'Administrator' as used herein refers to the Federal Emergency Administrator of Public Works. The term 'Act' as used herein refers to the National Industrial Recovery Act. The term 'Government Engineer' as used herein shall mean the State Engineer (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this Agreement by the Administrator. The term 'Engineer Inspector' as used refers to State Engineer In-
spector, Resident and Assistant Resident Engineer
222 Inspectors, and Supervising Engineers, appointed by the Administrator. The term 'materials' as used herein includes, in addition to materials incorporated in the

Project or used or to be used in the operation thereof, equipment and other material used and/or consumed in the performance of the work.

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, of materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Government Engineer.

4. *Force Labor.*—If prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement notwithstanding, to apply to the Administrator for permission to do all or any part of the Project by day labor, upon such conditions as the Administrator may impose.

Part Three

1. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will promptly commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, such engineering supervision and inspection as the Administrator or his representatives may require, and plans, drawings, specifications, and construction contracts which shall be
223 satisfactory to the Administrator. Except with the prior written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage or any conditional sale or title-retention agreement.

2. *Information.*—During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost, and progress of the work. The Bor-

rower will furnish to the Government, and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower and the Project as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.*—The Borrower represents and warrants as follows:

(a) *Litigation.*—No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the construction and operation of the Project, or the financial condition of the Borrower;

(b) *Financial Condition.*—The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of its assets or in its financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commissions.*—No fee or commission has been or will be paid by the Borrower or any of its officers, employees, agents, or representatives, and no agreement to pay a fee or commission has been or will be entered into by or on behalf of the Borrower, or any of its officers, employees, agents, or representatives, in order to secure the Loan or Grant hereunder;

(d) *Affirmation.*—Every statement contained in
224 this Agreement, in the Borrower's Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government by or on behalf of the Borrower is correct and complete, and no relevant fact materially affecting the Bonds, the Grant, or the Project, or the obligations of the Borrower under this Agreement has been, or will be, omitted therefrom.

4. *Sale of Bonds by the Government.*—The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser from the Government of 25 per centum of the Bonds, information for the preparation of a bond circular in customary form, signed by the proper official of the Borrower, containing such data as the

Government or such purchaser may reasonably request concerning the Borrower and the Project.

5. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, and expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement including, without limiting the generality of the foregoing, the cost of preparing, executing, or delivering the Bonds or obtaining all legal opinions requested by the Administrator.

6. *Waiver.*—Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement, if, in the opinion of the Administrator, which shall be conclusive, such waiver or amendment does not substantially vary the terms of this Agreement.

7. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agree-
225 ment, or to any benefit to arise therefrom.

8. *Validation.*—The Borrower hereby covenants that it will institute, prosecute, and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate, or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities, and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate, or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State of Alabama stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities, or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.*—Subject to the limitations herein con-

tained, this Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed by and be construed in accordance with the laws of the State of Alabama.

10. *Naming of Project.*—The Project shall not be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.*—If, in the opinion of the Administrator, which shall be conclusive, the
226 Borrower shall delay for an unreasonable time in carrying out any of the duties of the obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Nature of Liability.*—It is expressly understood and agreed that this Agreement does not constitute an indebtedness of the Borrower within the meaning of any provision or limitation of the Constitution of the State of Alabama and it is hereby made a condition of this Agreement that the covenants, agreements, representations, and warranties herein contained do not and shall never impose a pecuniary liability upon the Borrower or charge against its general credit.

13. *Construction of Agreement.*—If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the right or obligations of the parties hereto, provided in the opinion of the Administrator, the agreement does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF FLORENCE, ALABAMA, and the UNITED STATES OF AMERICA have, respectively, caused this Agreement to be duly executed as of the day and year first above written.

CITY OF FLORENCE, ALABAMA,
By LEE GLENN, *Mayor.*

UNITED STATES OF AMERICA,
By HAROLD L. ICKES,
Federal Emergency Administrator of Public Works.

[SEAL]

Attest:
S. P. HOWARD,
City Clerk.

227

EXHIBIT 11

Agreement Terminating the Loan and Grant Agreement Between the City of Florence (County of Lauderdale, Alabama) and the United States of America.

P. W. A. Docket No. 4259

Agreement Dated as of Dec. 2, 1935, Terminating the Loan and Grant Agreement Dated as of December 28, 1934, and the Amendatory Loan Agreement Dated as of April 15, 1935, Between the City of Florence, Lauderdale County, Alabama (Herein Called the "City") and the United States of America (Herein Called the "Government")

WHEREAS a Loan and Grant Agreement was entered into by and between the City and the Government dated as of December 28, 1934, and

WHEREAS said Loan and Grant Agreement was amended by an Amendatory Loan Agreement by and between the City and the Government dated as of April 15, 1935, and

WHEREAS it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement and said Amendatory Loan Agreement,

NOW, THEREFORE, IT IS HEREBY AGREED by and between the City and the Government that said Loan and Grant Agreement dated as of December 28, 1934, and said Amendatory Loan Agreement dated as of April 15, 1935, be and the same hereby are terminated.

CITY OF FLORENCE,

By LEE GLENN, *Mayor.*

UNITED STATES OF AMERICA,

Federal Emergency Administrator of Public Works.

(Sgd.) HORATIO B. HACKETT,
Assistant Administrator.

[SEAL]

Attest:
S. B. HOWARD,
City Clerk.

Exhibit 12 referred to in the foregoing motion is not printed at this point because it appears as Exhibit B to the defendants' answer to the third amended bill of complaint at p. 278 infra.

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1935.

No. 6583

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENT OF THE TREASURY OF THE UNITED STATES, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	a	1
Memoranda: Bill of complaint—filed, temporary restraining order—filed, injunction undertaking $5,000 approved and filed	1	2
Defendants' motion to dismiss the bill of complaint	2	2

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INDEX

	Original	Print
Amended bill of complaint for an injunction and other relief	4	3
Order dismissing bill of complaint	34	28
Appeal noted by plaintiff, bond for costs on appeal, &c., fixed	35	28
Order for injunction	36	29
Memoranda: Injunction undertaking $5,000 approved and filed, $50 deposit in lieu of cost bond	38	30
Assignment of errors	39	30
Designation of record	40	31
Clerk's certificate	42	32

United States Court of Appeals for the District of Columbia

No. 6583.

ALABAMA POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator, et al.

a Supreme Court of the District of Columbia.

In Equity.

No. 59671.

ALABAMA POWER COMPANY, a Corporation, Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof; John J. Madigan, Acting Executive Officer Thereof, et al., Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity.

No. 59671.

ALABAMA POWER COMPANY, a Corporation, Plaintiff,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof; John J. Madigan, Acting Executive Officer Thereof; F. E. Schnepfe, Director of Projects Division Thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, Defendants.

Memoranda.

October 4, 1935.—Bill of Complaint filed. Temporary Restraining Order filed. Injunction Undertaking $5000 approved and filed.

2 *Defendants' Motion to Dismiss the Bill of Complaint.*

Filed October 14, 1935.

* * * * * * *

Now come the defendants and move this Court to dismiss the bill of complaint herein for want of equity, in that:

I.

The bill of complaint does not set forth a cause of action nor any matter entitling the plaintiff to the relief prayed for against the defendants herein or any of them.

3 II.

The bill of complaint does not present a justiciable controversy of which this Court has jurisdiction.

III.

The plaintiff has not the capacity to maintain this suit, and does not show any injury or interest entitling it to maintain the same.

IV.

The suit is in effect against the United States of America and as such may not be maintained.

V.

The acts which the bill alleges the defendants propose or threaten to perform are valid and duly authorized by law and by the Constitution of the United States.

ANGUS D. MacLEAN,
Assistant Attorney General.
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
JOHN W. SCOTT,
Special Assistant to the Attorney General.
HENRY T. HUNT,
General Counsel for the Administrator of Public Works.
LESLIE C. GARNETT,
United States Attorney for the District of Columbia.
DAVID A. PINE,
Assistant United States Attorney.

4 Leave to file, granted. Oct. 14", 1935.
JESSE C. ADKINS.

Amended Bill of Complaint for an Injunction and Other Relief.

Filed October 14, 1935.

* * * * * * *

Now comes the plaintiff, and by leave of Court files this its amended bill of complaint, and for its causes of action against the defendants alleges:

Paragraph I.

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, is a resident and citizen of the State of Alabama, and has its principal office and corporate domicile in the City of Attalla, Alabama, and sues in its own right.

Paragraph II.

The defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set forth:

Harold L. Ickes is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act."

Horatio B. Hackett is the duly appointed, qualified, and acting Assistant Administrator of PWA.

John Herrick is the duly appointed, qualified, and acting Executive Assistant of PWA.

John J. Madigan is the duly appointed and qualified Acting Executive Officer of PWA.

F. E. Schnepfe is the duly appointed, qualified, and acting Director of Projects Division of PWA.

Henry Morgenthau, Jr. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

Guy Allen is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United

States and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under
6 pretended authority of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and the President's Executive Order of June 7, 1935.

Paragraph III.

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV.

Plaintiff alleges that by its charter it has the right to manufacture, supply and sell to the public electric energy produced either by steam or by water as a motive force, or by both, for lighting, heating, power and other purposes. Plaintiff now owns and operates electric public utility properties, serving the public in sixty-five of the sixty-seven counties of the State of Alabama. These properties consist of hydro-electric and of steam generating plants, of high tension transmission lines, of distribution lines, and all equipment and facilities necessary for use in generating, transmitting, distributing, metering and delivering electric energy to meet the demands of electricity consumers in the State of Alabama.

Plaintiff is now serving, directly and indirectly, approximately two hundred thousand (200,000) customers within said State, and its gross electrical revenue received therefrom in 1934 was approximately Fifteen Million Dollars ($15,000,000). Plaintiff's system is an integrated whole, coordinated so as to anticipate future needs and growth of the communities in the State of Alabama, and represents intensive application of the economies of large-scale, integrated power development. The loss of substantial numbers of its customers in any particular locality would materially impair the benefits to it and its customers derived from such integration.

7 Plaintiff's system is modern and efficient and in all respects equipped to furnish the public in Alabama with electricity service according to the most ad-

vanced standards of electrical engineering. The capacity of its hydro-electric plants alone is adequate to furnish more than the present demand upon it for electricity within said State.

Among other communities served by said system are the Town of Guntersville, County of Marshall, the Town of Hartselle, County of Morgan, and the Town of Russellville, County of Franklin, (hereinafter sometimes referred to as the Towns). These Towns are located in the northern portion of the State of Alabama, and together form a vital link in the plaintiff's system in that region. The following table indicates the approximate population of each of said Towns, the approximate number of customers served by plaintiff therein and the gross revenues of plaintiff from its electrical operations therein for the twelve months ended December 31, 1934:

Town	Approximate Population	Approximate No. of Customers	Gross Revenues of Plaintiff from such electric operations for year ending December 31, 1934
Guntersville	2826	546	$51,546.07
Hartselle	2204	560	24,507.11
Russellville	3146	564	71,186.07

Paragraph V.

The plaintiff's system, including that portion represented by the aforesaid three towns and the customers therein, is served almost entirely by plaintiff's hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat. 1288), whereby plaintiff was granted a license to build a dam across said river, a navigable water of the United States, at the location named, for the improvement of navigation on such river and the development of the water power inher-
8 ent therein; and Mitchell Dam and Jordan Dam, likewise on the Coosa River in Alabama; and Martin Dam on the Tallapoosa River in Alabama, which latter three dams were constructed under licenses from the Federal Power Commission, authorized by the Federal Water Power Act (41 Stat. 1063).. In granting such licenses the Federal Power Commission in each instance found:

1. That each of such dams on the Coosa River and the dam on the Tallapoosa River were necessary and con-

venient for the development and improvement of navigation and utilization of power in the respective rivers;

2. That such dams were best adapted to a comprehensive scheme of development and utilization of such waterways for such purposes;

3. That there was a market in Alabama for the power output of such plants;

4. That such dams were justified in the public interest.

Under and by such licenses, plaintiff was required to expend large sums in preparing certain portions of the river beds for future navigation to and through such dams and in the building of piers in the streams to form ultimate navigation guides to such locks; and, in addition, so to construct such dams that locks could be erected therein as and when the United States determined to complete the navigation from one pool level to the next; by the terms of the licenses, the licensee was required to permit of discharge through its dams, free of cost to the United States, of such part of the flow of the river necessary for the purpose of such lockage and to install such lights, signals, and power for the operation of such navigation structures as might be installed in the future by the United States; and with respect to Lay Dam, the plaintiff is required to convey to the United States a right of way around the end of such dam, and by the subsequent licenses issued to the plaintiff under which Mitchell Dam was erected, the plaintiff
9 was required to make such excavations and perform such other channel work to complete a passage way from the lock around Lay Dam to the pool level created by Mitchell Dam as might be necessary; and in connection with all such work plaintiff spent a large amount of money and has obligations in connection with the future use of such facilities and locks for navigation purposes in a sum that is not capable of present ascertainment. Under and by virtue of such licenses, plaintiff was required also to make such installations in the Coosa River projects as the Federal Power Commission should deem necessary from time to time to supply adequately the reasonable market demands of the pubilc. Such hydro-electric projects on the Coosa and Tallapoosa were built at a cost to the plaintiff of an amount in excess of $60,000,000. The completion of such projects on the Coosa River created contiguous slack water pools of 57 miles in length, and when such pools are

connected by locks placed in the aforementioned dams such pools will afford a nine-foot depth navigation on such river for a distance of 49 miles.

Plaintiff in good faith accepted the licenses from the Federal Power Commission and built Mitchell and Jordan Dams, resulting in the creation of navigable features of the Coosa and Tallapoosa Rivers as set out above, and in the improvement of the navigable features of the Alabama River, all with the agreement and understanding under the Federal Water Power Act and the licenses issued to plaintiff thereunder that the plaintiff would secure, as the consideration moving to it for the investment in excess of $60,000,000 made under the licenses so issued, the right and privilege freely to serve the market in Alabama with electric energy.

Paragraph VI.

Plaintiff is authorized by the laws of the State of Alabama to construct, own, operate, and maintain its
10 plant facilities and systems in each of the municipalities in which it renders electric service, including Guntersville, Hartselle and Russellville.

On August 10, 1915 the Town of Hartselle, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

On July 5, 1915, the Town of Guntersville, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

On June 28, 1923, the Town of Russellville, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

None of the above mentioned grants of franchises and rights to plaintiff contains any limitation as to the duration of such franchise and right, nor does the general law of the State of Alabama or the corporate powers of plaintiff impose any limit on the duration of such franchise and right, but all of the above mentioned franchises are in perpetuity, and are now in full force and effect.

Plaintiff has continuously and without interruption exercised and performed said franchises from the date of their original grant to the date of the filing of this bill of complaint.

Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the three towns named herein and their inhabitants and is the only person, firm or corporation now able to supply electric light and power to such towns and their inhabitants.

11 Paragraph VII.

The plaintiff's properties, plants, lines, and other facilities are modern and efficient and the plaintiff is equipped to and does render efficient and adequate electric utility service in all the municipalities and rural districts in which it operates, including the aforesaid three towns, and possesses facilities of adequate capacity to continue the rendition of such type of service for a considerable time in the future without substantial additions thereto.

The rates for sale of electric power and energy of the plaintiff and the character of its service in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission; and the rates now in effect in the territory served by the plaintiff in the State of Alabama and in the three towns aforesaid are rates approved as reasonable by, and placed in effect pursuant to order of, the Alabama Public Service Commission.

Paragraph VIII.

Plaintiff alleges that its electricity business in the aforesaid three towns is conducted pursuant to valid and subsisting franchise privileges granted to it by the Government of the United States through the Act of Congress and the licenses of the Federal Power Commission referred to in Paragraph V, and by the aforesaid three Towns, as alleged in Paragraph VI.

In reliance upon the grant of such franchise privileges, many thousands of dollars have been invested in the plaintiff's stocks and bonds, large amounts of which are held and owned by the general public, a very substantial part of its bonds and preferred stock having been sold to its

customers and to other citizens and investors residing in the territory in which it operates.

12 Paragraph IX.

Plaintiff is a taxpayer of each of the said Towns of Guntersville, Hartselle and Russellville, and of the Counties in which such Towns are located, and with respect to its electrical properties and operations in each of said Towns has paid to said Towns and said Counties many thousands of dollars in taxes in the past, and for the twelve months ended December 31, 1934, has paid or incurred the liability to pay such taxes as indicated in the following table:

City or Town	Tax Paid	County	Tax Paid
Guntersville	$1,468.22	Marshall	$6,720.68
Hartselle	579.49	Morgan	10,070.71
Russellville	1,350.24	Franklin	4,110.17

Plaintiff is likewise a taxpayer of the State of Alabama, and with respect to its electrical properties and operations in said State has paid to said State many thousands of dollars in taxes in the past, large portions of which sums are paid back by the State to the various communities, including the three Towns aforesaid, to be expended by such communities for their municipal purposes; and for the twelve months ended December 31, 1934, plaintiff has paid, or incurred the liability to pay, such taxes to the State in excess of the sum of Nine Hundred Thousand Dollars ($900,000.00). Plaintiff has incurred the liability to pay taxes to the Towns, the counties, the State, and other political subdivisions, for the current tax year 1935, in approximately the same amounts as paid and incurred for the year 1934, as aforesaid.

Paragraph X.

Plaintiff is a taxpayer of the United States, and with respect to its electrical properties and operations in the State of Alabama, including the properties and operations in each of the aforesaid three Towns, has paid to the United States many thousands of dollars in taxes in the past; and under the provisions of an Act of Con-
13 gress, approved June 16, 1933 (48 Stat. 254, 256), for the period ended August 1, 1935, has paid, or

incurred the liability to pay to the United States excise taxes in the sum of Two Hundred Seventy Thousand Dollars ($270,000.00) and has incurred the liability to pay to the United States similar taxes for the current year of 1935.

Paragraph XI.

PWA, under the direction of defendant Ickes, has conceived and for some time past has been executing throughout the country a plan to fix the rates of privately owned electricity utilities at levels determined by PWA to be "socially desirable" and to promote public ownership of electricity utilities, regardless of local state policy, as a "yardstick" of electricity rates and service to which privately owned electricity utilities must conform. This plan is not intended to have and, in fact, does not have any relation to interstate commerce; its intended and actual effect is control and regulation of entirely local and intrastate commerce.

The plan is effectuated by soliciting and inducing municipalities and other political subdivisions of the several states to permit PWA to institute and to carry out, as Federal Public Works Projects, the construction of electricity generating and distributing systems within such subdivisions, such systems being planned, built and financed by and under the control and direction of PWA and being operated by PWA through its retention of absolute control over the rates to be charged for the service of such systems when completed.

Upon tentative selection of an area for such a Project, PWA usually informs existing private electricity utilities in such area that to escape being superseded by or suffering competition from such a system such private
14 utilities must establish rates satisfactory to PWA and, in effect, consent to continuing PWA regulation of their rates under the threat of destruction. The rates so exacted are arbitrarily set by PWA, do not provide a reasonable return to such utilities upon their investment, are much less than those fixed by authorized state regulatory bodies, and are determined without hearing such utilities and without any consideration whatever of the elements required by the due process clauses of the Fifth and Fourteenth Amendments to be considered in rate regu-

lation. Plaintiff cannot aver with particularity the level to which such privately owned utilities are required to conform because PWA has never adopted definite criteria but acts in each case according to an arbitrary and vaguely formulated conception of "social desirability". In general, however, such level is that at which a system built and operated by PWA as aforesaid would earn enough to pay operating costs without provision for Federal, state, or local taxes, and to repay over a long period of time so much of the cost of construction thereof as is represented by the pretended loan made by PWA as hereinafter described; and in many instances PWA requires a level even lower.

If the existing private utilities in such area conform to the standard so fixed by PWA, PWA usually suspends consummation of such a Federal Public Works Project for a time sufficient to enable it to be assured that such conformity is in good faith and permanent and then, if satisfied, PWA usually abandons the project. Otherwise PWA proceeds to consummate the project, as heretofore and hereafter described, and either subjects the private utilities to rate-war to attain the rate level desired by PWA and if possible to drive such utilities out of business, or induces the state regulatory bodies to revoke the privileges of such utilities to do business.

This plan is frankly acknowledged by PWA in public press releases, in public statements of the Administrator, in instructions given to PWA agents charged with the administration of PWA functions, in negotiations with existing private utilities, and otherwise.

In deciding thus to build electricity generating and distributing systems, the sole consideration entertained by PWA is the rate level of existing privately owned utilities. The extent of unemployment in the vicinities, or elsewhere, and the relation between the employment given by such a Project and the character of workers unemployed, the dependability and economic soundness of existing private utilities, the capacity of the areas to absorb increased electricity production, and other considerations relating to the need for such a PWA electicity system are excluded entirely by PWA in reaching its decision to build and operate such a Project.

To induce the necessary cooperation of municipalities and other political subdivisions in the various states and to

procure their consent to such Federal Public Works Projects and to the regulation of the rates of existing privately owned utilities by PWA in accordance with the aforesaid plan, PWA, by advertising and other newspaper publicity and by circulars and direct statements made to municipalities by authorized agents has represented that it would authorize and direct the construction, as Federal Public Works Projects, of electricity generating and distributing systems, to become the property of such municipalities. The representations have been that thirty percent or more, in the present case forty-five percent, of the cost of the Project would be an outright gift, the balance of the cost to be repaid to PWA, if at all, out of the revenue of the system; and that thus no risk would be incurred by the municipality. When the municipality consents to such a Project and PWA decides to threaten existing utilities with its consummation, a so-called loan and grant arrangement is entered into similar to the so-called agreements between PWA and the Towns of Guntersville, Hartselle and Russellville, hereinafter described. Such an arrange-
16 ment constitutes a pretense and sham in that it does not in fact provide for a loan but merely for the possible recapture of a part of the cost of such projects out of the earnings thereof and imposes no obligations upon said municipalities and confers no authority upon them in the construction thereof, all as more specifically hereinafter set forth.

All the acts of the defendants hereinafter in this Bill of Complaint complained of are done or threatened in pursuance of the plan hereinbefore alleged; that is to say, PWA determined that plaintiff's rates in the aforesaid Towns were higher than rates determined by PWA to be socially desirable and, without affording the plaintiff the opportunity usually afforded such utilities, in accordance with the said plan, to conform to the rates determined upon by PWA in such case, authorized the Federal Public Works Projects hereinafter described solely in order to drive plaintiff out of business in the aforesaid Towns and attain the rate level desired by PWA. The aforesaid Towns were induced by PWA to consent to said Federal Public Works Projects and to take the steps hereinafter alleged in cooperation therewith and with PWA by the representations hereinbefore alleged.

Paragraph XII.

The aforesaid Towns, moved by the actions and inducement alleged in Paragraph XI, filed with PWA applications for Federal Public Works Projects consisting of electric distributing systems to be owned by said Towns, respectively.

While the procedure pursued by PWA, defendant Ickes and his agents in passing upon such applications does not provide for a hearing from those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, plaintiff requested and sought a hearing before PWA relative to the ap-
17 plications of the aforesaid Towns. Plaintiff has, however, constantly been denied the privilege of such hearing. Nevertheless, plaintiff filed with PWA a written protest against the approval of the applications of said Towns. Such protest set out in substance the facts heretofore and hereafter alleged in this bill. There is no further board, agency or official of the United States to whom plaintiff may apply to prevent the consummation of the Projects in said Towns. Consequently, plaintiff has exhausted all administrative remedies which it could possibly have to prevent such action.

Notwithstanding plaintiff's protests of the loans and grants aforesaid, plaintiff is informed, believes and avers that such protests were given no consideration whatsoever by PWA, but that, for no purpose other than that of driving down plaintiff's rates and destroying plaintiff's business in accordance with the plan of PWA as aforesaid, and upon findings that the action of PWA would in fact destroy and drive out plaintiff's business in said Towns, PWA approved such Public Works Projects for such Towns, to be carried out under pretended loan and grant agreements with the Towns in the amounts set out hereafter, the funds to be used in the erection and construction, as Federal Public Works Projects under the direction and control of PWA, of complete electric distribution systems in the Towns to serve the same parties and purposes as are now served by plaintiff therein. The amounts proposed to be given to the Towns are equal to forty-five per cent of the cost of labor and materials to be employed in the construction of such electric distribution systems. The pretended

loans and grants plaintiff alleges, upon information and belief, to be of the approximate amounts set out as follows:

Town	Loan	Grant
Guntersville	$48,000.00	$39,272.00
Hartselle	33,000.00	27,000.00
Russellville	69,000.00	56,454.00

18 Paragraph XIII.

Plaintiff is informed and believes and so alleges that the aforesaid plan to construct the said electricity systems as Federal Public Works Projects in said Towns for the purposes and objects hereinbefore alleged will immediately be carried out by PWA and the defendants herein, unless restrained, under the following arrangements:

The defendant Ickes and the said Towns have entered into pretended loan and grant agreements, which in effect provide that the defendant Ickes and his agents shall construct said electricity distribution systems in said Towns and finance said construction by granting outright to said Towns forty-five per cent of the cost of labor and materials employed in the construction of such systems, and by pretended lending to said Towns, by pretended purchase of their bonds, to be used for such financing and construction, the amounts heretofore alleged. Said grants will be pure gifts or bounties, designed solely to induce the Towns to enter into such arrangements and to insure the accomplishment of the wishes of PWA and these defendants with respect to the establishment of municipal facilities competing with and superseding the plaintiff. The said Towns have agreed in return that said funds will be made available to them upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of defendant Ickes is needed to complete the projects; that the proceeds of the "loans" and grants shall be deposited by the Towns in such banks as defendant Ickes chooses; that such proceeds shall be expended by the Towns only as defendant Ickes consents; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of defendant Ickes; that all work on the projects shall be done under the regulation of defendant Ickes; that no contractor or subcontractor shall bid for or work upon

19

such projects without the approval of defendant Ickes; that all contractors and subcontractors shall be equipped with bonds and insurance as defendant Ickes desires; that said Towns shall engage in such litigation as defendant Ickes deems advisable with respect to irregularities, or defects, or illegalities in the bonds; that defendant Ickes may cancel the agreements with the Towns at any time he wishes, if in his opinion said Towns have unreasonably delayed in carrying out any of their duties; that the aforesaid funds shall be available to the Towns only subject to the power of defendant Ickes to withhold them if he deems the Towns' budgetary situations to be unsatisfactory, or if he is not satisfied that the Towns have complied with all provisions of the agreements; and that in other respects the will of defendant Ickes shall control the Towns' actions, even to the extent of the naming of the projects. It is further a part of said arrangements that the defendant Ickes, or his agents, will be permitted to fix, and from time to time to change, mimimum rates of pay and maximum hours for all persons employed on such construction, to enforce employment preferences in favor of ex-service men and others, to designate agencies through which workmen may be employed, to direct the use of human labor in place of machinery, to require disclosure to PWA of all information which PWA may desire with respect to such construction work, to require that all the disputes between the Towns and the contractors or subcontractors, and all labor disputes arising in connection with the construction, shall be submitted to the Board of Labor Review or other agency of PWA for final determination, and in other ways to regulate the construction of such distribution systems. It is a part of said arrangements that the Towns shall undertake to obtain any other funds deemed by defendant Ickes necessary to complete such systems, in the manner and from sources prescribed by defendant Ickes; to operate the systems upon completion and furnish electricity to consumers now being served by plaintiff; never to charge rates at a level more than a level approved by defendant Ickes; to pay from the general funds of the Towns, at current selling rate schedules, for energy used by the Towns themselves; and in other ways to submit to the will and regulation of defendant Ickes with respect to the operation of such systems. The said pretended bonds to be issued by

the Towns, through the purchase of which the pretended loans from PWA are to be made, are to be secured by a pledge of the earnings of the said electricity systems.

Paragraph XIV:

Plaintiff avers that its capital investment in properties located in the Towns is not less than the amounts herein set out, to wit:

Guntersville	$90,000
Hartselle	70,000
Russellville	140,000

And a large portion of the balance of its capital investment in generating plants, transmission lines, substations and other machinery and equipment necessary in furnishing electric service to the Towns is allocable to the investment used and useful in furnishing such service.

Plaintiff avers that it has valid and subsisting contracts with each of said Towns for supplying such towns with electricity for schools, public buildings and other municipal purposes, and has valid and subsisting contracts with the inhabitants and industrial consumers in such Towns for supplying their demands for electricity. Plaintiff is informed and believes and therefore avers that each of such Towns, in the event such loans and grants are made, intend to breach its said contracts with plaintiff and take its requirements for electricity from such municipal project. Each of said Towns through its agents or servants has
21 solicited the patronage of plaintiff's other customers for the proposed municipal project and has secured written contracts with a large part of such customers, whereby the proposed municipal project will supply such customers' electric demands for a period of ten years. PWA has full knowledge of such intent and activity of the Towns and encouraged and conspired with the Towns thus to interfere with and procure the breach of plaintiff's contracts with such Towns and with the inhabitants thereof.

If the Towns of Guntersville, Hartselle and Russellville obtain municipal distribution systems to be operated in competition with plaintiff, plaintiff will be compelled either to suffer substantial and continuous losses in its operations in such Towns or to abandon entirely its property and sys-

tem therein, as shown by the fact that, instigated and directed by PWA, the agents or servants of each of the Towns have made a house-to-house canvass of plaintiff's customers in their respective Town, soliciting their patronage for the Town's proposed electric plant, and have reported to PWA that the project will not be competitive since practically all of plaintiff's customers have entered into contracts to purchase their electricity requirements from the proposed municipal projects as soon as service therefrom can be begun.

If defendants are permitted to consummate their unlawful projects in the Towns of Guntersville, Hartselle and Russellville, plaintiff is informed and believes and therefore states that they will undertake similar projects in many other cities and towns in the State of Alabama in which plaintiff is engaged in supplying electric public utility service, and construct a large number of municipal electric plants to be operated in ruinous competition with plaintiff.

As heretofore alleged the business of the plaintiff is made up of a combination of businesses done by it in
22 cities, towns, and rural areas in the State of Alabama as more particularly elsewhere alleged herein, all of which are connected with its system of transmission lines and served by its hydro generating plants. Each local business enables plaintiff better to serve the others and is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the remainder of its customers. The withdrawal of a large number of these local businesses would substantially impair plaintiff's ability to continue operation as a going concern in that it would destroy, make useless, and cause to lie idle much of plaintiff's modern, efficient and valuable properties, including dams, steam plant, transmission lines, and distribution systems.

Paragraph XV.

The threatened action of the defendants herein pursuant to the aforesaid arrangements with the Towns of Guntersville, Hartselle and Russellville, is null and void and without warrant in law, and the defendants are wholly without authority to perform any of the acts which said arrangements contemplate to be performed by them, as herein alleged, because:

1. Paragraph (a) of the President's Executive Order of June 7, 1935 confers upon PWA only such powers as it possessed under Title II of the National Industrial Recovery Act. Section 202 thereof provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202." PWA has announced that allotments are being and will be made before such a comprehensive program is prepared. In line with this policy allotments have been made in the absence of the preparation of such program, no such program has ever been prepared,

23 the allotments herein and the action of the defendants in financing and constructing the proposed plants and systems are being performed in the absence of the preparation of such a program, and the projects herein alleged for the Towns of Guntersville, Hartselle and Russellville, have never been included in any such program.

(2) The proposed loans to the Towns of Guntersville, Hartselle and Russellville are in violation of the requirement of Section 203 of the National Industrial Recovery Act as extended that such loans by the United States be reasonably secured. Such loans are not and cannot be reasonably secured, because the bonds of the Towns, on the faith of which said loans are to be made, are null and void because based upon undertakings of the Towns which violate the law of the State of Alabama, and any payment for them by the defendants is unauthorized by the National Industrial Recovery Act as extended:

(a) The Towns have surrendered to PWA and defendant Ickes absolute discretion to determine rates, rules and regulations for electric service to be furnished by such municipal electric distribution systems, to determine the depositories for their funds, the types of plants which shall be constructed, the materials to be used, the contractors and sub-contractors who shall perform the construction, the hours and wages of men working thereon, the place whence such men shall be hired, and in many other ways to determine and control the construction and operation of such plants, the costs thereof, the time within which they shall be completed, etc. Such a delegation of discretion to

PWA and defendant Ickes constitute an unlawful delegation of the sovereign duties of the aforesaid Towns to foreign agents in violation of the laws of Alabama, and constitutes a violation of the laws of Alabama with respect to competitive bidding.

(b) For reasons heretofore and hereafter set out, the contemplated grants and loans by PWA are invalid and therefore the Towns will be obligated immediately to refund to PWA the amounts of the grants and loans so illegally made and accepted by them, and the Towns
24 will thereby become indebted to PWA in violation of constitutional provisions of the State of Alabama with respect to the manner and the amounts of indebtedness which may be legally incurred by the Towns.

(c) The Towns have pledged the revenues from such municipal electricity systems to the payment of the issues of bonds and to the payment of other debts arising in connection with the construction of said systems in priority to the payment of general municipal expenses and the interest and principal on the general obligation bonds of the Towns now or hereafter outstanding, in violation of the laws of Alabama.

(3) The projects herein complained of are not authorized by the Emergency Relief Appropriation Act of 1935 or by the National Industrial Recovery Act as extended because they are not reasonably designed to provide relief, work relief or to increase employment by providing for useful projects. Plaintiff is informed, believes and so alleges that as such unemployment as exists in the aforesaid Towns or their vicinities, there is virtually none among persons who can be employed on projects of this sort. The projects will require almost altogether skilled workmen and have no reasonable relation to the unemployment situation in the Towns or their vicinities. Moreover, they will inevitably cause permanent unemployment of many, and perhaps eventually all, of those now in plaintiff's employ in said Towns.

(4) Said projects are not authorized by the Emergency Relief Appropriation Act of 1935 or by the National Industrial Recovery Act as extended because they are not of the type or character contemplated thereby.

(5) Said projects are not useful projects provided for in the Emergency Relief Appropriation Act of 1935 because

they are wholly useless and wasteful, in that they duplicate and destroy plaintiff's existing, adequate, reasonable and satisfactory system. The projects can result only in
25 disastrous rate wars, destructive of both plaintiff's facilities and the projects themselves. The small demand in said Towns can support only one utility. The additional projects will be not only useless but predatory, their effect will be to decrease, instead of to promote the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

(6) Said projects are not authorized by any law of the United States because the undertakings exacted from the Towns by PWA and defendant Ickes and the proposed construction and operation of the electricity systems will violate the law of the State of Alabama. Among other things, such undertakings constitute an unlawful delegation to foreign agents, these defendants, of the obligations of said Towns under the law of Alabama as alleged in Sub-paragraph (2) hereof.

(7) Said projects herein complained of are without warrant in any law of or in the Constitution of the United States, but the action of the defendants in furthering said projects is in violation of the Tenth Amendment to the Constitution of the United States, because:

(a) As heretofore alleged said projects are undertaken by the defendants solely for the express purpose of and pursuant to a publicly announced policy of controlling and lowering electricity rates within each State of the United States, and of making war upon creatures of the various States. Specifically, the projects threatened, as herein alleged, are designed solely to afford consumers within the Towns of Guntersville, Hartselle and Russellville with electricity rates at levels deemed by defendant Ickes and PWA to be "socially desirable" and to drive the plaintiff out of such Towns in accordance with the plan described in Paragraph XI hereof. Such action will in no manner affect interstate commerce; its effect is confined altogether to the inhabitants of said Towns, wholly within the State
26 of Alabama.

(b) Said projects are to be constructed and operated under the absolute direction and control of the defendants, even to their most minute details, in matters hav-

ing no relation to interstate commerce, and in a manner constituting usurpation of the local authority of the said Towns and assumption of control over their own affairs.

(8) In so far as any law of the United States or Executive Order of the President purports to confer upon said defendants, as officers of the United States, power to do any of the acts herein complained of, such law or order and said purported power are void and without warrant in the Constitution of the United States, but are in violation thereof because:

(a) Neither the Emergency Relief Appropriation Act of 1935 nor Title II of said National Industrial Recovery Act as extended nor any section thereof indicates any adequate legislative standard to guide these officers charged with the administration of said Title, but on the contrary seeks to delegate legislative power to the President and to such administrative officers in violation of Article I, Section 1; Article I, Section 8, Clauses 1; 2 and 18; and Article II, Section 1 of the Constitution.

(b) The funds of the United States available and to be used for the Projects herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said
27 Towns. Said projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manu-

facturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(c) Neither the Emergency Relief Appropriation Act of 1935 nor Title II of said National Industrial Recovery Act as extended nor any administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by action of the defendants may be given an opportunity for full and adequate hearing; nor has this plaintiff been afforded any such opportunity, although the defendants herein threaten to take its property by virtue of unlawful and destructive competition and the threat thereof. Such denial of a hearing constitutes a violation of the due process clause of the Fifth Amendment of the Constitution.

Paragraph XVI.

Action by these defendants carrying out said arrangements with said Towns will aid and abet the Towns of Guntersville, Hartselle and Russellville in violating the law and Constitution of the State of Alabama, as herein more particularly alleged in Paragraph XV, subparagraphs (2) and (6), and will therefore be unlawful and void.

28 Paragraph XVII.

Plaintiff is informed and believes and therefore alleges, that the said Towns of Guntersville, Hartselle and Russellville and the said defendants herein are, in accordance with the aforesaid unlawful arrangements between PWA, defendant Ickes and the Towns combining and conspiring together and with each other to consummate their joint projects of constructing and operating said electricity plants and distributing systems and to injure the plaintiff, and will, unless restrained by this Court, immediately proceed so to do. Pursuant to such combination and conspiracy PWA and defendant Ickes have entered into the aforesaid pretended loan and grant agreements with said Towns and the other details of said arrangements. Said Towns will immediately present to defendant Ickes, or one or more of the defendants, officers of PWA, or their agents,

initial requisitions of money to be furnished pursuant to said agreements, and said defendants, or one of them, will, unless restrained by this Court, pay over to said Towns all or a large portion of the loan and grant of public funds of the United States as provided in said agreements, and will immediately direct the construction of said projects in accordance with the plan in Paragraph XI hereof alleged. Each and all of the foregoing threatened acts of said defendants will result in immediate and irreparable injury, loss and damage to plaintiff, as hereinafter more specifically alleged.

Paragraph XVIII.

If the defendants, or any of them, shall carry out the provisions of the said arrangements with the Towns, or do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to enjoy its federal and municipal franchises free from injurious competition brought about by unlawful means and to conduct its business and charge rates free from interference and
29 domination by any agency of the federal government will immediately be invaded and destroyed; the value of the franchises and business of plaintiff in said Towns and of the tangible and intangible property acquired and used therein, and of the private funds invested and risked therein, represented by the capital stock and bonds of plaintiff, will immediately be greatly damaged and impaired, and finally rendered utterly worthless. It will immediately be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but, on the contrary, plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced altogether to retire from business; furthermore, by reason of said unlawful projects, it will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste. The plaintiff, as a taxpayer to the United States will be specially injured as in this paragraph set forth, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose without warrant in law or in the Constitution and in violation thereof. The plain-

tiff as a taxpayer to said Towns, Counties and State will be specially injured as in this paragraph alleged, and will have been and in the future will be subjected to a deprivation of its property by taxation for a purpose and in a manner without warrant in the laws or Constitution of Alabama or in the laws or Constitution of the United States and in violation thereof, and as such taxpayer its right that its municipal corporation shall not be forced to violate the law of the State of Alabama, and shall not enter into and be forced to carry out a relationship with others, specifically these defendants and PWA, who are without authority to enter into such a relationship, will be violated. By reason of all the foregoing allegations, the plaintiff, through unlawful interference with, injury to, and deprivation of its federal and municipal franchises, through unlawful deprivation of its property by taxation, and through unlawful deprivation and violation of its right that its municipalities shall not be forced to violate the law of Alabama and shall not enter into and be forced to carry out relationships with others who are unauthorized to enter into them, will suffer loss of its property without that due process of law guaranteed it by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has, and can have no adequate remedy at law.

Paragraph XIX.

In so far as plaintiff sues as a taxpayer of the United States, of the State of Alabama, and of the Counties of Morgan, Marshall and Franklin, or their subdivisions, or of the Towns of Guntersville, Hartselle and Russellville, it sues for all those persons similarly situated.

Paragraph XX.

The said Towns of Guntersville, Hartselle and Russellville and the members of their governing bodies are not made parties defendant hereto because they are without the jurisdiction of this court, and service of process cannot be had upon them in the District of Columbia.

Paragraph XXI.

Plaintiff alleges that it is futile to ask the said Towns to rescind their unlawful agreements and arrangements with defendant Ickes and PWA; plaintiff has repeatedly and constantly protested to the Towns the invalidity of such agreements and arrangements, substantially on the grounds herein set forth, but the Towns persist in their determination to consummate the said arrangements and the projects.

31 Paragraph XXII.

The said Towns have, as hereinbefore alleged, announced their intention to join with the defendants in the immediate consummation of the said projects, and plaintiff is informed and believes, and therefore alleges, that unless the defendants are immediately restrained from doing so, they will at once perform the acts herein complained of; plaintiff is further informed and believes, and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said acts would do all the mischief complained of by the plaintiff herein and would result in immediate and irreparable injury, loss and damage to the plaintiff, whereas restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

Wherefore, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this Court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office, from doing any act or thing to carry out any of the provisions of said unlawful arrangement with said Towns, and from, in any manner, aiding in the construction, or from financing the construction of said electricity generating and distributing systems in said Towns of Guntersville, Hartselle and Russellville; and, more spe-

cifically, from taking any steps to carry out any arrangement or agreement with the said Towns for the purpose of constructing or financing the construction of said electricity plant and systems in said Towns, from honoring any requisition and from transferring, lending, giving or dis-
32 bursing to the said Towns any funds whatsoever for said purpose, and from taking any step whatever designed to aid or facilitate the financing or construction of said plant and systems; such restraining order to be effective only until the matter of plaintiff's application for preliminary injunction shall be disposed of.

(3) That after notice and hearing, the Court enter a preliminary injunction to the same effect.

(4) And that upon final hearing, this Court enter a final order and decree to the same effect.

(5) And for such other and further relief as to the Court may seem meet.

ALABAMA POWER COMPANY,
By P. W. TURNER,
Its Vice President.

P. W. TURNER,
Solicitor for the Plaintiff,
Birmingham, Alabama.
EDWARD B. BURLING,
SPENCER GORDON,
HOWARD C. WESTWOOD,
Solicitors for the Plaintiff,
Union Trust Building,
Washington, D. C.
NEWTON D. BAKER,
Solicitor for Plaintiff,
Cleveland, Ohio.

33 DISTRICT OF COLUMBIA, *ss:*

P. W. Turner, being duly sworn, deposes and says that he is Vice President of Alabama Power Company, a corporation organized under the laws of the State of Alabama, the plaintiff named in the above entitled cause, that he has authority to make this affidavit in behalf of said corporation, that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof and that the statements therein made are true to his own knowledge except as to the matters therein stated to be alleged upon in-

formation and belief and as to those matters he verily believes the statements to be true.

P. W. TURNER.

Subscribed and sworn to before me this 14 day of October, 1935.

[SEAL.] T. C. MEIDINGER,
Notary Public.

34 *Order Dismissing Bill of Complaint.*

Filed October 15, 1935.

* * * * * * * *

This cause came on to be heard on the defendants' motion to dismiss the Bill of Complaint for want of equity, and the plaintiff having served notice of said motion and having been granted in open court leave to file an amended bill of complaint, and the bill having been filed and the parties having agreed that the said motion to dismiss should stand as to all the defendants against the amended Bill of Complaint, and this Court having heard the arguments of the parties thereon, and being fully advised in the premises,

Now, therefore, on motion of the defendants, it is this 14th day of October, 1935;

35 Adjudged, ordered and decreed that the motion of the defendants to dismiss the amended Bill of Complaint be and the same is hereby granted; and it is further

Adjudged, ordered and decreed that the amended Bill of Complaint be and the same is hereby dismissed, and it is further

Adjudged, ordered and decreed that the rule to show cause why a preliminary injunction should not be granted, heretofore made in this cause, is vacated.

Presented by:

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

No objection as to form.

DEAN ACHESON,
Attorney for Plaintiff.

(Sgd.) JESSE C. ADKINS,
Justice.

From the foregoing decree, the plaintiff, by its attorney, in open court, notes an appeal to the United States Court

of Appeals for the District of Columbia and the cost bond on appeal is hereby fixed at $100.00, or in lieu thereof a cash deposit of $50.00.

(Sgd.) JESSE C. ADKINS,
Justice.

36 *Order for Injunction.*

Filed October 15, 1935.

* * * * * * *

This cause having come on to be heard on the defendants' motion to dismiss the amended bill of complaint herein, and the said motion having been granted and the said bill having been dismissed and a decree entered, and the plaintiff having in open court noted an appeal from such decree, thereupon in open court the plaintiff moved the Court to issue an injunction during pendency of the appeal to restrain the defendants doing any of the acts alleged in the said amended bill of complaint. And the defendants having replied that the injunction prayed for should be modified,

Now, therefore, it is this 14th day of October, 1935, ordered that during the pendency of the aforesaid appeal, the defendants, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, Horatio B. Hackett, Assistant Administrator thereof, J. J. Madigan, Acting Executive Officer thereof, F. E. Schnepfe,
37 Director of Projects Division thereof, Henry Morgenthau, Jr., Secretary of the Treasury of the United States, W. A. Julian, Treasurer of the United States, and Guy Allen, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, and each of them, their agents and all persons acting in aid of them and their successors in office, be, and they are hereby restrained from constructing or in any manner aiding in the construction of electricity generating and distributing systems in the municipalities of Guntersville, Hartselle or Russellville, State of Alabama, or from transferring, lending, giving or disbursing to the said municipalities any funds whatsoever of the United States for the purpose of constructing or financing the construction by the said municipalities of electricity generating and distributing systems

and from doing any act or thing for the purpose of effecting or bringing about the transfer, loan, gift or disbursement to said municipalities of any funds whatsoever for the said purpose; provided, that nothing in this order contained shall be construed to restrain said defendants or their agents pending this appeal from negotiating and entering into new contracts with said municipalities, or any of them, terminating any existing agreement with any of said municipalities and from making any new offer to any of said municipalities; and provided further that the plaintiff, Alabama Power Company, file herein an undertaking in the sum of Five Thousand Dollars ($5,000.00) with a surety to be approved by this Court and conditioned upon the payment of such costs and damages as may be incurred or suffered by any of said defendants who may be found to have been wrongfully enjoined or restrained hereby.

By the Court.

JESSE C. ADKINS,
Justice.

38 *Memoranda.*

October 15, 1935.—Injunction Undertaking $5000 approved and filed.

October 19, 1935.—$50 deposit in lieu of cost bond.

39 *Assignment of Errors.*

Filed October 21, 1935.

* * * * * * *

Now comes the plaintiff, and in its capacity as the owner of an electricity business with appendant franchise rights in the Towns of Guntersville, Hartselle and Russellville, Alabama, and as a taxpayer of the United States, as a taxpayer of the said Towns and of the Counties of Marshall, Morgan and Franklin and of the State of Alabama, and assigns as error the action of the Court in the following matters:

1. The Court erred in sustaining the motion of the defendants to dismiss the amended bill of complaint.

2. The Court erred in dismissing the amended bill of complaint.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
Attorneys for Plaintiff.

Received a copy of the foregoing assignment of errors this 19 day of October, 1935.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

40 *Designation of Record.*

Filed October 21, 1935.

* * * * * * *

The Clerk will please prepare the record on appeal in the above entitled cause and include therein the following:

1. Memorandum: Bill of complaint, filed October 4, 1935.
2. Memorandum: Temporary restraining order. Bond fixed. Bond approved October 4, 1935.
3. Motion to dismiss bill of complaint, filed October 14, 1935, in full.
4. Amended bill of complaint, filed October 14, 1935, in full. Fiat.
5. Final decree entered October 15, 1935, in full, including notation of appeal and order fixing cost bond on appeal.
6. Order of October 14, 1935, continuing injunction pending appeal in full.
7. Memorandum injunction undertaking Five Thousand Dollars ($5,000.00) approved and filed.

41 8. Memorandum of deposit of Fifty Dollars ($50.00) in lieu of bond on appeal.

9. Assignment of errors.
10. This designation.

EDWARD B. BURLING,
DEAN G. ACHESON,
SPENCER GORDON,
H. C. WESTWOOD,
Attorneys for Plaintiff.

The defendants have no additional designation.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

42 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 41, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59671 in Equity, wherein Alabama Power Company, a corporation, is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of October, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,
By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6583. Alabama Power Company, a corporation, Appellant, vs. Harold L. Ickes, Administrator, et al. United States Court of Appeals for the District of Columbia. Filed Oct. 24, 1935. Henry W. Hodges, Clerk.

(7022-C)

271 Endorsed on cover: United States Court of Appeals for the District of Columbia. Filed Dec 14 1935. Henry W. Hodges, Clerk.

272 In the United States Court of Appeals for the District of Columbia

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No. 6583

ALABAMA POWER COMPANY, *Appellant*,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works, et al., *Appellees*.

Motion

Now come the appellees and respectfully show to this Court:

I

That the decree, entered herein in the Supreme Court of the District of Columbia on October 14, 1935, and from which the present appeal was taken, dismissed the bill of complaint on the ground of insufficiency and on other similar grounds. The suit was brought to enjoin the defendants from advancing Public Works Administration funds to the towns of Guntersvile, Hartselle, and Russellville, Alabama, for the purpose of constructing an electric power plant.

273 For several weeks last past the municipalities have been negotiating with the Public Works Administration, and during the pendency of this appeal said negotiations culminated on December 4, 1935, in formal offers on the part of the Public Works Administration to the said municipalities the terms of which are vitally and substantially different than is alleged in the bill of complaint. Thus the pleadings do not now represent an actually existing controversy between the parties and it would be futile and useless to continue the litigation on the basis of them.

Copies of the aforesaid offers are hereto annexed and marked Exhibits 1, 2, and 3.

Wherefore, and for the reasons set forth in the annexed memorandum, the appellees move that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts above set forth and for a trial or other disposition of the cause on such amended pleadings.

JAMES W. MORRIS.

Exhibits 1, 2 and 3 referred to in the foregoing motion are not printed at this point because they respectively appear as Exhibits A, B, and C to the defendants' answer to the second amended bill of complaint at pp. 378, 398, 417, respectively infra.

Counsel for the Federal Emergency Administration of Public Works.

304 United States Court of Appeals for the District of Columbia

No. 6579

TEXAS UTILITIES COMPANY, *Appellant*,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; et al., Appellees.

Upon consideration of the motion of appellees that the above entitled cause be remanded to the Supreme Court of the District of Columbia in order that the pleadings may be reformed, it is, this 19th day of December, 1935, ORDERED that the cause be remanded to the Supreme Court of the District of Columbia with directions to set aside forthwith the final decree entered by that court dismissing the bill, but with leave to the defendants (appellees here) to file any further pleadings or to supplement and amend their present pleadings within ten days, and likewise with leave to the plaintiff (appellant herein) to amend

or supplement its bill of complaint within ten days thereafter; and that the parties shall then apply to the Supreme Court of the District of Columbia for an immediate trial on the merits.

Further ORDERED, by agreement and stipulation of the parties, that an injunction entered by the Supreme Court of the District of Columbia in this cause, and now in effect, shall continue in effect until the further order of this court.

Attest: GEORGE E. MARTIN, *Chief Justice.*

Endorsed: No. 6579. Texas Utilities Co., Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al. Order remanding cause &c. United States Court of Appeals for the District of Columbia. Filed Dec. 19, 1935 Henry W. Hodges, Clerk.

305 United States Court of Appeals for the District of Columbia

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No. 6580

ALABAMA POWER COMPANY, *Appellant,*

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works, et al., *Appellees.*

Upon consideration of the motion of appellees that the above entitled cause be remanded to the Supreme Court of the District of Columbia in order that the pleadings may be reformed, it is, this 19th day of December, 1935, ORDERED that the cause be remanded to the Supreme Court of the District of Columbia with directions to set aside forthwith the final decree entered by that court dismissing the bill, but with leave to the defendants (appellees here) to file any further pleadings or to supplement and amend their present pleadings within ten days, and likewise with leave to the plaintiff (appellant herein) to amend or supplement its bill of complaint within ten days thereafter; and that the parties shall then apply to the Supreme Court of the District of Columbia for an immediate trial on the merits.

Further ORDERED, by agreement and stipulation of the parties, that the injunction entered by the Supreme Court of the District of Columbia in this cause, and now in effect, shall continue in effect until the further order of this court.

Attest: GEORGE E. MARTIN, *Chief Justice.*

Endorsed: No. 6580. Alabama Power Company, Appellants vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al. Order remanding cause &c. United States Court of Appeals for the District of Columbia. Filed Dec. 19, 1935. Henry W. Hodges, Clerk.

306 United States Court of Appeals for the District of Columbia

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No. 6580

ALABAMA POWER COMPANY, *Appellant,*

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; et al., Appellees.

Per Curiam:

Appellees move this court to remand this cause to the Supreme Court of the District of Columbia with leave to the parties to amend their pleadings. The ground of the motion is that after the decree was entered in this cause in the Supreme Court of the District, and while the cause was pending on appeal, the Administrator of Public Works on December 2, 1935, entered into an agreement with the City of Sheffield, Alabama, and with other Alabama municipalities, with whom similar agreements had been made, terminating the former agreement relating to the subject matter of the suit; that subsequently on December 4, 1935, the Administrator entered into a new agreement with the City of Sheffield and with other Alabama municipalities, copies of which are filed with the motion.

We set the motion for hearing and have heard argument of counsel for and against the granting of the motion. We think we have the power to grant the motion if it should appear to be proper to do so. After consideration, we have concluded to grant the motion on the terms made part of our order.

307 The exhibits filed with the motion unmistakebly show that the agreement between the Administrator of Public Works and the municipalities involved, is essentially different from the agreement which the bill of complaint prayed should be enjoined. To ignore the situation thus brought about and to proceed to hear the cause on the present record would, as we think, be to do a futile act. The agreement which the bill of complaint sought to restrain the performance of, admittedly is not the agreement now in effect, and the conclusion of this court as to the validity or invalidity of that agreement would not be decisive of the validity or invalidity of the agreement which has now been made and substituted in its place. Nor would it settle the controversy.

The lower court issued a preliminary injunction on the filing of the bill and, notwithstanding it subsequently sustained a motion to dismiss the bill, retained the injunction in full force and effect. As our order on this motion will further continue the injunction order until the case is again brought here on appeal and is decided by us, or otherwise finally disposed of to the satisfaction of all parties, appellant will be fully protected; and the court below and this court, by the granting of the motion, will have the opportunity and the duty of deciding an existing, rather than a moot, controversy.

Endorsed: No. 6580, Alabama Power Company, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al. Per Curiam. Memorandum in support of order remanding cause &c. United States Court of Appeals for the District of Columbia. Filed Dec. 19, 1935, Henry W. Hodges, Clerk.

308 United States Court of Appeals for the District of Columbia

No. 6583

ALABAMA POWER COMPANY, *Appellant*,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works, et al., *Appellees*.

Upon consideration of the motion of appellees that the above entitled cause be remanded to the Supreme Court of the District of Columbia in order that the pleadings may be reformed, it is this 19th day of December, 1935, ORDERED that the cause be remanded to the Supreme Court of the District of Columbia with directions to set aside forthwith the final decree entered by that court dismissing the bill, but with leave to the defendants (appellees here) to file any further pleadings or to supplement and amend their present pleadings within ten days, and likewise with leave to the plaintiff (appellant herein) to amend or supplement its bill of complaint within ten days thereafter; and that the parties shall then apply to the Supreme Court of the District of Columbia for an immediate trial on the merits.

Further ORDERED, by agreement and stipulation of the parties, that the injunction entered by the Supreme Court of the District of Columbia in this cause, and now in effect, shall continue in effect until the further order of this court.

Attest: GEORGE E. MARTIN, *Chief Justice*.

Endorsed: No. 6583. Alabama Power Company, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al. Order remanding cause &c. United States Court of Appeals for the District of Columbia. Filed Dec. 19, 1935, Henry W. Hodges, Clerk.

309 United States Court of Appeals for the District of Columbia.

April Term 1936

No. 6579

TEXAS UTILITIES, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DISBURSEMENTS DIVISION OF THE TREASURY OF THE UNITED STATES, APPELLEES.

No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENTS OF THE TREASURY OF THE UNITED STATES, APPELLEES.

310

No. 6583

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENTS OF THE TREASURY OF THE UNITED STATES, APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

INDEX

	Original	Print
Caption		202
Memoranda: Bill of complaint for injunction and other relief filed; order of Court of Appeals remanding cause filed in Cause No. 58927	1	203
Decree setting aside decree dismissing bill and granting leave to parties to file further pleadings	2	203
Answer to second amended bill of complaint	3	204
Exhibit A	14	
Amendment to second amended bill of complaint	40	212
Amendment to defendant's answer to the bill of complaint	43	214
311 Memoranda: Bill of complaint for injunction filed in Cause No. 59071; order of Court of Appeals remanding cause filed in Cause No. 59071	44	215
Decree setting aside decree dismissing bill and granting leave to parties to f'e further pleadings	45	215

Third amended bill of complaint for an injunction and other relief	46	216
Exhibit "A"	74	248
Answer to third amended bill of complaint	76	250
Exhibit A	88	259
Exhibit B	104	278
Exhibit C	120	297
Exhibit D	136	315
Memoranda: Bill of complaint for an injunction and other relief filed in Cause No. 59671; order of Court of Appeals remanding cause filed in Cause No. 59671	152	333
Decree setting aside decree dismissing bill and granting leave to parties to file further pleadings	153	334
Second amended bill of complaint for an injunction and other relief	154	334
Exhibit "A"	181	366
Answer to second amended bill of complaint	183	368
Exhibit A	194	378
Exhibit B	212	398
Exhibit C	230	417
Memorandum: Plaintiffs' motion to consolidate causes filed	248	436
Order consolidating causes	248	437
Pleadings, &c. in consolidated causes:		
Opinion of Chief Justice Wheat	249	437
Defendants' proposed findings of fact	260	447
Conclusions of Law	282	468
Decree dismissing bills with costs; appeals noted by plaintiffs and undertaking for costs fixed	286	472
Memoranda: $50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 58927; $50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 59071 and $50.00 deposited in lieu of bond on appeal in Equity Cause No. 59671	287	472
Assignment of Errors in Equity Cause No. 58927	288	473
Assignment of Errors in Equity Cause No. 59071	301	482
Assignment of Errors in Equity Cause No. 59671	313	491
Order making Statement of Evidence part of record	327	500
312 Designation of Record	328	500
Clerk's Certificate	331	502
Designation for printing		503

313 In the District Court of the United States for the District of Columbia.

No. 58927 In Equity.

TEXAS UTILITIES, a corporation organized and existing under the laws of the State of Texas, *Plaintiff*,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; J. J. MADIGAN, Acting Executive Officer thereof, et al, *Defendants*.

No. 59071 In Equity.

ALABAMA POWER COMPANY, a corporation, *Plaintiff*,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works, HORATIO B. HACKETT, Assistant Administrator thereof; J. J. MADIGAN, Acting Executive Officer thereof; et al, *Defendants*.

No. 59671 In Equity.

ALABAMA POWER COMPANY, a corporation, *Plaintiff*,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; JOHN HERRICK, Executive Assistant thereof, et al, *Defendants*.

314 BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled causes, to wit:—

315 In the Supreme Court of the District of Columbia
Holding an Equity Court

No. 58927 In Equity.

TEXAS UTILITIES, a corporation organized and existing under the laws of the State of Texas, *Plaintiff*,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; J. J. MADIGAN, Acting Executive Officer thereof; F. E. SCHNEPFE, Director of Projects Division thereof; HENRY MORGENTHAU, JR., Secretary of the Treasury of the United States; W. A. JULIAN, Treasurer of the United States, and GUY ALLEN, Chief Disbursing Officer, Disbursements Division of the Treasury of the United States, *Defendants*.

Memoranda.

June 24, 1935.

Bill of Complaint for an injunction and other relief, filed.

December 30, 1935.

Order of Court of Appeals remanding cause, filed.

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316 *Decree Setting Aside Decree Dismissing the Bill and Granting Leave to Parties to File Further Pleadings.*

Filed Dec 30 1935.

* * * * * * * * * * *

Upon consideration of the order of the United States Court of Appeals for the District of Columbia entered December 19, 1935, and this day filed in the above entitled cause, remanding said cause to this Court with directions to set aside the final decree entered by this Court dismissing the bill, with leave to the defendants to file any further pleadings or to supplement and amend their present pleadings within ten days, and with leave to the plaintiff to amend or supplement its bill of complaint within ten days thereafter; it is by the Court this 30th day of December, 1935,

ADJUDGED, ORDERED and DECREED, That the decree of this Court entered on October 14, 1935, dismissing the bill of complaint as amended, be, and the same is hereby, set aside and vacated; and it is further

ADJUDGED, ORDERED and DECREED, That the defendants be, and they are hereby, granted leave to file any further pleadings or to supplement and amend their present pleadings within ten days from this date; and that the plaintiff be, and it is hereby, granted leave to amend or supplement its bill of complaint within ten days thereafter.

F. DICKINSON LETTS
Justice

No objection as to the form of the above decree.

DEAN G. ACHESON.
Attorney for Plaintiff

ALEXANDER HOLTZOFF
Special Assistant to the Attorney General.

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317 *Answer to Second Amended Bill of Complaint*
Filed Jan. 9, 1936

* * * * * * * * * * *

Come now Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan Acting Executive Officer thereof; F. E. Schnepfe, Director of Projects Division thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States,; W. A. Julian, Treasurer of the United States; and Guy Allen, Chief Disbursing Officer Division of Disbursements, Treasury Department of the United States; defendants in the above entitled cause, and each of them, and for answer to the second amended bill of complaint, say:

I.

These defendants are informed that plaintiff is a corporation incorporated under the laws of the State of Texas, but are without knowledge as to any of the other allegations contained in Paragraph I of the bill of complaint.

II.

Defendants Harold L. Ickes, Horatio B. Hackett, J. J. Madigan and F. E. Schnepfe (hereinafter referred to Jointly as "the PWA defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them.

Defendants Henry Morgenthau, Jr., W. A. Julian,
318 and Guy F. Allen (hereinafter jointly referred to as "the Treasury defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that the Treasurer is in control of the disbursement of public funds of the United States, and aver that he is in control only of the payment of checks drawn upon him and that with certain minor exceptions not applicable to the instant situation, he has no control over the drawing of such checks.

III.

These defendants are advised that the allegations contained in Paragraph III are conclusions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

IV.

These defendants are without knowledge as to any of the allegations contained in Paragraph IV of the bill of complaint and demand strict proof thereof.

V.

The PWA defendants say that they are without knowledge as to the allegations of Paragraph V of the bill of complaint and demand strict proof thereof.

The Treasury defendants admit that plaintiff is a taxpayer of the United States, but say that information as to the amount of taxes paid, and of tax liability incurred must be obtained from other offices, that the necessary steps to secure such information has been taken, but that, as yet, these defendants are without knowledge as to the accuracy of the amounts set out in Paragraph V of the bill of complaint.

319 VI.

These defendants are without knowledge as to any of the allegations contained in Paragraph VI of the bill of complaint, and demand strict proof thereof.

VII.

The PWA defendants deny each and every allegation contained in Paragraph VII of the bill of complaint.

Further answering the allegations of such paragraph, said defendants say that they are engaged in administering the provisions of Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935; that by the terms of Title II of the National Industrial Recovery Act of 1933, the Federal Emergency Administrator of Public Works, under the direction of the President, is directed to prepare a comprehensive program of public works, and with a view to increasing employment quickly, while reasonably securing any loans made by the United States, (1) to construct, finance, or aid in the construction or financing of any public works project included in such program, and (2) upon such terms as the President shall prescribe, to make grants to states, municipalities or other public bodies for the construction, repair or improvement of any such projects provided that no grant shall exceed 30 per centum of the cost of the labor and materials employed upon the project.

That upon the adoption of said Act, applications were received from states, municipalities and other public bodies throughout the United States for aid in financing the construction of a large variety of useful public projects, including, among others, air ports, tunnels, bridges, hospitals, jails, swimming pools, streets and highways, water works, sewage and drainage systems, and electric generating, transmission and distribution systems; that all such applications have been carefully examined for the purpose of determining whether the application is authorized by law, and whether the project meets the requirements of the Act of Congress above referred to; that after such examination, the Federal Emergency Administrator of Public Works, with the approval of the President, has included in the comprehensive program of public works many thousands of useful public projects, and has approved of loans or grant, or both, to aid in financing the construction thereof, having first determined that each such loan or grant meets the requirements of Title II of the National Industrial Recovery Act, and Executive Orders of the President pursuant thereto, and will effectuate the purposes of said Act.

Said defendants further say that the projects included in such comprehensive program have not been limited to a particular section of the country, the comprehensive program being national in scope; that the projects have not been limited to any particular type or class, but have been greatly diversified; that defendants have not solicited, urged, or induced the construction of any particular type of useful public project, but have acted only at the instances and request of municipalities concerned; that where application is made for a loan or grant, or both, to finance or aid in financing the construction of a project which will involve competition between a municipality and a privately owned utility company, the Administrator has taken the position that it was the intention of Congress that the question of whether such competition is desirable should be left entirely to the municipality concerned; that where a grant only is made the Administrator has not given any consideration to the question of rates to be charged by the municipality; that where, as here, a loan is made to be re-
321 paid out of the revenues of the project and not out of local taxes, the Administrator, in determining whether the loan is reasonably secured, has considered the prospective earnings of the project, and solely for that purpose, the rates which the municipality proposed to charge; that the loan and grant to the City of Plainview was made pursuant to the policy outlined herein; that the sole aim and desire of these defendants is to carry out the mandate of Congress as set forth in the statutes herein referred to.

These defendants further allege that their activities under and pursuant to said statutes and executive orders have resulted in a vast increase in employment and an improvement in the national prosperity, including, among other things, a vast improvement in the credit of municipalities, an increase in the value of municipal bonds and a consequent increase in the assets of national banks and other financial institutions throughout the United States.

The Treasury defendants deny the allegations contained in the concluding sentence of Paragraph VII of the bill of complaint, and say that they are without knowledge as to the remaining allegations contained in Paragraph VII and demand strict proof thereof.

VIII.

The PWA defendants admit that an application was made by the City of Plainview, Texas, for a loan and grant to aid in financing the construction of a municipal electric plant and distribution system, and that a loan and grant in the sum of $423,346. for such purpose has been approved by the Administrator and the President.

Said defendants deny that such loan and grant was made pursuant to any alleged plan of regulating and con-
322 trolling intra-state rates, or of bargaining with utility companies for a reduction in rates, but allege that the loan and grant referred to herein was made pursuant to the policy of the PWA outlined in Paragraph VII of the answer.

Said defendants further say that Otto M. Rau is no longer employed by or connected with the Federal Emergency Administration of Public Works; that no offer or agreement and no record or reference to any offer or agreement on the part of said Rau to the effect that if the plaintiff would reduce and adjust its rates in a specified manner PWA would disapprove the Plainview municipal electric project appears in the correspondence, papers and documents on file with the PWA, but on the contrary the correspondence shows that plaintiff's rate reduction was entirely voluntary; that if the said Rau purported to make any such offer or agreement, he acted entirely without authority, and the defendants are without knowledge thereof.

Said defendants further deny that plaintiff has not been afforded an opportunity to be heard, and allege that plaintiff has been afforded an opportunity to present its objections to the proposed project, in person and in writing, on numerous occasions, and that plaintiff's objections were given careful consideration.

Said defendants deny each and every allegation of Paragraph VIII of the bill of complaint except as specifically admitted or qualified herein.

The Treasury defendants say that they are without knowledge as to any of the allegations of Paragraph VIII of the bill of complaint, and demand strict proof thereof.

IX.

The PWA defendants admit that they entered into a loan and grant agreement with the City of Plainview,
323 Texas, whereby they agreed to aid the City in financing the construction of a municipal electric plant and distributing system; said defendants further allege that in August, 1935, the United States Circuit Court of Appeals for the 8th Circuit held, in the case of *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F. (2d) 911, that a contract similar to the Plainview agreement was invalid under Missouri law because certain provisions thereof constituted an improper delegation of legislative power on the part of the municipality. While the correctness of that opinion seemed doubtful, particularly in its application outside the State of Missouri, it was nevertheless deemed advisable to execute a new agreement eliminating the objectionable features of the old. During the month of November, 1935, it was mutually agreed between the City of Plainview and these defendants that the previous contract be terminated and an offer for a unilateral contract be substituted in its place. Subsequently an examination of the decisions of certain United States District courts in similar cases indicated that it was desirable to make certain changes in this new form of contract to conform to these decisions. As a result, the agreement of November, 1935, was terminated by mutual consent and a new agreement, dated December 4, 1935, entered into between the parties, a true and correct copy of which is appended hereto, marked "Exhibit A" and by this reference made a part hereof.

Said defendants further say that all of the conditions of the loan and grant are contained in the offer of December 4, 1935 (Exhibit A); and that there are no conditions, express or implied, except as set forth therein; that all previous contracts and agreements have been terminated, and that there are no contracts or agreements, oral or written, between the parties, except as set forth in Exhibit A.

The PWA defendants admit that, unless restrained, they will proceed with the loan and grant in accordance
324 with the terms of the offer (Exhibit A) but deny all other allegations of Paragraph IX of the bill of complaint, except as expressly admitted or qualified herein.

The Treasury defendants deny each and every allegation contained in Paragraph IX in so far as it pertains to them, except they admit they will, unless restrained, honor vouchers duly and regularly drawn by the defendant Ickes, or his duly constituted subordinates, on moneys appropriated by Congress; and say that they are without knowledge as to any of the other allegations contained in said Paragraph, and demand strict proof thereof.

X.

The PWA defendants say that they are without knowledge as to the terms of any existing contracts between the City and the plaintiff, and demand strict proof thereof; they deny all other allegations contained in Paragraph X of the bill of complaint.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph X and demand strict proof thereof.

XI.

The PWA defendants deny each and every allegation of fact contained in Paragraph XI of the bill of complaint.

The Treasury defendants deny each and every allegation of fact contained in Paragraph XI in so far as it pertains to them; and specifically answering subparagraph (9) (b), say that the funds of the United States are not so allocated that borrowed moneys can be distinguished from other moneys in the Treasury; and these defendants say that they are without knowledge as to any other allegation of fact contained in said paragraph and demand strict proof thereof.

XII.

These defendants deny each and every allegation
325 of fact contained in Paragraph XII of the bill of complaint.

XIII.

The PWA defendants admit that, unless restrained, they will make a loan and grant to the City of Huntsville, in accordance with the terms of the offer (Exhibit A), but deny all other allegations of Paragraph XIII of the bill of complaint.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, upon funds appropriated by Congress; they deny each and every remaining allegation contained in Paragraph XIII insofar as it pertains to them and say that they are without knowledge as to any allegations of said paragraph insofar as they pertain to other defendants, and demand strict proof thereof.

XIV.

The PWA defendants deny each and every allegation of fact contained in Paragraph XIV of the bill of complaint.

The Treasury defendants say that they are without knowledge as to any of the facts contained in Paragraph XIV and demand strict proof thereof.

XV.

These defendants are advised that Paragraph XV of the bill of complaint consists of conclusions of law which they are not required to answer, but, if construed as averments of fact, deny each and every allegation thereof.

XVI.

These defendants admit that the City of Plainview and the members of its governing body are without the jurisdiction of this Court and that service of process cannot be had upon them in the District of Columbia.

326 The PWA defendants further admit that suit was instituted by plaintiff in the District Court of the United States for the Northern District of Texas, against the City and defendant Ickes and that such suit was dismissed on motion of the City Attorney, but said defendants are without knowledge as to the other allegations of Paragraph XVI of the bill of complaint.

The Treasury defendants are without knowledge as to the allegations of the bill of complaint relating to the suit in the United States District Court for the Northern District of Texas, and demand strict proof thereof.

XVII.

These defendants are without knowledge as to any of the allegations in Paragraph XVII of the bill of complaint and demand strict proof thereof.

XVIII.

The PWA defendants admit that, unless restrained, they will comply with the term of the offer (Exhibit A) but, except as expressly admitted herein, deny each and every allegation of fact contained in Paragraph XVIII of the bill of complaint.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendants Ickes, or his duly constituted subordinates, on moneys appropriated by the Congress, but deny each and every other allegation of fact, pertaining to them, contained in Paragraph XVIII of the bill of complaint.

WHEREFORE, the premises considered, these defendants jointly and severally pray that the bill of complaint be dismissed, with proper costs and charges.

JAMES W. MORRIS

Exhibit A, referred to in the foregoing answer, is not printed at this point because it appears as Exhibit F to the stipulation between the Texas Utilities Company and the defendants here, which stipulation appears at p. 167 of the Statement of Evidence herein, the said Exhibit appearing at p. 197 thereof.

Counsel for Federal Emergency Administration of Public Works.
Attorneys for Defendants.

354 *Amendment to Second Amended Bill of Complaint*

Filed April 9, 1936

* * * * * * * * *

Now comes the plaintiff and by leave of court files this its amendment to its second amended bill of complaint herein. The following amendment is to be inserted at the beginning of Paragraph VII of the said second amended bill of complaint:

The plaintiff is informed, believes and so alleges that, commencing in 1933, the President of the United States announced and undertook the execution of a permanent "national power policy" to make electricity "more broadly available at cheaper rates to industry, to domestic and to

agricultural consumers", to effectuate Federal regulation of rates for the intrastate generation, distribution and sale of electricity ,to establish Federal regulation and control over matters of policy and service in connection with intrastate electric utilities and to promote and bring about public ownership or cooperative ownership of facilities for the generation, transmission and distribution of electricity in intrastate commerce.

355 In furtherance of said "national power policy", the Federal Government has established great Federally owned power projects as "yardsticks" by which to measure cost of electricity and to regulate intrastate rates and charges for electricity and has established or utilized various additional agencies such as PWA, TVA and the Rural Electrification Administration. Such agencies have been and are actually engaged in carrying out various phases of said "national power policy". The campaign hereafter in this Paragraph described is in furtherance of and is part and parcel of said "national power policy".

TEXAS UTILITIES COMPANY
By HOWARD C. WESTWOOD
Attorney for Texas Utilities Company

356 DISTRICT OF COLUMBIA, *ss:*

Howard C. Westwood, being duly sworn, deposes and says that he is one of the attorneys for the Texas Utilities Company, that Texas Utilities Company is a corporation organized under the laws of the State of Texas and that said corporation and its officers are absent from the District of Columbia; that he is informed that the statements made in this amendment, upon information and belief, are statements of fact of which said officers have been informed and believe, and from information obtained from said corporation and its officers, he verily believes the facts stated in the amendment to be true.

HOWARD C. WESTWOOD

Subscribed and sworn to before me this 2nd day of April 1936.

PAUL J. ROBERTSON,
Notary Public, D. C.

My commission expires May 15, 1937.

357 *Amendment to Defendants' Answer to the Second Amended Bill of Complaint*

Filed April 20, 1936

* * * * * * * * *

Now come the defendants, and by leave of court file this amendment to their answer to the second amended bill of complaint.

The following amendment is to be inserted in Paragraph VII of said answer:

"The defendants deny each and every allegation of the amendment to Paragraph VII of the second amended bill of complaint."

JAMES W. MORRIS
Assistant Attorney General
ALEXANDER HOLTZOFF
Special Assistant to the Attorney General
JOHN W. SCOTT
Special Assistant to the Attorney General
JEROME N. FRANK
Counsel for Federal Emergency Administration of Public Works
Attorneys for Defendants

358 IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 59071 in Equity

ALABAMA POWER COMPANY, a Corporation, *Plaintiff*

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; JOHN HERRICK, Executive Assistant thereof; JOHN J. MADIGAN, Acting Executive Officer thereof; F. E. SCHNEPFE, Director of Projects Division thereof; HENRY MORGENTHAU, JR., Secretary of the Treasury of the United States; W. A. JULIAN, Treasurer of the United States, and GUY ALLEN, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States,

Defendants.

MEMORANDA

July 24, 1935. Bill of Complaint for Injunction, filed.
December 30, 1935. Order of Court of Appeals remanding cause, filed.

359 *Decree Setting Aside Decree Dismissing the Bill and Granting Leave to Parties to File Further Pleadings.*

Filed Dec. 30, 1935

* * * * * * * * * *

Upon consideration of the order of the United States Court of Appeals for the District of Columbia entered December 19, 1935, and this day filed in the above entitled cause, remanding said cause to this Court with directions to set aside the final decree entered by this Court dismissing the bill, with leave to the defendants to file any further pleadings or to supplement and amend their present pleadings within ten days, and with leave to the plaintiff to amend or supplement its bill of complaint within ten days thereafter; it is by the Court this 30th day of December, 1935,

ADJUDGED, ORDERED and DECREED, That the decree of this Court entered on October 14, 1935, dismissing the bill of complaint as amended, be, and the same is hereby, set aside and vacated; and it is further

ADJUDGED, ORDERED and DECREED, That the defendants be, and they are hereby, granted leave to file any further pleadings or to supplement and amend their present pleadings within ten days from this date; and that the plaintiff be, and it is hereby, granted leave to amend or supplement its bill of complaint within ten days thereaffer.

F. DICKINSON LETTS, *Justice*

No objection as to the form of the above decree.
DEAN G. ACHESON, *Attorney for Plaintiff*
ALEXANDER HOLTZOFF, *Special Assistant to the Attorney General.*

360 *Third Amended Bill of Complaint for an Injunction and Other Relief*

Filed March 2, 1936

* * * * * * * * *

Now comes the plaintiff, and by leave of Court files this its amended bill of complaint, and for its causes of action against the defendants alleges:

Paragraph I

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, is a resident and citizen of the State of Alabama, and has its principal office and corporate domicile in the City of Attalla, Alabama, and sues in its own right.

Paragraph II

The following defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set forth:

HAROLD L. ICKES is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the
361 United States of America dated July 8, 1933, in pursuance of the provisions of Section 201(a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act".

HORATIO B. HACKETT is the duly appointed, qualified, and acting Assistant Administrator of PWA.

JOHN HERRICK is the duly appointed, qualified, and acting Executive Assistant of PWA.

JOHN J. MADIGAN is the duly appointed and qualified Acting Executive Officer of PWA.

F. E. SCHNEPFE is the duly appointed, qualified, and acting Director of Projects Division of PWA.

HENRY MORGENTHAU, JR. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. JULIAN is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

GUY ALLEN is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United States, and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under the pretended authority of Title II of the National Industrial Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and paragraph (a) of the President's Executive Order of June 7, 1935.

Paragraph III

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV

Plaintiff institutes and brings this suit in its several capacities as a citizen and property owner lawfully engaged in business, as the owner of real and personal property and franchises and as a federal, state, county and municipal taxpayer sustaining special damages and special tax burdens peculiar to it and not sustained by taxpayers generally. Plaintiff's said business, property and franchises will be irreparably injured, damaged or destroyed unless the relief herein prayed for is granted with the result that plaintiff will suffer direct pecuniary loss amounting to many thousands of dollars, all as hereinafter more particularly set forth.

362

Paragraph V

Plaintiff is a taxpayer of each of the Cities of Decatur, Florence, Sheffield and Tuscumbia, Alabama, and of the Counties in which such Cities are located, and with respect

to its hereinafter mentioned electrical properties and operations in each of said Cities has paid to said Cities and said Counties many thousands of dollars in taxes in the past, and for the twelve months ended December 31, 1934, has paid or incurred the liability to pay such taxes as indicated in the following table:

City or Town	*Tax Paid*	*County*	*Tax Paid*
Decatur	$6,082.46	Morgan	$10,070.71
Florence	5,319.20	Lauderdale	4,305.52
Sheffield	5,350.60	Colbert	12,713.72
Tuscumbia	1,912.95	Colbert	12,713.72

Plaintiff is likewise a taxpayer of the State of Alabama, and with respect to its electrical properties and operations in said State has paid to said State many thousands of dollars in taxes in the past, large portions of which sums are paid back by the State to the various communities, including the four Cities aforesaid, to be expended by such communities for their municipal purposes; and for the twelve months ended December 31, 1934, plaintiff has paid, or incurred the liability to pay, such taxes to the State in excess of the sum of Nine Hundred Thousand Dollars ($900,000.00). Plaintiff has incurred the liability to pay taxes to the Cities, the counties, the State, and other political subdivisions, for the current tax year 1935, in approximately the same amounts as paid and incurred for the year 1934, as aforesaid.

Paragraph VI

Plaintiff is a taxpayer of the United States, and with respect to its electrical properties and operations in the State of Alabama, including the properties and operations in each of the aforesaid cities, has paid to the United
363 States many thousands of dollars in taxes in the past; and under the provisions of an Act of Congress, approved June 16, 1933 (48 Stat. 254, 256), for the period ended January 1, 1936, has paid, or incurred the liability to pay to the United States excise taxes in the sum of Two Hundred Seventy Thousand Dollars ($270,000.00) and has incurred the liability to pay to the United States similar taxes for the current year of 1935.

Paragraph VII

Plaintiff alleges that by its charter it has the right to manufacture, supply and sell to the public electric energy produced either by steam or by water as a motive force, or by both, for lighting, heating, power and other purposes. Plaintiff now owns and operates electric public utility properties, serving the public in sixty-five of the sixty-seven counties of the State of Alabama. These properties consist of hydro-electric and of steam generating plants, of high tension transmission lines, of distribution lines, and all equipment and facilities necessary for use in generating, transmitting, distributing, metering and delivering electric energy to meet the demands of electricity consumers in the State of Alabama.

Plaintiff is now serving, directly and indirectly, approximately two hundred thousand (200,000) customers within said State, and its gross electrical revenue received therefrom in 1934 was approximately Fifteen Million Dollars ($15,000,000). Plaintiff's system is an integrated whole coordinated so as to anticipate future needs and growth of the communities in the State of Alabama, and represents intensive application of the economies of large-scale, integrated power development. The loss of substantial numbers of its customers in any particular locality would materially impair the benefits to it and its customers derived from such integration.

Plaintiff's system is modern and efficient and in all respects equipped to furnish the public in Alabama with electricity service according to the most advanced standards of electrical engineering. The capacity of its electric plants is adequate to furnish more than the present demand upon it for electricity within said State, a capacity ample to supply all additional uses and users which may reasonably be foreseen in the future.

Among other communities served by said system are the City of Decatur, County of Morgan, the City of Florence, County of Lauderdale, and the Cities of Sheffield and Tus-
cumbia, County of Colbert. These cities are located
364 in close proximity to each other in the northwestern
portion of the State of Alabama, and together form a vital link in the plaintiff's system in that region. The following table indicates the approximate population of

each of said cities, the approximate number of customers served by plaintiff therein, and the gross revenues of plaintiff from its electrical operations therein for the twelve months ended December 31, 1934:

City	Approximate Population	Approximate Number of Customers	Gross Revenues of Plaintiff from such electric operations for year ending December 31, 1934
Decatur	15,593	3,247	$240,300.55
Florence	11,729	2,284	170,580.44
Sheffield	6,221	1,291	93,783.54
Tuscumbia	4,533	928	44,281.44
	38,076	7,750	$548,945.97

Paragraph VIII

The plaintiff's system, including that portion represented by the aforesaid four cities and the customers therein, is served almost entirely by plaintiff's hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat. 1288), whereby plaintiff was granted a license to build a dam across said river, a navigable water of the United States, at the location named, for the improvement of navigation on such river and the development of the water power inherent therein; and Mitchell Dam and Jordan Dam, likewise on the Coosa River in Alabama; and Martin Dam on the Tallapoosa River in Alabama, which latter three dams were constructed under licenses from the Federal Power Commission, authorized by the Federal Water Power Act (41 Stat. 1063). In granting such licenses the Federal Power Commission found:

1. That each of such dams on the Coosa River were necessary and convenient for the development and improvement of navigation and utilization of power therein;

2. That such dams were best adapted to a comprehensive scheme of development and utilization of such waterways for such purposes;

3. That said Tallapoosa River was a non-navigable stream and that the impounding and the release of the

waters of such river would benefit navigation on the Alabama River, a navigable stream, formed by the junction of the Tallapoosa and Coosa rivers;

4. That there was a market in Alabama for the power output of such plants;

5. That such dams are justified in the public interest.

Under and by such Act of Congress and such licenses, plaintiff was required to expend large sums in preparing certain portions of the Coosa River bed for future
365 navigation to and through such dams and in the building of piers in the streams to form ultimate navigation guides to such locks; and, in addition, so to construct such dams that locks could be erected therein as and when the United States determined to complete the navigation from one pool level to the next; by the terms of the Coosa River licenses, the licensee was required to permit of discharge through its dams, free of cost to the United States, of such part of the flow of the river necessary for the purpose of such lockage and to install such lights, signals, and power for the operation of such navigation structures as might be installed in the future by the United States; and with respect to Lay Dam, the plaintiff is required to convey to the United States a right of way around the end of such dam, and by the subsequent licenses issued to the plaintiff under which Mitchell Dam was erected, the plaintiff was required to make such excavations and perform such other channel work to complete a passage way from the lock around Lay Dam to the pool level created by Mitchell Dam as might be necessary; and in connection with all such work plaintiff spent a large amount of money and has obligations in connection with the future use of such facilities and locks for navigation purposes in a sum that is not capable of present ascertainment. Under and by virtue of such licenses, plaintiff was required also to make such installations in the Coosa and Tallapoosa river projects as the Federal Power Commission should deem necessary from time to time to supply adequately the reasonable market demands of the public. Such hydroelectric projects on the Coosa and Tallapoosa were built at a cost to the plaintiff of an amount in excess of $60,000,000. The completion of such projects on the Coosa River created contiguous slack water pools of 57 miles in length, and when

such pools are connected by locks placed in the aforementioned dams such pools will afford a nine-foot depth navigation on such river for a distance of 49 miles.

Plaintiff in good faith accepted the licenses from the Federal Power Commission and built Mitchell and Jordan Dams, resulting in the creation of navigable features of the Coosa River as set out above, and in the improvement of the navigable features of the Alabama River, all with the agreement and understanding under the Federal Water Power Act and the licenses issued to plaintiff thereunder that the plaintiff would secure, as the consideration moving to it for the investment in excess of $60,000,000 made under the licenses so issued, the right and privilege freely to serve the market in Alabama with electric energy.

366 *Paragraph IX*

Plaintiff is authorized by the laws of the State of Alabama to construct, own, operate, and maintain its plant facilities and systems in each of the municipalities in which it renders electric service, including Decatur, Florence, Sheffield and Tuscumbia.

On October 16, 1919 the City of Decatur granted to plaintiff a thirty-year electric franchise, the effectiveness of which was conditioned upon plaintiff's connecting its system in such city and its hydro-electric transmission system within a period of three years. On January 27, 1920 plaintiff made this connection and on such date such franchise became effective for a period of thirty years, is now in full force and effect, and will not expire until January 27, 1950.

In the year 1902 the Cities of Florence, Sheffield and Tuscumbia each granted plaintiff's predecessor in interest an electric franchise. Such franchises were validly assigned to this plaintiff in 1925. By their terms the franchises so granted by the Cities of Sheffield and Tuscumbia expired in October, 1932 and the franchise granted by the City of Florence expired in March, 1933. Since the expiration of these franchises plaintiff has continued to supply the Cities of Florence, Sheffield and Tuscumbia and the inhabitants thereof with electric service and during such period has paid to these cities annual licenses and privilege taxes for the operation of an electric utility and has sold to these cities electric light and power for lighting the streets and

public buildings and other public places therein. These three cities have given plaintiff no notice to cease the use of the streets, alleys, and other public places in supplying them and their inhabitants with electric light and power and have given no notice to plaintiff to remove its poles and wires from the streets, alleys, and other public places therein, but have continued to utilize plaintiff's facilities and to receive and avail themselves of plaintiff's service.

Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the Cities of Florence, Sheffield and Tuscumbia and their inhabitants and is the only person, firm or corporation now able to supply electric light and power to such cities and their inhabitants.

Paragraph X

The plaintiff's properties, plants, lines, and other facilities are modern and efficient and the plaintiff is
367 equipped to and does render efficient and adequate electric utility service in all the municipalities and rural districts in which it operates, including the aforesaid four cities, and possesses facilities of adequate capacity to continue the rendition of such type of service for a considerable time in the future without substantial additions thereto.

The rates for sale of electric power and energy of the plaintiff and the character of its service in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission; and the rates now in effect in the territory served by the plaintiff in the State of Alabama and in the four cities aforesaid are rates approved as reasonable by, and placed in effect pursuant to order of, the Alabama Public Service Commission.

Paragraph XI

Plaintiff alleges that its electricity business in the aforesaid four cities is conducted pursuant to valid and subsisting franchise privileges granted to it by the Government of the United States through the Act of Congress and the licenses of the Federal Power Commission referred to in Paragraph V, and by the aforesaid four cities, as alleged in Paragraph VI.

In reliance upon their franchise rights plaintiff and its predecessors have over a long period of years established and operated, and plaintiff now owns and operates the aforesaid services as a going business in such cities, with many customers and business contacts, financial credit and reputation acquired, established, developed and expanded at great expense and at the risk of the private investment of funds by the holders of its various securities.

The plaintiff is enjoying, and for many years has enjoyed, the good-will of its customers in the State of Alabama, including the aforesaid cities. The plaintiff has, and at all times prior hereto has had, ample facilities and is and has been ready and willing to serve any and all customers within the entire territory served by plaintiff's utility systems. The inhabitants of Alabama, and particularly of the Cities of Florence, Sheffield, Tuscumbia and Decatur, are, and for many years prior hereto, have been ready, willing and desirous of using the service of plaintiff. The good relations between the plaintiff and its customers represents one of its most valuable assets. The plaintiff is rendering, and for many years prior hereto has been rendering,
high class, efficient, dependable service at reasonable
368 rates, and except for the acts of the defendants
hereinafter specified, there is every reasonable probability that the friendly business relationships existing between it and its customers in Alabama, and particularly in the Cities of Florence, Sheffield, Tuscumbia and Decatur, will continue indefinitely on the same satisfactory basis which now exists and which has existed for many years past with mutual satisfaction and profit to the plaintiff and its customers.

Paragraph XII

As hereinafter more fully appears, plaintiff is informed and believes and therefore avers that said defendants Ickes, Hackett, Madigan and Schnepfe (hereinafter together referred to as the PWA defendants) acting in concert with another agency of the Federal Government, to-wit Tennessee Valley Authority (hereinafter sometimes called TVA) and/or its directors, officers, agents and representatives some time in the year 1933 informed a plan unlawfully to disrupt the good relations existing between plaintiff and

its customers and to invade and destroy the property, business and business relationships of plaintiff in the preceding paragraph described, and conspired and unlawfully agreed together and have ever since so conspired and agreed, by and through unlawful means, including unlawful use of public funds of the U ited States by PWA to take unlawfully from plaintiff its business, rights and property by destroying the same so far as possible or rendering them useless wholly or to a great but unascertainable degree and greatly impairing, if not wholly destroying the value thereof. Said defendants are now and for some time have been proceeding unlawfully to induce, finance and cause the construction of an electric distribution system in said cities, and the operation thereof in competition with plaintiff in the sale of electricity in said cities and elsewhere, where the plaintiff is now lawfully engaged in its business.

Paragraph XIII

Commencing in 1933, the President announced and undertook the execution of a permanent "national power policy" to make electricity "more broadly available at cheaper rates to industry, to domestic and to agricultural consumers", to effectuate Federal regulation of rates for the interstate generation, distribution and sale of electricity, to establish Federal regulation and control over matters of policy and service in connection with intrastate electric utilities and to promote and bring about public ownership or cooperative ownership of facilities for the gen-
369 eration, transmission and distribution of electricity in intrastate commerce.

In furtherance of said "national power policy", the Federal Government has established great Federally owned power projects as "yardsticks" by which to measure cost of electricity and to regulate intrastate rates and charges for electricity and has established or utilized various additional agencies such as PWA, TVA and the Rural Electrification Administration. Such agencies have been and are actually engaged in carrying out various phases of said "national power policy".

In particular, sometime in 1933, after the passage of the National Industrial Recovery Act, the PWA defendants

and particularly the defendant Ickes, acting pursuant to and in furtherance of this "national power policy", conceived and have since been executing throughout the United States a plan, scheme or policy to promote public ownership and operation of local intrastate electric utilities regardless of local state policy and to regulate and fix the rates at which privately-owned intrastate electric utilities should serve the public in the various states and thereby to extend Federal control over matters of intrastate commerce and local police power. The plan is not intended to have and in fact does not have any relation to interstate commerce. Its intended and actual effect is control and regulation of entirely local and intrastate commerce and matters of state police power.

It has been carried out through the promulgation by PWA defendants of a policy of constructing with federal funds local intrastate electric utilities under the claim of authority so to do in the National Industrial Recovery Act or in the Emergency Relief Appropriation Act of 1935 and to the end of regulation of intrastate electric rates through direct federal competition and federally-subsidized competition regardless of whether existing rates were and are established by state authority and were and are reasonable or unreasonable.

In the United States generally, the plan and purpose of the PWA defendants is effected by inducing and persuading the municipalities and other political subdivisions in the various states to conspire and act in concert with the PWA defendants in the accomplishment of their illegal purposes and in the unconstitutional and illegal disbursement of public monies of the United States by joint action in carrying out as Federal Public Works Projects the construction of electric generating and distributing plants and systems within such subdivisions planned, built and
370 financed under the control and direction of the PWA defendants and to be operated in such manner as from time to time directed by the PWA defendants. Such projects, when undertaken, are carried out in such manner that the political subdivisions which are nominally to construct and operate the projects are mere dummies in such construction and operation under the control, direction and domination of the PWA defendants.

In applying this plan in the states generally, the PWA defendants usually threaten private electric utilities in particular locations with the construction of such project with federal monies unless such private utilities agree to establish rates satisfactory to the PWA defendants. The rates so to be established usually demanded by the PWA defendants are arbitrary, unreasonable and non-compensatory. If the private utility threatened with direct federal competition or federally-subsidized competition through the establishment of such project accedes to the demands of the PWA defendants, the project is usually abandoned. If the threat is disregarded, the PWA defendants go forward with the project without regard to the extent of unemployment in the particular location or elsewhere, the relation between employment given by such project and the character of the workers unemployed, the dependability and economic soundness of the existing private utility, the capacity of the location to absorb the increased electricity produced or other considerations relating to the need for such project, all of which are excluded entirely or given no substantial consideration by PWA defendants in reaching a decision to construct and operate the project.

To induce the necessary concert of action by the political subdivisions in the various states and to procure their consent to such Federal Works Projects, PWA defendants by advertising and other newspaper publicity and by circulars and by direct statements which have been and are being made to the political subdivisions of the several states by the PWA defendants offer to meet the entire cost of such projects by outright gifts of thirty per cent., and more recently, of forty-five per cent. of the cost of the project and by pretended loan of the balance of the cost repayable by its terms only out of the net revenues from the operation of the project so that no financial risk whatever will be incurred by the political subdivision. In the construction and operation of the proposed project either by express contract or by requirements of compliance with general rules, regulations and conditions imposed by the PWA defendants, little, if any, discretion is vested in the particular subdivision with respect to the details

371 of the construction thereof or of the subsequent operation. Arrangements made by the PWA defendants for the construction and operation of such a project constitute a pretense and sham in that they do not in fact provide for a real loan of monies but merely for the possible recapture of part of the cost of the project out of the net revenues, if any, from its operation, and impose no obligation upon the particular political subdivision and confer no authority upon it in the construction of the project. By express or implied threats of competition with such federally-subsidized projects, the PWA defendants have sought and continue to seek a regulation by them of intrastate electric utility rates and a general and purely arbitrary lowering of intrastate electric utility rates.

This plan is frankly acknowledged by PWA defendants in public press releases and public statements of the defendant Ickes, public offers made generally throughout the several states to their political subdivisions, in instructions given to the agents of PWA charged with the administration of their affairs, in negotiations with existing private utilities and otherwise. Among other instances, said plan was publicly set forth in Press Release No. 989 under date of September 17, 1934, a copy of which is attached hereto and marked Exhibit "A".

In the Tennessee Valley states, and particularly in the State of Alabama, the general plan of the PWA defendants above set forth has been varied by concert of action with TVA, its directors, agents and representatives in such a fashion as to provide, secure and exercise Federal control over intra-state local distribution rates for electric light, heat, and power through TVA rather than directly by PWA. Specifically PWA has induced and coerced the aforesaid Cities of Florence, Sheffield, Tuscumbia and Decatur to enter into agreements with TVA whereby TVA fixes and determines the rates and charges which said cities will make for the electricity produced at the contemplated projects. Said agreements are a part of the "national power policy" hereinabove referred to and are intended and designed to further the establishment of federally controlled "yardsticks" to measure the cost of electricity and to regulate intrastate rates and charges for electricity. This design and purpose is illustrated by the telegram dis-

patched by defendant Ickes from Washington, D. C., under date of July 11, 1934 to Hon. Lee Glenn, Mayor of Florence, Alabama. Said telegram read as follows:

378 "Washington D C
1934 July 11

Hon. Lee Glenn
Mayor, Florence, Ala.

Lilienthal TVA has explained proposal to communities North Alabama whereby Authority will purchase distribution facilities Florence and other communities from Alabama Company, rehabilitate them and turn them back to communities. Also your proposal amend your application such manner Florence purchases existing facilities and uses PWA funds for rehabilitation and extensions. Lilienthal informs me that all other communities in area affected have approved TVA plan, that Florence alone is holding out. Policy Public Works is to support TVA. Its proposal furthers regional operation rural electrification pursuant to President's desire, whereas your proposal impedes that policy. This Administration will advance no funds to Florence for expenditures inconsistent TVA plan. It will aid entire region and in our judgment is highly advantageous to you. However allotment and grant will be maintained and pending completion transaction between TVA and Alabama Company. Suggest you promptly take appropriate action accept TVA proposal so that it may exercise option within effective period.

ICKES, ADMINISTRATOR."

In this area PWA defendants have likewise, and in concert with TVA, its directors, officers, agents and representatives, pursued the unlawful purpose and design of regulation by federally-subsidized competition of intrastate electric utility rates and of fostering a policy of public ownership of intrastate electric utilities.

Paragraph XIV

The aforesaid four cities, moved by the actions and inducement alleged in Paragraph XIII, through their respective mayors, filed with PWA applications for Federal

Public Works Projects consisting of electric distributing systems to be owned by said cities, respectively.

While the procedure pursued by PWA, defendant Ickes and his agents in passing upon such applications does not provide for a hearing from those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, plaintiff requested and sought a hearing before PWA relative to said applications of the aforesaid cities. Plaintiff has, however, constantly been denied the privilege of such hearing. Nevertheless, plaintiff filed with PWA a written protest against the approval of the applications of said cities, except in the case of the City of Florence. Such protest set out in substance the facts heretofore and hereafter alleged in this bill. There is no further board, agency or official of the United States to whom plaintiff may apply to prevent the consummation of the projects in said cities. Consequently,
plaintiff has exhausted all administrative remedies
373 which it could possibly have to prevent such action.

Notwithstanding plaintiff's protests of the applications aforesaid, plaintiff is informed, believes and avers that such protests were given no consideration whatsoever by PWA, but that, for no purpose other than that of driving down plaintiff's rates and destroying plaintiff's business in accordance with the plan of PWA aforesaid, *and upon findings* that the action of PWA would in fact destroy and drive out plaintiff's business in said cities, PWA approved such Public Works Projects for said cities, to be carried out under pretended loan and grant agreements with the cities at the times and in the amounts set out hereafter, the funds to be used in the erection and construction, as Federal Public Works Projects under the direction and control of PWA, of complete electric distribution systems in the cities to serve the same parties and purposes as are now served by plaintiff therein. The amounts proposed to be granted to the cities are equal to thirty per cent. of the cost of labor and materials to be employed in the construction of such electric distribution systems. The pretended loans and grants plaintiff alleges, upon information and belief, to be of the approximate amounts set out as follows:

City	"Loan"	Grant
Decatur	$268,000	$82,000
Florence	336,000	100,000
Sheffield	187,000	43,000
Tuscumbia	105,000	25,000

Paragraph XV

Plaintiff is informed and believes and so alleges that the aforesaid plan to construct the said electric systems as Federal Public Works Projects in said cities for the purposes and objects hereinbefore alleged will immediately be carried out by PWA and the defendants herein, unless restrained, under the following arrangement:

The defendant Ickes and the said cities have entered into pretended "loan and grant agreements", which, in effect, provide that the defendant Ickes and his agents shall construct said electricity distribution systems in said cities and finance said construction by granting outright to said cities thirty per cent. of the cost of labor and materials employed in the construction of such systems, and by the pretense of lending to said cities, by pretended purchase of their bonds, to be used for such financing and construction, the amounts heretofore alleged. Said grants will be pure gifts or bounties, designed solely to induce the cities to enter into
374 such arrangements and to insure the accomplishment of the wishes of PWA and these defendants with respect to the establishment of municipal facilities competing with and superseding the plaintiff. The said cities have agreed in return that said funds will be made available to them upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of PWA is needed to complete the projects; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of PWA; that all contractors and subcontractors shall be equipped with bonds and insurance as PWA desires; that defendant Ickes may cancel the agreements with the cities at any time he wishes, if in his opinion said cities have unreasonably delayed in carrying out any of their duties; that the aforesaid funds shall be available to the cities only subject to the power of defendant

Ickes to withhold them if he deems the cities' budgetary situations to be unsatisfactory, or if he is not satisfied that the cities have complied with all provisions of the agreements; and that in other respects the will of defendant Ickes shall control the cities' actions. It is further a part of said arrangements imposed by PWA that in the construction of such projects the city or the contractor:

(1) Shall pay a minimum wage to be fixed by law or ordinance;

(2) Shall give preference in employment to ex-service men;

(3) Shall exclude convicts from working on such project;

(4) Shall work no laborer thereon more than eight hours in any one day or more than thirty hours in any one week;

(5) Shall pay each employee on said project in full each week, without deduction of lawful set-offs against such debt;

(6) Shall give the employee on the project the right to organize and bargain collectively free from interference and discrimination because of union affiliations;

(7) Shall report to PWA and other governmental agencies the number of persons on the payroll, rate of wages and the man hours;

(8) Shall be subject to the pains and penalties of Public Act No. 324 (48 Stat. 948) and the rules and regulations promulgated thereunder.

The said pretended bonds to be issued by the cities, through the purchase of which the pretended loans from PWA are to be made, are not general obligations of the cities, but it is expressly understood and agreed between said cities, respectively, and PWA that said bonds shall not constitute an indebtedness of said cities within the
375 meaning of any provision or limitation of the Constitution of the State of Alabama and shall never impose a pecuniary liability upon said cities or charge against their general credit. Said pretended bonds are payable solely from the revenue to be derived from said projects.

Paragraph XVI

While the applications of the aforesaid cities for such projects were pending before PWA, plaintiff undertook to negotiate with the cities for the sale to them of its properties located therein. Plaintiff offered to sell to the City of Decatur its distribution system located therein with all its customers attached, for the sum of $359,000, which plaintiff alleges was far below what said properties and business were worth. This offer was declined by said city, said city stating that the availability of a PWA loan and grant would not make it worthwhile for the city to make such a purchase. Plaintiff likewise offered to sell to the City of Florence its distribution system therein with all its customers attached, for the sum of $195,000, which said sum was much less than the properties and business were worth. The City of Florence also declined to make such purchase because of the availability of the loan and grant from PWA.

Plaintiff offered to sell to the City of Sheffield its distribution system located therein, with all its customers attached, for the sum of One Hundred Sixty-four Thousand Dollars ($164,000.00), which said sum is much less than such properties and business were worth. The City of Sheffield likewise declined said offer. It admitted that said offer was reasonable, but in view of the availability of the PWA grant insisted that plaintiff allow it a discount of 30 per cent. of the reasonable value of such properties. Plaintiff offered to sell to the City of Tuscumbia its distribution system located therein, with all its customers attached, at the price of One Hundred Four Thousand Dollars ($104,000.00), which said sum is much less than such properties and business were worth. The City of Tuscumbia likewise declined said offer. It admitted that said offer was reasonable, but in view of the availability of the PWA grant insisted that plaintiff allow it a discount of 30 per cent. of the reasonable value of such properties.

Paragraph XVII

Each of the Cities of Florence, Sheffield, Tuscumbia and Decatur is in default in the payment of either the
376 principal and interest or the interest on its presently outstanding, matured, and past due obligations,

and there is no market for the pretended income obligations of said cities described in Paragraph XV in the general financial markets or in any special financial markets, and except for the proposed acts of the defendants, the said cities would be unable to secure monies for said purposes.

Paragraph XVIII

The proposed projects of the PWA defendants with the said cities are not for a national or other public purpose for the following reasons:

(1) There is no need for the construction of an electric distribution system in said cities since any and all possible need for electric energy and service in each of said localities is now, and for a long time past has been, and will continue to be, fully and adequately provided by private capital and enterprise and by means of capital invested in and represented by plaintiff's existing plant and equipment, which it operates as a public utility subject to the laws of the State of Alabama.

(2) The proposed projects are solely local projects confined to the area in which they are to render electric services and solely for the local and private welfare and benefit of the consumers of electricity in said area and are not and cannot be for the purpose of serving or providing any benefit for the general public of the United States, and will not and cannot promote the general welfare of the United States. The projects will, if anything, be to the general detriment of the United States by reason of creating unnecessary and wasteful duplication of electric distribution facilities and causing unemployment and loss of invested capital.

(3) The expenditure of federal funds for such projects can inure, if at all, only to the private benefit of the consumers of electricity in and about said cities and such cities in their private and commercial capacities, and said expenditures are solely and purely for private purposes.

(4) The only possible further benefit which could be served or promoted by the expenditure of federal funds for the proposed projects is the private and individual benefits to manufacturers and producers of material, equipment and electrical appliances to be purchased, acquired and con-

structed thereby, and to the builders, contractors and providers of labor to be expended in the assembling and construction thereof, and if any secondary or ultimate or incidental benefit should result from the stimulation of industry and increase of profits in the manufacture, sale, assembly, transportation and installation of materials entering into the construction of said property, the same will be merely a secondary, remote and contingent benefit, and the expenditure of public funds for such purposes will constitute a disbursement and expenditure for the private gain and profit of such manufacturers, sellers and contractors.

Paragraph XIX

The federal funds employed in making loans and grants for the construction of municipal or publicly owned utilities, and particularly the funds to be employed for the proposed loan and grant to the aforesaid cities, are largely, if not wholly, monies borrowed on the credit of the United States.

377 *Paragraph XX*

The threatened action of the defendants herein pursuant to the aforesaid arrangement with said cities (including particularly the threatened loan and grant and disbursement of public funds of the United States and delivery thereof to said cities for the purposes and uses herein set out) is illegal and unauthorized by, and contrary to, the terms and purposes of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the defendants are wholly without authority in law to perform any of the acts which said arrangements with the said cities contemplate to be performed by them as herein alleged, because:

(1) Section 202 of the National Industrial Recovery Act as extended provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202". PWA has announced that allotments are being and will be made before such a comprehensive program is prepared. In line with this policy, allotments have been made in the absence of the preparation of such program, no such program has ever been prepared, the allot-

ment herein and the action of the defendants in financing and constructing the proposed plants and systems are being performed in the absence of the preparation of such a program, and the projects herein alleged have never been included in any such program. The only program ever prepared is the sum of particular projects which PWA has, from time to time, determined to carry out; this is not the preparation of a program under Section 202, but is a mere catalogue of action taken without any such program.

(2) Said projects are not reasonably designed for, or capable of, increasing employment quickly. Plaintiff avers that the amount of employment which will be given by the construction of said proposed distributing system and transmission lines will be small and temporary, wholly out of proportion to the enormous sum contemplated to be expended and to the tremendous loss and injury to plaintiff's business and property. Indeed such construction will cause, by its inevitable impairment and possible destruction of the plaintiff's operations and business in said cities, the unemployment of many and possibly all of those now engaged in plaintiff's operations and business in said cities.

(3) Section 202 of the National Industrial Recovery Act, as extended, by particularly enumerating, in the list of Public Works for which public monies might be loaned and granted, the following, "development of water power" and "transmission of electrical energy", has excluded from the projects included in said act, electrical plants and systems other than water power and electricity transmission systems, such as the plants and systems contemplated by said projects. Neither said provision nor any other provision of said section authorized a publicly-owned distribution system of this sort. Furthermore the purported authority to make a grant such as that contemplated, expired on June 16, 1935, by virtue of Section 201 (d) of said Act, and such purported authority was not extended by the Emergency Relief Appropriation Act of 1935. Nor does such Act of 1935 authorize a project of this type. Among other things, this project, as heretofore alleged, will not be self-liquidating.

(4) Said pretended loans are not repaid and cannot be reasonably secured since they are to be repaid only from, and secured only by, the net earnings of the projects, which will be wholly insufficient to pay operating expenses. Said

projects are wholly useless and wasteful in that they duplicate plaintiff's existing, adequate systems, and be-
378 cause they are uneconomic and unsound in that independent systems cannot be maintained save at exorbitant rates, if at all, in said cities, due to the small number of possible customers. The projects can result only in disastrous rate wars, destructive of both plaintiff's facilities and the projects themselves. The small demand in each of said cities can support only one such utility. The additional projects will be not only useless but predatory; their effect will be to decrease, instead of promote the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

No unusual emergency has arisen which necessitates the making of a grant by PWA for the construction of a publicly-owned electrical plant and system at Florence, Sheffield, Tuscumbia and Decatur, Alabama. The conditions with respect to the rendition of electrical service in such cities are now the same as they have been for a number of years in the past, except that substantially lower rates for such service have been made effective in recent years, and material improvements in the facilities for furnishing such service has been made. Plaintiff is adequately supplying all demands for electrical service in such cities.

(5) Said proposed and contemplated arrangements would violate the laws of the State of Alabama in that the undertakings assumed or proposed to be assumed by the said cities under said arrangements would, if carried out, constitute an unlawful delegation to foreign agents of their sovereign duties. More specifically, the cities propose to surrender to these defendants complete control of the terms, manner and purpose of expenditure, the regulation of the construction and the cost thereof, the regulation of the type of labor to be used thereon, choice of contractors, laborers and other agents, the selection and approval of materials and the regulation of labor costs thereon, the regulation of rates to be charged for electricity service, and other matters, at the same time leaving to the defendants the determination of whether said funds shall be withheld and the projects remain uncompleted, and said cities would otherwise delegate to the PWA defendants their responsi-

bilities, duties, and power in respect to the construction, financing and operation of said plants and distribution systems.

Furthermore, the law of the State of Alabama will be violated in that the grants and loans by PWA are, for reasons heretofore and hereafter set out, invalid and therefore the cities will be obligated immediately to refund to PWA the amount of the grants so illegally made and accepted by them and the cities will thereby become indebted to PWA in violation of statutory provisions of the State of Alabama with respect to the manner and amounts of the indebtedness which may be legally incurred by the cities.

(6) Said proposed and contemplated arrangements provide or will provide by their terms for the supervision, control and direction of many things by PWA subsequent to June 30, 1937, whereas PWA by law is continued in any event, if at all, only until June 10, 1937.

(7) Said projects are undertaken by the defendants along with other similar projects for the express purpose of controlling and lowering intrastate electricity rates within each state of the United States, of fostering a policy of public ownership of intrastate electric utilization in the United States.

(8) Said projects are specifically designed to impair the value of plaintiff's property, franchises and rights by selling electricity to municipalities and customers now served by plaintiff in Alabama.

(9) No provision of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935 or of any other law of the United States authorizes any part of such funds to be loaned or granted to said cities for the acquisition of real estate or rights of way for such distribution systems or transmission lines as are contemplated. Plaintiff is informed and believes and therefore avers that it is proposed and planned that said cities shall use substantial amounts from said funds for the acquisition of such real estate and rights of way.

(10) Neither the National Industrial Recovery
379 Act, nor the Emergency Relief Appropriation Act of 1935, nor any other Act of Congress, authorizes the making of loans and grants to finance competitive proj-

ects, destructive to lawful private industry already established and adequately serving the public. The result of the construction of the proposed projects will be to interfere with, instead of to "promote the fullest possible utilization of the present productive capacity of industries," as required by Section 1 of the National Industrial Recovery Act. The making of loans and grants for such projects, as herein contemplated, tends to increase unfair competitive practices instead of to "eliminate unfair competitive practices" as required by said Section. Competitive projects are likewise contrary to the rules prescribed by the President of the United States under the National Industrial Recovery Act, as set forth in PWA Circular No. 1, which provides that "projects for the transmission of electric energy into territory not now served" will be preferred for grants.

(11). No provision of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, or of any other law of the United States, authorizes the PWA defendants to undertake such projects (as they are doing), for the express purpose of controlling and lowering intrastate electricity rates within each state of the United States without reference to the reasonableness of existing rates and fostering a policy of public ownership of intrastate electric properties in the United States.

(12) The grant and loan of Federal moneys to said political subdivisions, under the conditions, penalties, threats and coercion herein set forth, is an attempt by the PWA defendants to acquire for the Federal Government control over matters of a purely intrastate nature, forbidden to it by the Federal Constitution, through the device, expedient and indirect means of contractually requiring the vesting of such control in the Federal Government as a condition of the making of such grants and loans.

Paragraph XXI

If and to the extent that said National Industrial Recovery Act as extended and/or said Emergency Relief Appropriation Act of 1935 be held in terms to confer upon said defendants or any of them, or upon any officer of the United States power to do any of the acts or things herein complained of, said acts, said purported power, and said

actions and things attempted to be done in reliance thereon are unlawful, unconstitutional and void for the following reasons:

(a) Neither of said Acts nor the actions and things attempted to be done in reliance thereon are authorized by any power delegated to the Federal Government by the Constitution;

(b) The National Industrial Recovery Act as extended and the Emergency Relief Appropriation Act of 1935 severally attempt to extend Federal power over matters of intrastate commerce and State police power, including the regulation of intrastate public utilities, in contravention of the Ninth and Tenth Amendments to the Federal Constitution and constitute the taking of plaintiff's property in violation of the Fifth Amendment to the Federal Constitution;

(c) Neither Title II of the National Industrial Recovery Act as extended, nor any section thereof, nor said Emergency Relief Appropriation Act of 1935, nor any section thereof, indicates any standard to guide those officers charged with the administration of said Acts, but on the contrary both delegate legislative power to the President and, under said Acts and to effectuate their purposes, the President is permitted and does redelegate such legislative power to PWA, and said Act permits and authorizes the President and PWA to promulgate such rules and regulations, having the effect of law, as will in his judgment best provide for the general welfare, all violative of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1 of the Constitution of the United States;

(d) Section 12 of the Emergency Relief Appropriation Act of 1935 purports to delegate to the President of the United States the purely legislative function of determining what, if any, functions conferred upon PWA by the National Industrial Recovery Act shall be performed by PWA after June 16, 1935. PWA is an authority purported to be constituted by Act of Congress with functions specified and defined by such Act of Congress expiring, by the provisions of said National Industrial Recovery Act, June 16, 1935. Said Section 12 of the Emergency Relief Appropriation Act of 1935 seeks unlawfully to delegate the legislative power of Congress to specify the powers, authority and

duties of its own creature, PWA, to the President without indicating any adequate legislative standard to guide the President in the determination of what powers, authority and duties shall be vested in PWA after June 16, 1935, in violation of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1 of the Constitution. Accordingly, any and all acts by PWA, its officials, employees and agents, including defendant Ickes and the other defendants herein who are officials of PWA, are without warrant in law and illegal;

(e) Neither Title II of the National Industrial Recovery Act, as extended, nor any section thereof, nor said Emergency Relief Appropriation Act of 1935, nor any section thereof contains any definite appropriation by the Congress of the United States of any funds to be granted or "loaned" to the said cities for the construction of electric distribution systems or electric transmission lines or any standard to guide those officers charged with the administration of said laws in the determination that each of said cities is a party or one of a class of parties for whose benefits an appropriation for any such purpose or purposes was made by the Congress and said laws and each of them delegates legislative power to select the subject of appropriations and the beneficiaries of the appropriations to the President, and under said laws, and to effectuate their purpose the President is permitted to, and does redelegate such legislative power to PWA in violation of Article I, Section 1; Article I, Section 9, Clause 7; and Article II, Section 1 of the Constitution of the United States;

(f) Neither Title II of said National Industrial Recovery Act as extended, nor said Emergency Relief Appropriation Act of 1935, nor any Administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by the actions of the defendants may be given an opportunity to be heard, and plaintiff has not been afforded any opportunity to be heard although the defendants herein threaten to take its property and said Acts and the actions taken thereunder by the defendants for that reason deny due process of law as a matter of procedure in violation of the Fifth Amendment to the Federal Constitution.

(g) If the said pretended loans and grants of funds are made to the cities as aforesaid, the plaintiff will be deprived of its property without due process of law and its property will be taken without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

(h) If it be that these defendants seek and find some purported authority in the Emergency Relief Appropriation Act of 1935 further than that granted in Paragraph (a) of the President's Executive Order of June 7, 1935,
381 any such further authority is baseless and void for the reasons heretofore set out.

(i) The funds of the United States available and to be used for the Projects herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said Cities. Said projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purposes would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(j) Each of said Acts in contravention of the Ninth and Tenth Amendments to the Federal Constitution, attempt to abridge the rights of plaintiff, its officers, employees and security holders, to earn a livelihood, and to use and enjoy its properties, all located within the State of Alabama, and to derive a reasonable return therefrom.

Paragraph XXII

Action by these defendants in the respects herein set forth, whether in furtherance of the unlawful conspiracy herein alleged or otherwise, will amount in practical substance and effect to actual construction and operation of the projects herein complained of by these defendants without warrant in law and illegally and not by the aforesaid cities.

Paragraph XXIII

Plaintiff is informed and believes, and therefore charges, that a part of the plan for the construction of publicly owned electric distributing systems in the Cities of Florence, Sheffield and Tuscumbia, induced by PWA as aforesaid, is that said cities shall when said municipal systems are completed revoke and terminate plaintiff's right to carry on its business in each of such cities and plaintiff will be compelled to abandon entirely its business, properties and systems in such cities. If it were not for such plan and for such inducement of PWA plaintiff would in all reasonable probability continue to enjoy the right to carry on its business in each of said cities for many years.

If the City of Decatur obtains in pursuance of the
382 plan hereinbefore alleged such a Public Works Project it will operate such system in competition with plaintiff, and plaintiff will be compelled either to suffer substantial and continuous losses in its operations in such city or to abandon entirely its property and system therein, as shown by the fact that, in anticipation of receiving such a project, the city authorities, at the instigation and direction of PWA, have made a house-to-house canvass of plaintiff's customers in such city, soliciting their patronage for the proposed municipal electric plant, and have reported to PWA that more than 95% of domestic, 70% of commercial, and 75% of industrial consumers in such city will take power from the municipal plant as soon as service can be begun.

If defendants are permitted to consummate such unlawful plan and make such pretended loans and grants to the Cities of Decatur, Florence, Sheffield and Tuscumbia, plaintiff is informed and believes and therefore states that they will authorize and construct a large number of publicly

owned electric plants in many other cities and towns in the State of Alabama in which plaintiff is engaged in supplying electric public utility service, to be operated in ruinous competition with plaintiff:

As heretofore alleged the business of the plaintiff is made up of a combination of businesses done by it in cities, towns, and rural areas in the State of Alabama as more particularly elsewhere alleged herein, all of which are connected with its system of transmission lines and served by its hydro generating plants. Each local business enables plaintiff better to serve the others and is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the remainder of its customers. The withdrawal of a number of these local businesses would substantially impair plaintiff's ability to continue operation as a going concern in that it would destroy, make useless, and cause to lie idle much of plaintiff's modern, efficient and valuable properties, including dams, steam plant, transmission lines, and distribution systems and thereby would cripple plaintiff in the exercise of its rights, privileges and duties under its aforesaid franchises from the United States.

Paragraph XXIV

Plaintiff is informed and believes, and therefore alleges, the said defendants, aided and abetted by the said cities and their respective officials, will, unless restrained by this court, immediately proceed with such projects of con-
383 structing said electric distribution systems in said cities in accordance with said unlawful arrangements and will consummate the execution of said proposed and contemplated arrangements and will perform the acts and do the things therein contemplated. Said cities have presented or are about to present to defendant Ickes or to one or more of the defendants, officers of PWA, or their agents, initial requisitions of money to be furnished pursuant to said contemplated unlawful arrangement, and said PWA defendants or the defendants Morgenthau, Julian and Allen will, unless restrained by this court, pay over to said city all or a large portion of the loan and grant of public funds of the United States as contemplated to be provided in said arrangements, and will immediately take further steps in consummating said projects. Each and all

of the foregoing threatened acts of said defendants will result in immediate and irreparable injury, loss and damage to plaintiff, as herein specifically alleged.

Paragraph XXV

If the defendants or any of them are permitted to continue in said unlawful conspiracy or to carry out the provisions of the unlawful contemplated arrangements, or to do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to operate its property and to enjoy its franchise free from injurious competition brought about by unlawful means and to conduct its intrastate business and charge rates free from unconstitutional interference and domination by an agency or agencies of the federal government, will immediately be invaded and destroyed; the value of the business of plaintiff in said cities and of its tangible and intangible property acquired and used therein, will immediately be greatly damaged and impaired, and finally rendered utterly worthless. It will immediatey be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but on the contrary plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced to retire from business; furthermore, by reason of said unlawful project it will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste.

Further, the plaintiff as a taxpayer subjected to special, rather than general tax burdens, will be specially injured as in this paragraph set forth, and will have been and, in the future will be, subjected to a deprivation of its property for a purpose without warrant in law or in the Constitution and in violation thereof.

By reason of all of the foregoing facts, the plain-
384 tiff, through unlawful interference with, injury to, and deprivation of its property and franchises, will suffer loss of its property without compensation and without that due process of law guaranteed it by the Fifth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has and can have no adequate remedy at law.

Paragraph XXVI

Plaintiff alleges that it is futile to ask the defendants to rescind their aforesaid unlawful arrangements with the said cities and their officials. The PWA defendants, aided and abetted by the TVA, its directors, officers, agents, employees and representatives, have for nearly two years continued negotiations with such cities to consummate some such arrangements with them and have finally induced the cities and their officials to revise the original arrangements so as to vary substantially therefrom, and, as is herein alleged, said cities and their officials have been continuously advised, urged and incited by the PWA defendants herein and TVA, its directors, officers, agents, employees and representatives, to press said applications and revise the same, from time to time, to conform to the desires and will of said defendants in furtherance of their unlawful conspiracy against the plaintiff herein alleged.

Paragraph XXVII

The said Cities of Florence, Sheffield, Tuscumbia and Decatur and the members of their respective governing bodies are not made parties defendant hereto for the reason that they are without the jurisdiction of this court, and service of process cannot be had upon them in the District of Columbia. The said cities have, as hereinbefore alleged, announced their intention to aid and abet the PWA in the immediate consummation of the said project, and plaintiff is informed and believes, and therefore alleges, that unless the defendants are immediately restrained from doing so they will at once perform the acts alleged herein; plaintiff is further informed and believes and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said
385 acts would do all the mischief complained of by the plaintiff herein and would result in immediate and irreparable injury, loss and damage to the plaintiff, whereas restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

WHEREFORE, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation,

the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all of the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office (in so far as they are not already restrained by order of this court), from continuing to do any acts or things in any respect in furtherance of the conspiracy herein alleged, from doing any act or thing towards the execution of said alleged unlawful arrangement for a loan and grant to the Cities of Decatur, Sheffield, Tuscumbia and Florence or from performing any act in contemplation thereof or pursuant thereto; and from in any manner aiding in the construction of or from financing the construction of said electric distribution systems in the Cities of Decatur, Sheffield, Tuscumbia and Florence; and from honoring any requisition and from transferring, lending, giving or disbursing to said cities any funds whatsoever for the purpose of constructing or financing the construction of said electric systems.

(3) That after notice and hearing the court enter a preliminary injunction to the same effect.

386 (4) And that upon final hearing this court enter a final order and decree to the same effect.

(5) And for such other and further relief as to the court may seem meet.

ALABAMA POWER COMPANY
By P. W. TURNER
Its Vice-President

EDWARD B. BURLING
SPENCER GORDON
DEAN ACHESON
HOWARD C. WESTWOOD
Solicitors for the Plaintiff,
Union Trust Building
Washington, D. C.

NEWTON D. BAKER
Solicitor for Plaintiff
Cleveland, Ohio

P. W. TURNER
Solicitor for the Plaintiff
Birmingham, Alabama

387 DISTRICT OF COLUMBIA, *ss:*

P. W. Turner, being duly sworn, deposes and says that he is Vice-President of Alabama Power Company, a corporation organized under the laws of the State of Alabama, the plaintiff named in the above entitled cause, that he has authority to make this affidavit in behalf of said corporation, that he has read the foregoing amended bill of complaint by him subscribed and knows the contents thereof and that the statements therein made are true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he verily believes the statements to be true.

P. W. TURNER

Subscribed and sworn to before me this 29 day of Feb. 1936.

T. C. MEIDINGER
(Seal). *Notary Public.*

388 *Exhibit "A"*

Filed March 2, 1936.
Frank E. Cunningham, Clerk.

PWA Press Section
Immediate Release Release No. 989

Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

Municipal or local publically owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

The statement of Administrator Ickes followed action by some privately owned utilities, which, on re-examination of their condition, found it possible to reduce rates to a point below those proposed by municipal project plants.

In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the

fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

Since the Public Works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cognizant of the greater use of power resulting from lower rates.

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance mu-
389 nicipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

"Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as

unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

"PWA will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

"State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect."

390 *Answer to Third Amended Bill of Complaint*

Filed March 24, 1936

* * * * * * * * * * *

Come now Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; John Herrick, Executive Assistant thereof; J. J. Madigan, Acting Executive Officer thereof; F. E. Schnepfe, Director of Projects Division thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States; and Guy F. Allen, Chief Disbursing Officer, Division of Disbursements, Treasury Department of the United States; defendants in the above-entitled case, and each of them, and for answer to the amended bill of complaint, say:

391 I.

These defendants are informed that plaintiff is a corporation incorporated under the laws of the State of Alabama, but are without knowledge as to any of the other allegations contained in Paragraph I of the bill of complaint.

II.

Defendants Harold L. Ickes, Horatio B. Hackett, J. J. Madigan and F. E. Schnepfe (hereinafter referred to

jointly as "the PWA defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that they are threatening to perform any acts under pretended authority.

Defendants Henry Morgenthau, Jr., W. A. Julian and Guy F. Allen (hereinafter jointly referred to as "the Treasury defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that the Treasurer is in control of the disbursement of public funds of the United States, and aver that he is in control only of the payment of checks drawn upon him and that, with certain minor exceptions not applicable to the instant situation, he has no control over the drawing of such checks; and further deny that they are threatening to perform any acts under pretended authority.

III.

These defendants are advised that the allegations contained in Paragraph III are conclusions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

IV.

Defendants deny each and every allegation of fact contained in Paragraph IV of the bill of complaint.

392

V.

These defendants are without knowledge as to any of the allegations contained in Paragraph V of the bill of complaint, and demand strict proof thereof.

VI.

The PWA defendants are without knowledge as to the allegations of Paragraph VI of the bill of complaint, and demand strict proof thereof.

The Treasury defendants admit that plaintiff is a taxpayer of the United States, but say that information as to the amount of taxes paid, and the amount of tax liability incurred, is contained in other offices, that the necessary steps to secure said information have been taken, but that, as yet, they are without knowledge as to the accuracy of the amounts averred in Paragraph VI of the bill of complaint.

VII.

These defendants are without knowledge as to any of the allegations contained in Paragraph VII of the bill of complaint, and demand strict proof thereof.

VIII.

These defendants are without knowledge as to the allegations of Paragraph VIII of the bill of complaint, and demand strict proof thereof, except that the PWA defendants deny that by the terms of the Federal Water Power Act, or any license, agreement or understanding pursuant thereto, the plaintiff is entitled to be protected from competition in the sale of electrical energy by municipalities having a lawful right to engage in such business.

393

IX.

These defendants are without knowledge as to any of the allegations contained in Paragraph IX of the bill of complaint, and demand strict proof thereof.

X.

These defendants are without knowledge as to any of the allegations contained in Paragraph X of the bill of complaint, and demand strict proof thereof.

XI.

These defendants are without knowledge as to any of the allegations contained in Paragraph XI of the bill of complaint, and demand strict proof thereof.

XII.

The PWA defendants deny each and every allegation contained in Paragraph XII of the bill of complaint.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XII of the bill of complaint, and demand strict proof thereof.

XIII.

The PWA defendants deny each and every allegation contained in Paragraph XIII of the bill of complaint, except as hereinafter admitted or qualified.

Further answering the allegations of Paragraph XIII of

the bill of complaint, the PWA defendants say that they are engaged in administering the provisions of Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935; that by the terms of Title II of the National Industrial Recovery Act of
394 1933, the Federal Emergency Administrator of Public Works, under the direction of the President, is directed to prepare a comprehensive program of public works, and with a view to increasing employment quickly, while reasonably securing any loans made by the United States, (1) to construct, finance, or aid in the construction or financing of any public works project included in such program, and (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, provided that no grant shall exceed 30 per centum of the cost of the labor and materials employed upon the project.

That upon the adoption of said Act, applications were received from States, municipalities, and other public bodies throughout the United States for aid in financing the construction of a large variety of useful public projects, including, inter alia, airports, tunnels, bridges, hospitals, jails, swimming pools, streets and highways, waterworks, sewage and drainage systems, and electric generating, transmission and distribution systems; that all such applications have been carefully examined for the purpose of determining whether the application is authorized by law, and whether the project meets the requirements of the Act of Congress above referred to; that after such examination, the Federal Emergency Administrator of Public Works, with the approval of the President, has included in the comprehensive program of public works many thousands of useful public projects, and has approved the making of loans or grants, or both, to aid in financing the construction thereof, having first determined that each such loan or grant meets the requirements of Title II of the National Industrial Recovery Act, and Executive Orders of the President pursuant thereto, and will effectuate the purposes of said Act.

395 Said defendants further say that the projects included in such comprehensive program have not been

limited to a particular section of the country, the comprehensive program being national in scope; that the projects have not been limited to any particular type or class, but have been greatly diversified; that defendants have not solicited, urged, or induced the construction of any particular type of useful public project, but have acted only at the instance and request of the municipality concerned; that where application is made for a loan or grant, or both, to finance or aid in financing the construction of a project which will involve competition between a municipality and a privately owned utility company, the Administrator has taken the position that it was the intention of Congress that the question of whether such competition is desirable should be left entirely to the municipality concerned; that where a grant only is made, the Administrator has not given any consideration to the question of rates to be charged by the municipality; that where, as in these cases, loans are made to be repaid out of the revenues of the project and not out of local taxes, the Administrator, in determining whether the loans are reasonably secured, has considered the prospective earnings of the projects, and solely for that purpose, the rates which the municipalities proposed to charge; that the loans and grants to the cities of Decatur, Florence, Sheffield, and Tuscumbia were made pursuant to the policy outlined herein; that the sole aim and desire of these defendants is to carry out the mandate of Congress as set forth in the Statutes herein referred to.

The PWA defendants further aver that their activities under and pursuant to said statutes and Executive Orders have resulted in a vast increase in employment and
396 an improvement in the national prosperity, including, among other things, a vast improvement in the credit of municipalities, an increase in the value of municipal bonds and a consequent increase in the assets of national banks and other financial institutions throughout the United States.

The PWA defendants admit that press release no. 989, a copy of which is attached to the third amended bill of complaint, was issued by the press section of the Public Works Administration on September 17, 1934, and that on July 11, 1934, the Administrator dispatched a telegram to Hon. Lee Glenn, Mayor of Florence, Alabama, a copy of which is set

forth in the bill of complaint; said defendants say that such press release and telegram were not intended to and do not adequately set forth the policy of PWA with respect to municipal electric projects and at most, set forth an incomplete statement of such policy; that the true and correct policy of PWA with respect to such projects is as set forth herein.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XIII of the Bill of Complaint, and demand strict proof thereof.

XIV.

The PWA defendants admit that applications were filed by the cities of Decatur, Florence, Sheffield and Tuscumbia, in the State of Alabama, for loans and grants to aid such cities in financing the construction of municipal electric distributing systems in each of such cities; that loans and grants for such purpose have been approved by the Administrator and the President in the following amounts:

Decatur	$350,000.
Florence	436,000.
Sheffield	230,000.
Tuscumbia	130,000.

397 Said defendants deny each and every allegation of Paragraph XIV of the bill of complaint, except as herein specifically admitted or qualified, and further say that plaintiff has been afforded an opportunity to present its objections to the proposed projects, and that such objections were given careful consideration.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XIV of the bill of complaint and demand strict proof thereof.

XV.

The PWA defendants admit that during the month of December 1934, they entered into loan and grant agreements with the cities of Decatur, Florence, Sheffield and Tuscumbia whereby the Government agreed to aid the cities in financing the construction of municipal electric distributing systems; said defendants further aver that in August,

1935, the United States Circuit Court of Appeals for the Eighth Circuit held, in the case of *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F. (2d) 911, that a contract similar to the agreements with the four cities herein referred to was invalid under Missouri law because certain provisions thereof constituted an improper delegation of legislative power on the part of the municipality. While the correctness of that opinion seemed doubtful, particularly in its application outside the State of Missouri, it was nevertheless deemed advisable to execute new agreements eliminating the objectionable features of the old. During the first part of December, 1935, the original contracts with each of the four cities were terminated by mutual consent, and new agreements, dated December 4, 1935, entered into between each of the cities and these defendants, true and cor-
398 rect copies of which are appended hereto, and marked Exhibits "A", "B", "C", and "D".

Said defendants further say that all of the conditions of the loans and grants are contained in the agreements of December 4, 1935, above referred to, and that there are no conditions, express or implied, except as set forth therein; that all previous contracts and agreements have been terminated, and that there are no contracts or agreements, oral or written, between the parties, except as set forth in Exhibits "A", "B", "C", and "D".

The PWA defendants deny each and every allegation contained in Paragraph XV of the bill of complaint, except as expressly admitted or qualified herein.

The Treasury defendants have no knowledge as to the allegations of Paragraph XV of the bill of complaint, and demand strict proof thereof.

XVI.

These defendants are without knowledge as to any of the allegations of Paragraph XVI of the bill of complaint, and demand strict proof thereof.

XVII.

The PWA defendants deny each and every allegation of fact contained in Paragraph XVII of the bill of complaint.

The Treasury defendants are without knowledge as to any of the allegations of Paragraph XVII of the bill of complaint, and demand strict proof thereof.

XVIII.

These defendants deny each and every allegation of fact contained in Paragraph XVIII of the bill of complaint.

399

XIX.

Defendants deny each and every allegation contained in Paragraph XIX of the bill of complaint, and say that the funds of the United States are not so allocated that borrowed moneys can be distinguished from the other moneys in the Treasury.

XX.

The PWA defendants deny each and every allegation of fact contained in Paragraph XX of the bill of complaint, and further answering, say that the proposed action of the cities in constructing municipal electric distributing systems and issuing obligations of the type described in Exhibits "A", "B", "C" and "D" has been upheld as valid by the Courts of Alabama in similar cases.

The Treasury defendants deny each and every allegation of fact contained in Paragraph XX, in so far as it pertains to them; and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

XXI.

These defendants deny each and every allegation of fact contained in Paragraph XXI of the bill of complaint.

XXII.

These defendants deny each and every allegation of fact contained in Paragraph XXII of the bill of complaint.

XXIII.

These defendants deny each and every allegation of fact contained in Paragraph XXIII of the bill of complaint, except that they say that they are without knowledge as to the allegations contained in the last sub-paragraph thereof.

400

XXIV.

The PWA defendants admit that, unless restrained, they will make loans and grants to the cities of Decatur, Florence, Sheffield and Tuscumbia, in accordance with the terms

of the offers (Exhibits A, B, C, and D), but deny all other allegations of Paragraph XXIV of the bill of complaint.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on moneys appropriated by Congress, but deny each and every other allegation of fact pertaining to them, contained in Paragraph XXIV of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

XXV.

The PWA defendants deny each and every allegation of fact contained in Paragraph XXV of the bill of complaint; but the Treasury defendants say that they are without knowledge as to any of said allegations and demand strict proof thereof.

XXVI.

The PWA defendants deny each and every allegation of fact contained in Paragraph XXVI of the bill of complaint; but the Treasury defendants say that they are without knowledge as to any of said allegations and demand strict proof thereof.

XXVII.

The PWA defendants admit that the cities of Decatur, Florence, Sheffield and Tuscumbia are without the jurisdiction of this court and that service of process cannot be had upon them in the District of Columbia. They are without knowledge as to whether the members of their gov-
401 erning bodies are without the jurisdiction of this Court and that service of process cannot be had upon them in the District of Columbia.

They further admit that unless restrained they will make loans and grants to such cities in accordance with the terms of the offers (Exhibits A, B, C, and D).

They deny each and every allegation of fact contained in Paragraph XXVII of the bill of complaint except as expressly admitted herein.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on

moneys appropriated by the Congress, but deny each and every other allegation of fact pertaining to them, contained in Paragraph XXVII of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

WHEREFORE, the premises considered, these defendants jointly and severally pray that the bill of complaint be dismissed, with proper costs and charges.

JAMES W. MORRIS,
Assistant Attorney General,
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General,
JOHN W. SCOTT,
Special Assistant to the Attorney General,
JEROME N. FRANK,
Counsel for Federal Emergency Administration of Public Works.
Attorneys for Defendants.

Receipt of copy of the foregoing instrument hereby acknowledged on the 24th day of March, 1936.

HOWARD C. WESTWOOD,
24th of March, 936.
Counsel for Plaintiff.

Exhibit A to answer to third amended bill of complaint.

402 Copy Conformed to
Executed Original
Legal Division, P. W. A. P. W. 46002-12
Checked Rice Date Dec 6 1935.

Federal Emergency Administration
of Public Works

Accepted by applicant
Dec 7 1935
Date
City of Decatur,
Morgan County, Alabama.

Washington, D. C.
December 4, 1935.
PWA Docket No. 6587.
Filed March 24, 1936
Frank E. Cunningham,
Clerk

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the

construction of an electrical distribution system, including the low side of the substation and equipment (herein called the "Project") by making a loan and grant to the City of Decatur, Alabama (herein called the "Applicant") in an amount not exceeding in the aggregate the sum of $350,000.

2. *Method of Making Loan.* The Government will purchase from the Applicant, at the principal amount thereof plus accrued interest, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $268,000, less such amount of such obligations, if any, as the Applicant may sell the purchasers other than the Government:

(a) Obligor: City of Decatur;

(b) Type: Special obligation, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: September 1, 1934;

(e) Interest rate and interest payment dates: Four per cent per annum, payable on March 1, 1935, and semi-annually thereafter on September 1 and March 1 in each year;

(f) Place of Payment: At the office of the City Treasurer, Decatur, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration privileges: At the option of the holder, as to principal only;

(h) Maturities: On September 1 in years and amounts as follows:

1937-1940, inclusive	$9,000,
1941 and 1942	12,000,
1943 and 1944	14,000,
1945-1954, inclusive	18,000;

403

(i) Security: Payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

3. *Amount of Grant.* The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Govern-

ment will make the grant either wholly by the payment of money, or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $100,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the

construction, cost, and progress of the work. Upon
404 request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the prepartion of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Gov-

ernment, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be em-
ployed upon the Project. When the Project shall be
405 approximately 70 percent completed the Applicant
may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 percent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 30 percent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and

any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Accounts shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes 406 of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be consrued under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name if followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is

used in lieu of descriptive detail of substance and function, the term "or equal" is to be [illegible]lly construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which it is required by the laws of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly
407 as possible after funds are made available and be

continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desires, be inserted verbatim in such construction contract or contracts).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA
Federal Emergency Administrator of Public Works

By (Sgd.) Horatio B. Hackett
Assistant Administrator.

408 Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week;

PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: PROVIDED, HOWEVER, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, to-

gether with a statement of the deductions therefrom
409 for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of.... ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) .... PROVIDED, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In case
410 any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operation be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less

than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such
411 laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufac-

tured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the

412

following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 99 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs*—The contractor shall furnish signs bearing the legend: "FEDERAL PUBLIC WORKS PROJECT NO. ....." as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any
413 of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P.W.A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1(b):

And provided further. It having been determined
414 prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1(b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

Section 2. Each contractor and subcontractor en-
415 gaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ... (name the party signing affidavit) ..... (Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate re-

port of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (project), for the weekly pay roll period from the..... day of ....., 193...., to the ..... day of ....., 193...., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ....193....

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit
416 with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by

Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

417 *Penalty*

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

Exhibit B to answer to third amended bill of complaint.

418 Copy Conformed to

Executive Original

Legal Division, P. W. A.. P. W. 46002-11
Checked Rice Date Dec 6 1935

Federal Emergency Administration
of Public Works

Washington, D. C.
December 4, 1935.
PWA Docket No. 4259.

City of Florence,
State of Alabama.

Filed March 24, 1936.
Frank E. Cunningham,
Clerk.

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric distribution system, including a sub-station, an office building and a warehouse (herein called the "Project") by making a loan and grant to the City of Florence, Alabama (herein called the "Applicant"), in an amount not exceeding in the aggregate the sum of $436,000.

2. *Method of Making Loan.* The Government will purchase from the Applicant; at the principal amount thereof plus accrued interest, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $336,000, less such amount of such obligations, if any, as the

Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Florence;

(b) Type: Special obligation, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: April 1, 1934;

(e) Interest rate and interest payment dates: Four per cent per annum, payable on October 1, 1934, and semi-annually thereafter on April 1 and October 1 in each year;

(f) Place of payment: At the office of the City Treasurer, Florence, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration privileges: At the option of the holder, as to principal only;

(h) Maturities: On April 1 in years and amounts as follows:

1938	$11,000,
1939	$12,000,
1940	$13,000,
1941-1945, inclusive	$14,000,
1946-1955, inclusive	$15,000,
1956-1959, inclusive	$20,000;

(i) Security: Payable solely from and secured
419 only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

3. *Amount of Grant.* The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Government will make the grant either wholly by the payment of money, or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $120,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as heretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plan and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to

aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used;

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete;

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be

421 employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 per cent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 30 percent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto;

(e) *Construction Account.* A Separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account;

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified

in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund;

(g) *Use of Moneys in Bond Fund.* Moneys in the
422 Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment;

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory;

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder;

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount

equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which if is required by the laws of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate;

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor;

(f) That minimum or other wage rates required to
423 be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents;

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner;

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desires, be inserted verbatim in such construction contract or contracts).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such

rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA
Federal Emergency Administrator
of Public Works

By (Sgd.) HORATIO B. HACKETT
Assistant Administrator.

424

Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: PROVIDED, HOWEVER, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United

States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) .....
and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) .....
PROVIDED, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered

by the protection accorded by the contractor. In case
426 any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part

thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such
427 laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the proj-
428 ect, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P.W.A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof,

on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs*—The contractor shall furnish signs bearing the legend: "FEDERAL PUBLIC WORKS PROJECT NO. ....." as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any
429 of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and

perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P.W.A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1(b):

And provided further. It having been determined prior to advertisement that a sufficient amount of
430 labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1(b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employ-

ment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

Section 2. Each contractor and subcontractor en-
431 gaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ... (name the party signing affidavit) ..... (Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (project), for the weekly pay roll period from the ..... day of ....., 193...., to the ..... day of ....., 193...., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force,

intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of .....193..

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affi-
432 davit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' *Statute*" *shall not be construed to prohibit deductions* required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

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433 *Penalty*

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

Exhibit C to answer to third amended bill of complaint.

434 Copy Conformed to
Executed Original
Legal Division, P. W. A.
Checked Rice Date Dec 6 1935

P. W. 46002-15

Federal Emergency Administration
of Public Works

Accepted by applicant
Dec 7 1935

Washington, D. C.,
December 4, 1935.

Date

PWA Docket No. 3124.

City of Sheffield,
Colbert County, Alabama.

Filed March 24, 1936
Frank E. Cunningham,
Clerk

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric transmission line and distribution system, and other necessary appurtenances thereto (herein called the "Project") by making a loan and grant to the City of Sheffield herein called the "Applicant") not exceeding in the aggregate the sum of $230,000.

2. *Method of Making Loan.* The Government will purchase, at the principal amount thereof, plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $187,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Sheffield;

(b) Type: Special obligation, revenue serial coupon bond;

(c) Denomination: $1,000; (d) Date: April 1, 1935;

(e) Interest Rate and Interest Payment Dates: 4 percent per annum, payable semi-annually on April 1 and October 1;

(f) Place of Payment: At the office of the City Treasurer, Sheffield, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration Privileges: Registerable at the option of the holder as to principal only;

(h) Maturities: Payable on April 1 in years and amounts as follows:

Year	Amount
1938-1945 (both inclusive)	$10,000,
1946	11,000,
1947-1954 (both inclusive)	12,000;

(i) Security: Payable as to both principal and in-
435 terest solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof.

3. *Amount of Grant.* The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Government will make the grant either wholly by the payment of money, or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $52,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition:* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project:* If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes:* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes

to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the
436 Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. This advance grant may be used for paying architectural, engi-

neering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment of Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a
437 grant of an amount representing the difference between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 percent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting

the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 30 percent of the actual cost of labor and materials employed on the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to purchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the
438 Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the

condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which it is required by the laws of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage

439 insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desires, be inserted verbatim in such construction contract or contracts).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA
Federal Emergency Administrator
of Public Works
By (Sgd.) HORATIO B. HACKETT
Assistant Administrator.

440 Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: PROVIDED, HOWEVER, That this clause shall not be construed to prohibit

the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom
441 for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) ..... PROVIDED, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor.

442 In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any

one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on
443 the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project,
444 the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the cur-

rent month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs*—The contractor shall furnish signs bearing the legend:

"Federal Public Works Project No. ....."

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-Called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval

of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

445 16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1(b):

446 *And provided further.* It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1(b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 3, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

447 Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ... (name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of)..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of .....(project), for the weekly pay

roll period from the.....day of....., 193..., to the.....day of....., 193..., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this.....day of.....193...

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

448 Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

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449 Penalty

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious

statement * * *'' relating to any matter within the jurisdiction of any governmental department or agency.

450 *Exhibit D to Answer to Third Amended Bill of Complaint*

Copy Conformed to
Executed Original
Legal Division, P. W. A:
Checked Rice Date Dec 6 1935

P. W. 46002-16

Federal Emergency Administration
of Public Works

Washington, D. C.,
December 4, 1935.
PWA Docket No. 3125.
Filed March 24, 1936
Frank E. Cunningham
Clerk

City of Tuscumbia,
Colbert County, Alabama.

1. *Offer.* The United States of America (herein called the ''Government'') hereby offers to aid in financing the construction of an electric transmission line and distribution system, and other necessary appurtenances thereto (herein called the ''Project'') by making a loan and grant to the City of Tuscumbia (herein called the ''Applicant'') not exceeding in the aggregate the sum of $130,000.

2. *Method of Making Loan.* The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $105,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Tuscumbia;

(b) Type: Special obligation, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: June 1, 1934;

(e) Interest rate and interest payment dates: 4 per cent per annum, payable semi-a[illegible]on June 1 and December 1;

(f) Place of payment: Payable at the office of the City Treasurer, Tuscumbia, Alabama, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration privileges: Registerable at the option of the holder as to principal only;

451 (h) Maturities: Payable on June 1 in years and amounts as follows:

Year	Amount
1937 and 1938	$4,000
1939 — 1945 (both inclusive)	5,000
1946 — 1948 (both inclusive)	6,000
1949 — 1952 (both inclusive)	7,000
1953 and 1954	8,000;

(i) Security: Payable as to both principal and interest solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for reasonable cost of operation and maintenance thereof.

3. *Amount of Grant.* The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the project. The Government will make the grant either wholly by the payment of money, or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $30,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a

certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

452 5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per cent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers for any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 per cent of the estimated cost of labor and materials to be employed on the Project. This

advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and cost of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment of Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

453 (c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 15 per cent of said previously estimated cost of labor and materials to be employed upon the Project. When the Project shall be approximately 70 per cent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 per cent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 30 per cent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

454 (f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to purchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have

been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contract will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which it is required by the laws of Alabama that protection for
455 labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and material-

men's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desires, be inserted verbatim in such construction contract or contracts).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating

to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA
Federal Emergency Administrator
of Public Works

By (Sgd.) Horatio B. Hackett
Assistant Administrator.

456 Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any week; Provided, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States,

in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, However, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of.....to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the
457 work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county)..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District)..... Provided, That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or

their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In
458 case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide,.....for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as

well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on
459 the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The

safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their re-

460 spective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs*—The contractor shall furnish signs bearing the legend:

"Federal Public Works Project No. ....."

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

461 16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by

the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1(b):

462 *And provided further.* It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1(b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

463 Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ... (name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of..... .....(project), for the weekly pay roll period from the.....day of....., 193.., to the .....day of....., 193.., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this.....day of.....193..

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

464 Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a

statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause " * * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily author-

ized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

465 *Penalty*

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

466 In the Supreme Court of the District of Columbia

Holding an Equity Court

No. 59671 in Equity

ALABAMA POWER COMPANY, a corporation,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; JOHN HERRICK, Executive Assistant thereof; JOHN J. MADIGAN, Acting Executive Officer thereof; F. E. SCHNEPPE, Director of Projects Division thereof; HENRY MORGENTHAU, JR., Secretary of the Treasury of the United States; W. A. JULIAN, Treasurer of the United States, and GUY AILEN, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, *Defendants.*

Memoranda.

OCTOBER 4, 1935.

Bill of Complaint for an injunction and other relief, filed.

DECEMBER 30, 1935.

Order of Court of Appeals remanding cause, filed.

467 *Decree Setting Aside Decree Dismissing the Bill and Granting Leave to Parties to File Further Pleadings.*

Filed Dec 30 1935

* * * * * * * *

Upon consideration of the order of the United States Court of Appeals for the District of Columbia entered December 19, 1935, and this day filed in the above entitled cause, remanding said cause to this Court with directions to set aside the final decree entered by this Court dismissing the bill, with leave to the defendants to file any further pleadings or to supplement and amend their present pleadings within ten days, and with leave to the plaintiff to amend or supplement its bill of complaint within ten days thereafter; it is by the Court this 30th day of December, 1935,

ADJUDGED, ORDERED and DECREED, That the decree of this Court entered on October 14, 1935, dismissing the bill of complaint as amended, be, and the same is hereby, set aside and vacated; and it is further

ADJUDGED, ORDERED and DECREED, That the defendants be, and they are hereby, granted leave to file any further pleadings or to supplement and amend their present pleadings within ten days from this date; and that the plaintiff be, and it is hereby, granted leave to amend or supplement its bill of complaint within ten days thereafter.

F. DICKINSON LETTS,
Justice.

No objection as to the form of the above decree.

DEAN G. ACHESON,
Attorney for Plaintiff.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

468 *Second Amended Bill of Compliant for an Injunction and Other Relief*

Filed March 2, 1936

* * * * * * * *

Now comes the plaintiff, and by leave of Court files this its amended bill of complaint, and for its causes of action against the defendants alleges:

Paragraph I

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, is a resident and citizen of the State of Alabama, and has its principal office and corporate dom. ile in the City of Attalla, Alabama, and sues in its own right.

Paragraph II

The following defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set f rth:

Harold L. Ickes is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United
469 States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act".

Horatio B. Hackett is the duly appointed, qualified, and acting Assistant Administrator of PWA.

John Herrick is the duly appointed, qualified, and acting Executive Assistant of PWA.

John J. Madigan is the duly appointed and qualified Acting Executive Officer of PWA.

F. E. Schnepfe is the duly appointed, qualified, and acting Director of Projects Division of PWA.

Henry Morgenthau, Jr. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

Guy Allen is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual

drawing and issuing of checks on behalf of the United States, and the actual disbursements of the public funds of the United States.

Each of the foregoing officers or employees is sued on account of acts which he threatens to perform under the pretended authority of Title II of the National Industrial Recovery Act as extended by section 12 of the Emergency Relief Appropriation Act of 1935 and paragraph (a) of the President's Executive Order of June 7, 1935.

Paragraph III

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV

Plaintiff institutes and brings this suit in its several capacities as a citizen and property owner lawfully
470 engaged in business, as the owner of real and personal property and franchises and as a federal, state, county and municipal tax payer sustaining special damages and special tax burdens peculiar to it and not sustained by taxpayers generally. Plaintiff's said business, property and franchises will be irreparably injured, damages or destroyed unless the relief herein prayed for is granted with the result that plaintiff will suffer direct pecuniary loss amounting to many thousands of dollars, all as hereinafter more particularly set forth.

Paragraph V

Plaintiff is a taxpayer of each of the Towns of Guntersville, Hartselle and Russellville, in the State of Alabama, and of the Counties in which such Towns are located, and with respect to its hereinafter mentioned electrical properties and operations in each of said Towns has paid to said Towns and said Counties many thousands of dollars in taxes in the past, and for the twelve months ended December 31, 1934, has paid or incurred the liability to pay such taxes as indicated in the following table:

Town	*Tax Paid*	*County*	*Tax Paid*
Guntersville	$ 1,468.22	Marshall	$ 6,720.68
Hartselle	579.49	Morgan	10,070.71
Russellville	1,350.24	Franklin	4,110.17

Plaintiff is likewise a taxpayer of the State of Alabama, and with respect to its electrical properties and operations in said State has paid to said State many thousands of dollars in taxes in the past, large portions of which sums are paid back by the State to the various communities, including the Towns aforesaid, to be expended by such communities for their municipal purposes; and for the twelve months ended December 31, 1934, plaintiff has paid, or incurred the liability to pay, such taxes to the State in excess of the sum of Nine Hundred Thousand Dollars ($900,000.00). Plaintiff has incurred the liability to pay taxes to the Towns, the counties, the State, and other political subdivisions, for the current tax year 1935, in approximately the same amounts as paid and incurred for the year 1934, as aforesaid.

Paragraph VI

Plaintiff is a taxpayer of the United States, and with respect to its electrical properties and operations in the State of Alabama, including the properties and operations in each of the aforesaid Towns, has paid to the
471 United States many thousands of dollars in taxes in the past; and under the provisions of an Act of Congress, approved June 16, 1933 (48 Stat. 254, 256), for the period ended January 1, 1936, has paid, or incurred the liability to pay to the United States excise taxes in the sum of Two Hundred Seventy Thousand Dollars ($270,000.00) and has incurred the liability to pay to the United States similar taxes for the current year of 1935.

Paragraph VII

Plaintiff alleges that by its charter it has the right to manufacture, supply and sell to the public electric energy produced either by steam or by water as a motive force, or by both, for lighting, heating, power and other purposes. Plaintiff now owns and operates electric public utility properties, serving the public in sixty-five of the sixty-seven counties of the State of Alabama. These properties consist of hydro-electric and of steam generating plants, of high tension transmission lines, of distribution lines, and all equipment and facilities necessary for use in generating, transmitting, distributing, metering and delivering electric

energy to meet the demands of electricity consumers in the State of Alabama.

Plaintiff is now serving, directly and indirectly, approximately two hundred thousand (200,000) customers within said State, and its gross electrical revenue received therefrom in 1934 was approximately Fifteen Million Dollars ($15,000,000). Plaintiff's system is an integrated whole, coordinated so as to anticipate future needs and growth of the communities in the State of Alabama, and represents intensive application of the economies of large-scale, integrated power development. The loss of substantial numbers of its customers in any particular locality would materially impair the benefits to it and its customers derived from such integration.

Plaintiff's system is modern and efficient and in all respects equipped to furnish the public in Alabama with electricity service according to the most advanced standards of electrical engineering. The capacity of its electric plants is adequate to furnish more than the present demand upon it for electricity within said State, a capacity ample to supply all additional uses and users which may reasonably be foreseen in the future.

Among other communities served by said system are the Town of Guntersville, County of Marshall, the Town of Hartselle, County of Morgan, and the Town of Russellville, County of Franklin. These Towns are located in close proximity to each other in the northern portion of
472 the State of Alabama, and together form a vital link in the plaintiff's system in that region. The following table indicates the approximate population of each of said Towns, the approximate number of customers served by plaintiff therein, and the gross revenues of plaintiff from its electrical operations therein for the twelve months ended December 31, 1934:

Town	*Approximate Population*	*Approximate No. of Customers*	*Gross Revenues of Plaintiff from such electric operations for year ending December 31, 1934*
Guntersville	2826	546	$51,546.07
Hartselle	2204	560	24,507.11
Russellville	3146	564	71,186.07

Paragraph VIII

The plaintiff's system, including that portion represented by the aforesaid Towns and the customers therein, is served almost entirely by plaintiff's hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat. 1288), whereby plaintiff was granted a license to build a dam across said river, a navigable water of the United States, at the location named, for the improvement of navigation on such river and the development of the water power inherent therein; and Mitchell Dam and Jordan Dam, likewise on the Coosa River in Alabama; and Martin Dam on the Tallapoosa River in Alabama, which latter three dams were constructed under licenses from the Federal Power Commission, authorized by the Federal Water Power Act (41 Stat. 1063). In granting such licenses the Federal Power Commission found:

1. That each of such dams on the Coosa River were necessary and convenient for the development and improvement of navigation and utilization of power therein;

2. That such dams were best adapted to a comprehensive scheme of development and utilization of such waterways for such purposes;

3. That said Tallapoosa River was a non-navigable stream and that the impounding and the release of the waters of such river would benefit navigation on the Alabama River, a navigable stream, formed by the junction of the Tallapoosa and Coosa rivers;

4. That there was a market in Alabama for the power output of such plants;

5. That such dams were justified in the public interest.

Under and by such Act of Congress and such licenses, plaintiff was required to expend large sums in preparing certain portions of the Coosa River bed for future
473 navigation to and through such dams and in the building of piers in the streams to form ultimate navigation guides to such locks; and, in addition, so to construct such dams that locks could be erected therein as and when the United States determined to complete the navigation from one pool level to the next; by the terms of the Coosa River licenses, the licensee was required to permit of

discharge through its dams, free of cost to the United States, of such part of the flow of the river necessary for the purpose of such lockage and to install such lights, signals, and power for the operation of such navigation structures as might be installed in the future by the United States; and with respect to Lay Dam, the plaintiff is required to convey to the United States a right of way around the end of such dam, and by the subsequent licenses issued to the plaintiff under which Mitchell Dam was erected, the plaintiff was required to make such excavations and perform such other channel work to complete a passage way from the lock around Lay Dam to the pool level created by Mitchell Dam as might be necessary; and in connection with all such work plaintiff spent a large amount of money and has obligations in connection with the future use of such facilities and locks for navigation purposes in a sum that is not capable of present ascertainment. Under and by virtue of such licenses, plaintiff was required also to make such installations in the Coosa and Tallapoosa river projects as the Federal Power Commission should deem necessary from time to time to supply adequately the reasonable market demands of the public. Such hydro-electric projects on the Coosa and Tallapoosa were built at a cost to the plaintiff of an amount in excess of $60,000,000. The completion of such projects on the Coosa River created contiguous slack water pools of 57 miles in length, and when such pools are connected by locks placed in the aforementioned dams such pools will afford a nine-foot depth navigation on such river for a distance of 49 miles.

Plaintiff in good faith accepted the licenses from the Federal Power Commission and built Mitchell and Jordan Dams, resulting in the creation of navigable features of the Coosa River as set out above, and in the improvement of the navigable features of the Alabama River, all with the agreement and understanding under the Federal Water Power Act and the licenses issued to plaintiff thereunder that the plaintiff would secure, as the consideration moving to it for the investment in excess of $60,000,000 made under the licenses so issued, the right and privilege freely to serve the market in Alabama with electric energy.

474 *Paragraph IX*

Plaintiff is authorized by the laws of the State of Alabama to construct, own, operate, and maintain its plant facilities and system in each of the municipalities in which it renders electric service, including Guntersville, Hartselle and Russellville.

On August 10, 1915, the Town of Hartselle, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

On July 5, 1915, the Town of Guntersville, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

On June 28, 1923, the Town of Russellville, by its duly constituted authorities granted unto plaintiff its successors and assigns a franchise and right to construct, maintain and operate throughout said Town an electric distribution system and business.

None of the above mentioned grants of franchises and rights to plaintiff contains any limitation as to the duration of such franchise and right, nor does the general law of the State of Alabama or the corporate powers of plaintiff impose any limit on the duration of such franchise and right, but all of the above mentioned franchises are in perpetuity, and are now in full force and effect.

Plaintiff has continuously and without interruption exercised and performed said franchises from the date of their original grant to the date of the filing of this bill of complaint.

Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the three towns named herein and their inhabitants and is the only person, firm or corporation now able to supply electric light and power to such towns and their inhabitants.

Paragraph X

The plaintiff's properties, plants, lines, and other facilities are modern and efficient and the plaintiff is equipped to and does render efficient and adequate electric utility ser-

vice in all the municipalities and rural districts in
475 which it operates, including the aforesaid Towns, and possesses facilities of adequate capacity to continue the rendition of such type of service for a considerable time in the future without substantial additions thereto.

The rates for sale of electric power and energy of the plaintiff and the character of its service in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission; and the rates now in effect in the territory served by the plaintiff in the State of Alabama and in the Towns aforesaid are rates approved as reasonable by, and placed in effect pursuant to order of, the Alabama Public Service Commission.

Paragraph XI

Plaintiff alleges that its electricty business in the aforesaid Towns is conducted pursuant to valid and subsisting franchise privileges granted to it by the Government of the United States through the Act of Congress and the licenses of the Federal Power Commission referred to in Paragraph V, and by the aforesaid Towns, as alleged in Paragraph VI.

In reliance upon their franchise rights plaintiff and its predecessors have over a long period of years established and operated, and plaintiff now owns and operates the aforesaid services as a going business in such Towns, with many customers and business contacts, financial credit and reputation acquired, established, developed and expanded at great expense and at the risk of the private investment of funds by the holders of its various securities.

The plaintiff is enjoying, and for many years has enjoyed, the goodwill of its customers in the State of Alabama, including the aforesaid Towns. The plaintiff has, and at all times prior hereto has had, ample facilities and is and has been ready and willing to serve any and all customers within the entire territory served by plaintiff's utility systems. The inhabitants of Alabama, and particularly of the Towns of Guntersville, Hartselle and Russellville, are, and for many years prior hereto, have been ready, willing and desirous of using the service of plaintiff. The good relations between the plaintiff and its customers rep-

resents one of its most valuable assets. The plaintiff is rendering, and for many years prior hereto has been rendering, high class, efficient, dependable service at reasonable rates, and, except for the acts of the defendants
476 hereinafter specified, there is every reasonable probability that the friendly business relationships existing between it and its customers in Alabama, and particularly in the Towns of Guntersville, Hartselle and Russellville, will continue indefinitely on the same satisfactory basis which now exists and which has existed for many years past with mutual satisfaction and profit to the plaintiff and its customers.

Paragraph XII

As hereinafter more fully appears, plaintiff is informed and believes and therefore avers that said defendants Ickes, Hackett, Madigan and Schnepfe (hereinafter together referred to as the PWA defendants) acting in concert with anothey agency of the Federal Government, to-wit Tennessee Valley Authority (hereinafter sometimes called TVA) and/or its directors, officers, agents and representatives sometime in the year 1933 formed a plan unlawfully to disrupt the good relations existing between plaintiff and its customers and to invade and destroy the property, business and business relationships of plaintiff in the preceding paragraph described, and conspired and unlawfully agreed together and have ever since so conspired and agreed, by and through unlawful means, including unlawful use of public funds of the United States by PWA to take unlawfully from plaintiff its business, rights and property by destroying the same so far as possible or rendering them useless wholly or to a great but unascertainable degree and greatly impairing, if not wholly destroying the value thereof. Said defendants are now and for some time have been proceeding unlawfully to induce, finance and cause the construction of an electric distribution system in said Towns, and the operation thereof in competition with plaintiff in the sale of electricity in said Towns and elsewhere, where the plaintiff is now lawfully engaged in its business.

Paragraph XIII

Commencing in 1933, the President announced and undertook the execution of a permanent "national power policy" to make electricity "more broadly available at cheaper rates to industry, to domestic and to agricultural consumers", to effectuate Federal regulation of rates for the intrastate generation, distribution and sale of electricity, to establish Federal regulation and control over matters of policy and service in connection with intrastate electric utilities and to promote and bring about public ownership or cooperative ownership of facilities for the generation, transmission and distribution of electricity in intrastate commerce.

477

In furtherance of said "national power policy", the Federal Government has established great Federally owned power projects as "yardsticks" by which to measure cost of electricity and to regulate intrastate rates and charges for electricity and has established or utilized various additional agencies such as PWA, TVA and the Rural Electrification Administration. Such agencies have been and are actually engaged in carrying out various phases of said "national power policy".

In particular, sometime in 1933, after the passage of the National Industrial Recovery Act, the PWA defendants and particularly the defendant Ickes, acting pursuant to and in furtherance of this "national power policy", conceived and have since been executing throughout the United States a plan, scheme or policy to promote public ownership and operation of local intrastate electric utilities regardless of local state policy and to regulate and fix the rates at which privately-owned intrastate electric utilities should serve the public in the various states and thereby to extend Federal control over matters of intrastate commerce and local police power. The plan is not intended to have and in fact does not have any relation to interstate commerce. Its intended and actual effect is control and regulation of entirely local and intrastate commerce and matters of state police power.

It has been carried out through the promulgation by PWA defendants of a policy of constructing with federal funds local intrastate electric utilities under the claim of

authority so to do in the National Industrial Recovery Act or in the Emergency Relief Appropriation Act of 1935 and to the end of regulation of intrastate electric rates through direct federal competition and federally-subsidized competition regardless of whether existing rates were and are established by state authority and were and are reasonable or unreasonable.

In the United States generally, the plan and purpose of the PWA defendants is effected by inducing and persuading the municipalities and other political subdivisions in the various states to conspire and act in concert with the PWA defendants in the accomplishment of their illegal purposes and in the unconstitutional and illegal disbursement of public monies of the United States by joint action in carrying out as Federal Public Works Projects the construction of electric generating and distributing plants and systems within such subdivisions planned, built and financed
478 under the control and direction of the PWA defendants and to be operated in such manner as from time to time directed by the PWA defendants. Such projects wher undertaken, are carried out in such manner that the political subdivisions which are nominally to construct and operate the projects are mere dummies in such construction and operation under the control, direction and domination of the PWA defendants.

In applying this plan in the states generally, the PWA defendants usually threaten private electric utilities in particular locations with the construction of such project with federal monies unless such private utilities agree to establish rates satisfactory to the PWA defendants. The rates so to be established usually demanded by the PWA defendants are arbitrary, unreasonable and non-compensatory. If the private utility threatened with direct federal competition or federally-subsidized competition through the establishment of such project accedes to the demands of the PWA defendants, the project is usually abandoned. If the threat is disregarded, the PWA defendants go forward with the project without regard to the extent of unemployment in the particular location or elsewhere, the relation between employment given by such project and the character of the workers unemployed, the dependability and economic soundness of the existing private utility, the

capacity of the location to absorb the increased electricity produced or other considerations relating to the need for such project, all of which are excluded entirely or given no substantial consideration by PWA defendants in reaching a decision to construct and operate the project.

To induce the necessary concert of action by the political subdivisions in the various states and to procure their consent to such Federal Works Projects, PWA defendants by advertising and other newspaper publicity and by circulars and by direct statements which have been and are being made to the political subdivisions of the several states by the PWA defendants offer to meet the entire cost of such projects by outright gifts of thirty per cent. and more recently, of forty-five per cent. of the cost of the project and by pretended loan of the balance of the cost repayable by its terms only out of the net revenues from the operation of the project so that no financial risk whatever will be incurred by the political subdivision. In the construction and operation of the proposed project either by express contract or by requirements of compliance with general rules, regulations and conditions imposed by the PWA defendants, little, if any, discretion is vested in the particular subdivision with respect to the details of the
479 construction thereof or of the subsequent operation.

Arrangements made by the PWA defendants for the construction and operation of such a project constitute a pretense and sham in that they do not in fact provide for a real loan of monies but merely for the possible recapture of part of the cost of the project out of the net revenues, if any, from its operation, and impose no obligation upon the particular political subdivision and confer no authority upon it in the construction of the project. By express or implied threats of competition with such federally-subsidized projects, the PWA defendants have sought and continue to seek a regulation by them of intrastate electric utility rates and a general and purely arbitrary lowering of intrastate electric utility rates.

This plan is frankly acknowledged by PWA defendants in public press releases and public statements of the defendant Ickes, public offers made generally throughout the several states to their political subdivisions, in instructions given to the agents of PWA charged with the administra-

tion of their affairs, in negotiations with existing private utilities and otherwise. Among other instances, said plan was publicly set forth in Press Release No. 989 under date of September 17, 1934, a copy of which is attached hereto and marked Exhibit "A".

In the Tennessee Valley states, and particularly in the State of Alabama, the general plan of the PWA defendants above set forth has been varied by concert of action with TVA, its directors, agents and representatives in such a fashion as to provide, secure and exercise Federal control over intrastate local distribution rates for electric light, heat, and power through TVA rather than directly by PWA. Specifically PWA has induced and coerced the aforesaid Towns of Guntersville, Hartselle and Russellville to enter into agrements with TVA whereby TVA fixes and determines the rates and charges which said Towns will make for the electricity produced at the contemplated projects. Said agreements are a part of the "national power policy" hereinabove referred to and are intended and designed to further the establishment of federaly controlled "yardsticks" to measure the cost of electricity and to regulate intrastate rates and charges for electricity. This design and purpose is illustrated by the telegram dispatched by defendant Ickes from Washington, D. C., under date of July 11, 1934 to Hon. Lee Glenn, Mayor of Florence, Alabama. Said telegram read as follows:

480 "Washington D C
1934 July 11

Hon. Lee Glenn
Mayor, Florence, Ala.

Lilienthal TVA has explained proposal to communities North Alabama whereby Authority will purchase distribution facilities Florence and other communities from Alabama Company, rehabilitate them and turn them back to communities. Also your proposal amend your application such manner Florence purchases existing facilities and uses PWA funds for rehabilitation and extensions. Lilienthal informs me that all other communities in area affected have approved TVA plan, that Florence alone is holding out. Policy Public Works is to support TVA. Its proposal furthers regional operation rural electrification pursuant to

President's desire, whereas your proposal impedes that policy. This Administration will advance no funds to Florence for expenditures inconsistent TVA plan. It will aid entire region and in our judgment is highly advantageous to you. However allotment and grant will be maintained and pending completion transaction between TVA and Alabama Company. Suggest you promptly take appropriate action accept TVA proposal so that it may exercise option within effective period.

ICKES, *Administrator.*"

In this area PWA defendants have likewise, and in concert with TVA, its directors, officers, agents and representatives, pursued the unlawful purpose and design of regulation by federally-subsidized competition of intrastate electric utility rates and of fostering a policy of public ownership of intrastate electric utilities.

Paragraph XIV

The aforesaid Towns, moved by the actions and inducement alleged in Paragraph XIII, through their respective mayors, filed with PWA applications for Federal Public Works Projects consisting of electric distributing systems to be owned by said Towns, respectively.

While the procedure pursued by PWA, defendant Ickes and his agents in passing upon such applications does not provide for a hearing from those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, plaintiff requested and sought a hearing before PWA relative to said applications of the aforesaid Towns. Plaintiff has, however, constantly been denied the privilege of such hearing. Nevertheless, plaintiff filed with PWA a written protest against the approval of the applications of said Towns. Such protest set out in substance the facts heretofore and hereafter alleged in this bill. There is no further board, agency or official of the United States to whom plaintiff may apply to prevent the consummation of the projects in said Towns. Consequently, plaintiff has exhausted all administrative remedies which it could possibly have to prevent
481 such action.

Notwithstanding plaintiff's protests of the appli-

cations aforesaid, plaintiff is informed, believes and avers that such protests were given no consideration whatsoever by PWA, but that, for no purpose other than that of driving down plaintiff's rates and destroying plaintiff's business in accordance with the plan of PWA aforesaid, *and upon findings* that the action of PWA would in fact destroy and drive out plaintiff's business in said Towns, PWA approved such Public Works Projects for said Towns, to be carried out under pretended loan and grant agreements with the Towns at the times and in the amounts set out hereafter, the funds to be used in the erection and construction, as Federal Public Works Projects under the direction and control of PWA, of complete electric distribution systems in the Towns to serve the same parties and purposes as are now served by plaintiff therein. The amounts proposed to be granted to the Towns are equal to forty-five per cent. of the cost of labor and materials to be employed in the construction of such electric distribution systems. The pretended loans and grants plaintiff alleges, upon information and belief, to be of the approximate amounts set out as follows:

Town	*Loan*	*Grant*
Guntersville	$48,000.00	$39,272.00
Hartselle	33,000.00	27,000.00
Russellville	69,000.00	56,454.00

Paragraph XV

Plaintiff is informed and believes and so alleges that the aforesaid plan to construct the said electric systems as Federal Public Works Projects in said Towns for the purposes and objects hereinbefore alleged will immediately be carried out by PWA and the defendants herein, unless restrained, under the following arrangement:

The defendant Ickes and the said Towns have entered into pretended "loan and grant agreements", which, in effect, provide that the defendant Ickes and his agents shall construct said electricity distribution systems in said Towns and finance said construction by granting outright to said Towns forty-five per cent. of the cost of labor and materials employed in the construction of such systems, and by the pretense of lending to said Towns, by pretended purchase

of their bonds, to be used for such financing and construction, the amounts heretofore alleged. Said grants will be pure gifts or bounties, designed solely to induce the Towns to enter into such arrangements and to insure the accom-
482 plishment of the wishes of PWA and these defendants with respect to the establishment of municipal facilities competing with and superseding the plaintiff. The said Towns have agreed in return that said funds will be made available to them upon requisition only in such amounts as defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of PWA is needed to complete the projects; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of PWA; that all contractors and subcontractors shall be equipped with bonds and insurance as PWA desires; and defendant Ickes may cancel the agreements with the Towns at any time he wishes, if in his opinion said Towns have unreasonably delayed in carrying out any of their duties; that the aforesaid funds shall be available to the Towns only subject to the power of defendant Ickes to withhold them if he deems the Towns' budgetary situations to be unsatisfactory, or if he is not satisfied that the Towns have complied with all provisions of the agreements; and that in other respects the will of defendant Ickes shall control the Towns' actions. It is further a part of said arrangements imposed by PWA that in the construction of such projects the Town or the contractor:

(1) Shall pay a minimum wage to be fixed by law or ordinance;

(2) Shall give preference in employment to ex-service men;

(3) Shall exclude convicts from working on such project;

(4) Shall work no laborer thereon more than eight hours in any one day or more than thirty hours in any one week;

(5) Shall pay each employee on said project in full each week, without deduction of lawful set-offs against such debt;

(6) Shall give the employee on the project the right to organize and bargain collectively free from interference and discrimination because of labor affiliations;

(7) Shall report to PWA and other governmental agencies the number of persons on the payroll, rate of wages and the man hours;

(8) Shall be subject to the pains and penalties of Public Act No. 324 (48 Stat. 948) and the rules and regulations promulgated thereunder.

The said pretended bonds to be issued by the Towns, through the purchase of which the pretended loans from PWA are to be made, are not general obligations of the Towns, but it is expressly understood and agreed between said Towns, respectively, and PWA that said bonds shall not constitute an indebtedness of said Town within the meaning of any provision or limitation of the Con-
483 stitution of the State of Alabama and shall never impose a pecuniary liability upon said Towns or charge against their general credit. Said pretended bonds are payable solely from the revenue to be derived from said projects.

Paragraph XVI

Each of the Towns of Guntersvile, Hartselle and Russellville has exceeded its constitutional debt limit, and there is no market for the pretended income obligations of said Towns described in Paragraph XV in the general financial markets or in any special financial markets, and except for the proposed acts of the defendants, the said Towns would be unable to secure monies for said purposes.

Paragraph XVII

The proposed projects of the PWA defendants with the said Towns are not for a national or other public purpose for the following reasons:

(1) There is no need for the construction of an electric distribution system in said Towns since any and all possible need for electric energy and service in each of said localities is now, and for a long time past has been, and will continue to be, fully and adequately provided by private capital and enterprise and by means of capital invested in and represented by plaintiff's existing plant and equipment, which it operates as a public utility subject to the laws of the State of Alabama.

(2) The proposed projects are solely local projects confined to the area in which they are to render electric services and solely for the local and private welfare and benefit of the consumers of electricity in said area and are not and cannot be for the purpose of serving or providing any benefit for the general public of the United States, and will not and cannot promote the general welfare of the United States. The projects will, if anything, be to the general detriment of the United States by reason of creating unnecessary and wasteful duplication of electric distribution facilities and causing unemployment and loss of invested capital.

(3) The expenditure of federal funds for such projects can inure, if at all, only to the private benefit of the consumers of electricity in and about said Towns and such Towns in their private and commercial capacities, and said expenditures are solely and purely for private purposes.

(4) The only possible further benefit which could be served or promoted by the expenditure of federal funds for the proposed projects is the private and individual benefits to manufacturers and producers of material, equipment and electrical appliances to be purchased, acquired and constructed thereby, and to the builders, contractors and providers of labor to be expended in the assembling and construction thereof, and if any secondary or ultimate or incidental benefit should result from the stimulation of industry and increase of profits in the manufacture, sale, assembly, transportation and installation of materials entering into the construction of said property, the same will be merely a secondary, remote and contingent benefit, and the expenditure of public funds for such purposes will constitute a disbursement and expenditure for the private gain and profit of such manufacturers, sellers and contractors.

Paragraph XVIII

The federal funds employed in making loans and grants for the construction of municipal or publicly owned utilities, and particularly the funds to be employed for
484 the proposed loan and grant to the aforesaid Towns, are largely, if not wholly, monies borrowed on the credit of the United States.

Paragraph XIX

The threatened action of the defendants herein pursuant to the aforesaid arrangement with said Towns (including particularly the threatened loan and grant and disbursement of public funds of the United States and delivery thereof to said Towns for the purposes and uses herein set out) is illegal and unauthorized by, and contrary to, the terms and purposes of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the defendants are wholly without authority in law to perform any of the acts which said arrangements with the said Towns contemplate to be performed by them as herein alleged, because:

(1) Section 202 of the National Industrial Recovery Act as extended provides that the Administrator shall prepare a comprehensive program of public works. Section 203 provides that the Administrator may construct, finance, or aid in the construction or financing of any public works project "included in the program prepared pursuant to Section 202". PWA has announced that allotments are being and will be made before such a comprehensive program is prepared. In line with this policy, allotments have been made in the absence of the preparation of such program, no such program has ever been prepared, the allotment herein and the action of the defendants in financing and constructing the proposed plants and systems are being performed in the absence of the preparation of such a program, and the projects herein alleged have never been included in any such program. The only program ever prepared is the sum of particular projects which PWA has, from time to time, determined to carry out; this is not the preparation of a program under Section 202, but is a mere catalogue of action taken without any such program.

(2) Said projects are not reasonably designed for, or capable of, increasing employment quickly. Plaintiff avers that the amount of employment which will be given by the construction of said proposed distributing system and transmission lines will be small and temporary, wholly out of proportion to the enormous sum contemplated to be expended and to the tremendous loss and injury to plaintiff's business and property. Indeed such construction will

cause, by its inevitable impairment and possible destruction of the plaintiff's operations and business in said Towns, the unemployment of many and possibly all of those now engaged in plaintiff's operations and business in said Towns.

(3) Section 202 of the National Industrial Recovery Act, as extended, by particularly enumerating, in the list of Public Works for which public monies might be loaned and granted, the following "development of water power" and "transmission of electrical energy", has excluded from the projects included in said acts, electrical plants and systems other than water power and electricity transmission systems, such as the plants and systems contemplated by said projects. Neither said provision nor any other provision of said section authorized a publicly-owned distribution system of this sort. Furthermore the purported authority to make a grant such as that contemplated, expired on June 16, 1935, by virtue of Section 201 (d) of said Act, and such purported authority was not extended by the Emergency Relief Appropriation Act of 1935. Nor does such Act of 1935 authorize a project of this type. Among other things, this project, as heretofore alleged, will not be self-liquidating.

(4) Said pretended loans are not repaid and cannot be reasonably secured since they are to be repaid only from, and secured only by, the net earnings of the projects, which will be wholly insufficient to pay operating expenses.

485 Said projects are wholly useless and wasteful in that they duplicate plaintiff's existing, adequate systems, and because they are uneconomic and unsound in that independent systems cannot be maintained save at exorbitant rates, if at all, in said Towns, due to the small number of possible customers. The projects can result only in disastrous rate wars, destructive of both plaintiff's facilities and the projects themselves. The small demand in each of said Towns can support only one such utility. The additional projects will be not only useless but predatory; their effect will be to decrease, instead of promote the fullest possible utilization of the present productive capacity of the electrical industry, and particularly that portion of the industry carried on by plaintiff.

No unusual emergency has arisen which necessitates the making of a grant by PWA for the construction of a publicly-owned electrical plant and system at Guntersville, Hartselle and Russellville, Alabama. The conditions with respect to the rendition of electrical service in such Towns are now the same as they have been for a number of years in the past, except that substantially lower rates for such service have been made effective in recent years, and material improvements in the facilities for furnishing such service have been made. Plaintiff is adequately supplying all demands for electrical service in such Towns.

(5) Said proposed and contemplated arrangements would violate the laws of the State of Alabama in that the undertakings assumed or proposed to be assumed by the said Towns under said arrangements would, if carried out, constitute an unlawful delegation to foreign agents of their sovereign duties. More specifically, the Towns propose to surrender to these defendants complete control of the terms, manner and purpose of expenditure, the regulation of the construction and the cost thereof, the regulation of the type of labor to be used thereon, choice of contractors, laborers and other agents, the selection and approval of materials and the regulation of labor costs thereon, the regulation of rates to be charged for electricity service, and other matters, at the same time leaving to the defendants the determination of whether said funds shall be withheld and the projects remain uncompleted, and said Towns would otherwise delegate to the PWA defendants their responsibilities, duties, and power in respect to the construction, financing and operation of said plants and distribution systems.

Furthermore, the law of the State of Alabama will be violated in that the grants and loans by PWA are, for reasons heretofore and hereafter set out, invalid and therefore the Towns will be obligated immediately to refund to PWA the amount of the grants so illegally made and accepted by them and the Towns will thereby become indebted to PWA in violation of statutory provisions of the State of Alabama with respect to the manner and amounts of the indebtedness which may be legally incurred by the Towns.

(6) Said proposed and contemplated arrangements provide or will provide by their terms for the supervision, control and direction of many things by PWA subsequent to

June 30, 1937, whereas PWA by law is continued in any event, if at all, only until June 30, 1937.

(7) Said projects are undertaken by the defendants along with other similar projects for the express purpose of controlling and lowering intrastate electricity rates within each state of the United States, of fostering a policy of public ownership of intrastate electric utilization in the United States.

(8) Said projects are specifically designed to impair the value of plaintiff's property, franchises and rights by selling electricity to municipalities and customers now served by plaintiff in Alabama.

(9) No provision of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935 or of any other law of the United States authorizes any part of such funds to be loaned or granted to said Towns for the acquisition of real estate or rights of way for such distribution systems or transmission lines as are contemplated. Plaintiff is informed and believes and therefor avers that it is proposed and planned that said Towns shall use substantial amounts from said funds for the acquisition of such real estate and rights of way.

(10) Neither the National Industrial Recovery Act, 486 nor the Emergency Relief Appropriation Act of 1935, nor any other Act of Congress, authorizes the making of loans and grants to finance competitive projects, destructive to lawful private industry already established and adequately serving the public. The result of the construction of the proposed projects will be to interfere with, instead of to "promote the fullest possible utilization of the present productive capacity of industries," as required by Section 1 of the National Industrial Recovery Act. The making of loans and grants for such projects, as herein contemplated, tends to increase unfair competitive practices instead of to "eliminate unfair competitive practices" as required by said Section. Competitive projects are likewise contrary to the rules prescribed by the President of the United States under the National Industrial Recovery Act, as set forth in PWA Circular No. 1, which provides that "projects for the transmission of electric energy into territory not now served" will be preferred for grants.

(11) No provision of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, or of any other law of the United States, authorizes the PWA defendants to undertake such projects (as they are doing), for the express purposes of controlling and lowering intrastate electricity rates within each state of the United States without reference to the reasonableness of existing rates and fostering a policy of public ownership of intrastate electric properties in the United States.

(12) The grant and loan of Federal moneys to said political subdivisions, under the conditions, penalties, threats and coercion herein set forth, is an attempt by the PWA defendants to acquire for the Federal Government control over matters of a purely intrastate nature, forbidden to it by the Federal Constitution, through the device, expedient and indirect means of contractually requiring the vesting of such control in the Federal Government as a condition of the making of such grants and loans.

Paragraph XX

If and to the extent that said National Industrial Recovery Act as extended and/or said Emergency Relief Appropriation Act of 1935 be held in terms to confer upon said defendants or any of them, or upon any officer of the United States power to do any of the acts or things herein complained of, said acts, said purported power, and said actions and things attempted to be done in reliance thereon are unlawful, unconstitutional and void for the following reasons:

(a) Neither of said Acts nor the actions and things attempted to be done in reliance thereon are authorized by any power delegated to the Federal Government by the Constitution;

(b) The National Industrial Recovery Act as extended and the Emergency Relief Appropriation Act of 1935 severally attempt to extend Federal power over matters of intrastate commerce and State police power, including the regulation of intrastate public utilities, in contravention of the Ninth and Tenth Amendments to the Federal Constitution and constitute the taking of plaintiff's property in violation of the Fifth Amendment to the Federal Constitution;

(c) Neither Title II of the National Industrial Recovery Act as extended, nor any section thereof, nor said Emer-

gency Relief Appropriation Act of 1935, nor any section thereof, indicates any standard to guide those officers charged with the administration of said Acts, but on the contrary both delegate legislative power to the President and, under said Acts and to effectuate their purposes, the

President is permitted and does redelegate such leg-
487 islative power to PWA, and said Act permits and authorizes the President and PWA to promulgate such rules and regulations, having the effect of law, as will in his judgment best provide for the general welfare, all violative of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1 of the Constitution of the United States;

(d) Section 12 of the Emergency Relief Appropriation Act of 1935 purports to delegate to the President of the United States the purely legislative function of determining what, if any, functions conferred upon PWA by the National Industrial Recovery Act shall be performed by PWA after June 16, 1935. PWA is an authority purported to be constituted by Act of Congress with functions specified and defined by such Act of Congress expiring, by the provisions of said National Industrial Recovery Act, June 16, 1935. Said Section 12 of the Emergency Relief Appropriation Act of 1935 seeks unlawfully to delegate the legislative power of Congress to specify the powers, authority and duties of its own creature, PWA, to the President without indicating any adequate legislative standard to guide the President in the determination of what powers, authority and duties shall be vested in PWA after June 16, 1935, in violation of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; and Article II, Section 1 of the Constitution. Accordingly, any and all acts by PWA, its officials, employees and agents, including defendant Ickes and the other defendants herein who are officials of PWA, are without warrant in law and illegal;

(e) Neither Title II of the National Industrial Recovery Act, as extended, nor any section thereof, nor said Emergency Relief Appropriation Act of 1935, nor any section thereof contains any definite appropriation by the Congress of the United States of any funds to be granted or "loaned" to the said Towns for the construction of electric distribution systems or electric transmission lines or any standard

to guide those officers charged with the administration of said laws in the determination that each of said Towns is a party or one of a class of parties for whose benefits an appropriation for any such purpose or purposes was made by the Congress and said laws and each of them delegates legislative power to select the subject of appropriations and the beneficiaries of the appropriations to the President, and under said laws and to effectuate their purpose the President is permitted to, and does redelegate such legislative power to PWA in violation of Article I, Section 1; Article I, Section 9, Clause 7; and Article II, Section 1 of the Constitution of the United States:

(f) Neither Title II of said National Industrial Recovery Act as extended, nor said Emergency Relief Appropriation Act of 1935, nor any Administrative regulation or procedure followed by PWA or the defendants in administering said Title provides for any method whereby persons whose rights will be injured and whose property will be taken by the actions of the defendants may be given an opportunity to be heard, and plaintiff has not been afforded any opportunity to be heard although the defendants herein threaten to take its property and said Acts and the actions taken thereunder by the defendants for that reason deny due process of law as a matter of procedure in violation of the Fifth Amendment to the Federal Constitution.

(g) If the said pretended loans and grants of funds are made to the Towns as aforesaid, the plaintiff will be deprived of its property without due process of law and its property will be taken without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

(h) If it be that these defendants seek and find some purported authority in the Emergency Relief Appropriation Act of 1935 further than that granted in Paragraph
488 (a) of the President's Executive Order of June 7, 1935, any such further authority is baseless and void for the reasons heretofore set out.

(i) The funds of the United States available and to be used for the projects herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such author-

ity conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said Towns. Said projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be merely for the private gain and profit of such manufacturers, sellers and contractors.

(j) Each of said Acts in contravention of the Ninth and Tenth Amendments to the Federal Constitution, attempt to abridge the rights of plaintiff, its officers, employees and security holders, to earn a livelihood, and to use and enjoy its properties, all located within the State of Alabama, and to derive a reasonable return therefrom.

Paragraph XXI

Action by these defendants in the respects herein set forth, whether in furtherance of the unlawful conspiracy herein alleged or otherwise, will amount in practical substance and effect to actual construction and operation of the projects herein complained of by these defendants without warrant in law and illegally and not by the aforesaid Towns.

Paragraph XXII

Plaintiff avers that its capital investment in properties located in the Towns is not less than the amounts herein set out, to wit:

Guntersville	$90,000
Hartselle	70,000
Russellville	140,000

And a large portion of the balance of its capital investment in generating plants, transmission lines, substations and other machinery and equipment necessary in furnishing electric service to the Towns is allocable to the investment used and useful in furnishing such service.

Plaintiff avers that it has valid and subsisting contracts with each of said Towns for supplying such Towns
489 with electricity for schools, public buildings and other municipal purposes, and has valid and subsisting contracts with the inhabitants and industrial consumers in such Towns for supplying their demands for electricity. Plaintiff is informed and believes and therefore avers that each of such Towns, in the event such loans and grants are made, intend to breach its said contracts with plaintiff and take its requirements for electricity from such municipal project. Each of said Towns through its agents or servants has solicited the patronage of plaintiff's other customers for the proposed municipal project and has secured written contracts with a large part of such customers, whereby the proposed municipal project will supply such customers' electric demands for a period of ten years. PWA has full knowledge of such intent and activity of the Towns and encouraged and conspired with the Towns thus to interfere with and procure the breach of plaintiff's contracts with such Towns and with the inhabitants thereof.

If the Towns of Guntersville, Hartselle and Russellville obtain municipal distribution systems to be operated in competition with plaintiff, plaintiff will be compelled either to suffer substantial and continuous losses in its operations in such Towns or to abandon entirely its property and system therein, as shown by the fact that, instigated and directed by PWA, the agents or servants of each of the Towns have made a house-to-house canvass of plaintiff's customers in their respective Town, soliciting their patronage for the Town's proposed electric plant, and have reported to PWA that the project will not be competitive since practically all of plaintiff's customers have entered into contracts to purchase their electricity requirements from the proposed

municipal projects as soon as service therefrom can be begun.

If defendants are permitted to consummate their unlawful projects in the Towns of Guntersville, Hartselle and Russellville, plaintiff is informed and believes and therefore states that they will undertake similar projects in many other cities and towns in the State of Alabama in which plaintiff is engaged in supplying electric public utility service, and construct a large number of muncipal electric plants to be operated in ruinous competition with plaintiff.

As heretofore alleged the business of the plaintiff is made up of a combination of businesses done by it in cities, towns, and rural areas in the State of Alabama as more particularly elsewhere alleged herein, all of which are con-
490 nected with its system of transmission lines and served by its hydro generating plants. Each local business enables plaintiff better to serve the others and is incapable of withdrawal without substantial impairment of plaintiff's ability to serve the remainder of its customers. The withdrawal of a large number of these local businesses would substantially impair plaintiff's ability to continue operation as a going concern in that it would destroy, make useless, and cause to lie idle much of plaintiff's modern, efficient and valuable properties, including dams, steam plant, transmission lines, and distribution systems.

Paragraph XXIII

Plaintiff is informed and believes, and therefore alleges, the said defendants, aided and abetted by the said Towns and their respective officials, will, unless restrained by this court, immediately proceed with such projects of constructing said electric distribution systems in said Towns in accordance with said unlawful arrangements and will consummate the execution of said proposed and contemplated arrangements and will perform the acts and do the things therein contemplated. Said Towns have presented or are about to present to defendant Ickes or to one or more of the defendants, officers of PWA, or their agents, initial requisitions of money to be furnished pursuant to said contemplated unlawful arrangement, and said PWA defendants or the defendants Morgenthau, Julian and Allen will, unless

restrained by this court, pay over to said Towns all or a large portion of the loan and grant of public funds of the United States as contemplated to be provided in said arrangements, and will immediately take further steps in consummating said projects. Each and all of the foregoing threatened acts of said defendants will result in immediate and irreparable injury, loss and damage to plaintiff, as herein specifically alleged.

Paragraph XXIV

If the defendants or any of them are permitted to continue in said unlawful conspiracy or to carry out the provisions of the unlawful contemplated arrangements, or to do any or all of the acts threatened by them as hereinbefore alleged, the property right of plaintiff to operate its property and to enjoy its franchise free from injurious competition brought about by unlawful means and to conduct its intrastate business and charge rates free from unconstitutional interference and domination by an agency or agencies of the federal government, will immediately be invaded and destroyed; the value of the business of plaintiff in said Towns and of its tangible and intangible property acquired and used therein, will immediately be greatly damaged and impaired, and finally rendered utterly worthless. It will immediately be impossible for plaintiff to obtain new customers or to increase the consumption of electricity by its present customers, but on the contrary
491 plaintiff will immediately lose great numbers of its customers and must engage in a destructive rate war with the danger of being forced to retire from business; furthermore, by reason of said unlawful project it will be impossible for plaintiff to sell or otherwise to dispose of its business and property save as junk and waste.

Further, the plaintiff as a taxpayer subjected to special, rather than general tax burdens, will be specially injured as in this paragraph set forth, and will have been and, in the future will be, subjected to a deprivation of its property for a purpose without warrant in law or in the Constitution and in violation thereof.

By reason of all of the foregoing facts, the plaintiff, through unlawful interference with, injury to, and deprivation of its property and franchises, will suffer loss of its

property without compensation and without that due process of law guaranteed it by the Fifth Amendment to the Constitution of the United States, and such injury and deprivation will constitute an immediate and irreparable loss, for which it has and can have no adequate remedy at law.

Paragraph XXV

Plaintiff alleges that it is futile to ask the defendants to rescind their aforesaid unlawful arrangements with the said Towns and their officials. The PWA defendants, aided and abetted by the TVA, its directors, officers, agents, employees and representatives, have for nearly two years continued negotiations with such Towns to consummate some such arrangements with them and have finally induced the Towns and their officials to revise the original arrangements so as to vary substantially therefrom, and, as is herein alleged, said Towns and their officials have been continuously advised, urged and incited by the PWA defendants herein and TVA, its directors, officers, agents, employees and representatives, to press said applications and revise the same, from time to time, to conform to the desires and will of said defendants in furtherance of their unlawful conspiracy against the plaintiff herein alleged.

Paragraph XXVI

The said Towns of Guntersville, Hartselle and Russellville and the members of their respective governing bodies are not made parties defendant hereto for the reason that they are without the jurisdiction of this court, and service of process cannot be had upon them in the District of Columbia. The said Towns have, as hereinbefore alleged, announced their intention to aid and abet the PWA in the immediate consummation of the said project, and plaintiff is informed and believes, and therefore alleges, that
492 unless the defendants are immediately restrained from doing so they will at once perform the acts alleged herein; plaintiff is further informed and believes, and therefore alleges, that the giving of notice of application for a restraining order would precipitate said unlawful acts and that said acts would do all the mischief complained of by the plaintiff herein and would result in

immediate and irreparable injury, loss and damage to the plaintiff, whereas restraint of the doing thereof until disposition of plaintiff's application for a temporary injunction has been made would result in no detriment or injury to the defendants.

WHEREFORE, the premises considered, the plaintiff prays:

(1) That process issue against the defendants requiring them to answer this bill (but not under oath or affirmation, the benefit whereof is hereby expressly waived by the plaintiff).

(2) That this court grant plaintiff a temporary restraining order against defendants, and each of them, enjoining each and all of the defendants, their officers, agents and all persons acting in the aid of said defendants and their successors in office (in so far as they are not already restrained by order of this court), from continuing to do any acts or things in any respect in furtherance of the conspiracy herein alleged, from doing any act or thing towards the execution of said alleged unlawful arrangement for a loan and grant to the Towns of Guntersville, Hartselle and Russellville or from performing any act in contemplation thereof or pursuant thereto; and from in any manner aiding in the construction of or from financing the construction of said electric distribution systems in the Towns of Guntersville, Hartselle and Russellville; and from honoring any requisition and from transferring, lending, giving or disbursing to said Towns any funds whatsoever for the purpose of constructing or financing the construction of said electric systems.

(3) That after notice and hearing the court enter a preliminary injunction to the same effec

(4) And that upon final hearing this court enter
493 a final order and decree to the same effect.

(5) And for such other and further relief as to the court may seem meet.

ALABAMA POWER COMPANY

By P. W. TURNER

Its Vice-President

EDWARD B. BURLING
SPENCER GORDON
DEAN ACHESON
HOWARD C. WESTWOOD
Solicitors for the Plaintiff,
Union Trust Building
Washington, D. C.

NEWTON D. BAKER
Solicitor for Plaintiff
Cleveland, Ohio

P. W. TURNER
Solicitor for the Plaintiff
Birmingham, Alabama

DISTRICT OF COLUMBIA, *ss:*

494 **P. W. Turner**, being duly sworn, deposes and says that he is Vice-President of Alabama Power Company, a corporation organized under the laws of the State of Alabama, the plaintiff named in the above entitled cause, that he has authority to make this affidavit in behalf of said corporation, that he has read the foregoing amended bill of complaint by him subscribed and knows the contents thereof and that the statements therein made are true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he verily believes the statements to be true.

P. W. TURNER

Subscribed and sworn to before me this 29 day of February, 1936.

T. C. NEIDINGER,
Notary Public.

(Seal)

495 EXHIBIT "A"

Filed March 2, 1936
Frank E. Cunningham
Clerk

PWA Press Section
Immediate Release
Release No. 989

Achievement in certain instances of the administration purpose of making electric energy more widely available

at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

Municipal or local publically owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

The statement of Administrator Ickes followed action by some privately owned utilities, which, on re-examination of their condition, found it possible to reduce rates to a point below those proposed by municipal projects plants.

In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

Since the Public Works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cognizant of the greater use of power resulting from lower rates.

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable
496 where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect

rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

"Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

"PWA will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

"State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect."

497 *Answer to Second Amended Bill of Complaint*

Filed March 24, 1936.

* * * * * * *

Come now Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; John Herrick, Executive Assistant thereof; J. J. Madigan, Acting Executive Officer thereof; F. E. Schnepfe, Director of Projects

Division thereof; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States; and Guy Allen, Chief Disbursing Officer, Division of Disbursements, Treasury Department of the United States; defendants in the above entitled case, and each of them, and for answer to the second amended bill of complaint, say:

498

I.

These defendants are informed that plaintiff is a corporation incorporated under the laws of the State of Alabama, but are without knowledge as to any of the other allegations contained in Paragraph I of the bill of complaint.

II.

Defendants Harold L. Ickes, Horatio B. Hackett, J. J. Madigan and F. E. Schnepfe (hereinafter referred to jointly as "the PWA defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that they are threatening to perform any acts under pretended authority.

Defendants Henry Morgenthau, Jr., W. A. Julian and Guy Allen (hereinafter jointly referred to as "the Treasury defendants") admit the allegations of Paragraph II of the bill of complaint pertaining to them, except that they deny that the Treasurer is in control of the disbursement of public funds of the United States, and aver that he is in control only of the payment of checks drawn upon him and that, with certain minor exceptions not applicable to the instant situation, he has no control over the drawing of such checks; and further deny that they are threatening to perform any acts under pretended authority.

III.

These defendants are advised that the allegations contained in Paragraph III are conclusions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

IV.

Defendants deny each and every allegation of fact contained in Paragraph IV of the bill of complaint.

V.

These defendants are without knowledge as to any of the allegations contained in Paragraph V of the bill of complaint, and demand strict proof thereof.

499

VI.

The PWA defendants are without knowledge as to the allegations of Paragraph VI of the bill of complaint, and demand strict proof thereof.

The Treasury defendants admit that plaintiff is a taxpayer of the United States, but say that information as to the amount of taxes paid, and the amount of tax liability incurred, is contained in other offices, that the necessary steps to secure said information have been taken, but that, as yet, they are without knowledge as to the accuracy of the amounts averred in Paragraph VI of the bill of complaint.

VII.

These defendants are without knowledge as to any of the allegations contained in Paragraph VII of the bill of complaint, and demand strict proof thereof.

VIII.

These defendants are without knowledge as to the allegations of Paragraph VIII of the bill of complaint, and demand strict proof thereof, except that the PWA defendants deny that by the terms of the Federal Water Power Act, or any license, agreement or understanding pursuant thereto, the plaintiff is entitled to be protected from competition in the sale of electrical energy by municipalities having a lawful right to engage in such business.

IX.

These defendants are without knowledge as to any of the allegations contained in Paragraph IX of the bill of complaint, and demand strict proof thereof.

X.

These defendants are without knowledge as to any of the allegations contained in Paragraph XI of the bill of complaint, and demand strict proof thereof.

500

XI.

These defendants are without knowledge as to any of the allegations contained in Paragraph XI of the bill of complaint, and demand strict proof thereof.

XII.

The PWA defendants deny each and every allegation contained in Paragraph XII of the Bill of Complaint.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XII of the bill of complaint, and demand strict proof thereof.

XIII.

The PWA defendants deny each and every allegation contained in Paragraph XIII of the bill of complaint, except as hereinafter admitted or qualified.

Further answering the allegations of Paragraph XIII, the PWA defendants say that they are engaged in administering the provisions of Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935; that by the terms of the Emergency Relief Appropriation Act of 1935, and Executive Orders of the President pursuant thereto, the Federal Emergency Administrator of Public Works, with the approval of the President, is authorized, for the purpose of providing work relief and to increase employment by providing for useful projects, to make loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project.

That upon the adoption of said Act, applications were received from States, municipalities, and other public bodies throughout the United states for aid in financing the construction of a large variety of useful public proj-
501 ects, including, inter alia, airports, tunnels, bridges, hospitals, jails, swimming pools, streets and high-

ways, waterworks, sewage and drainage systems, and electric generating, transmission and distribution systems; that all such applications have been carefully examined for the purpose of determining whether the application is authorized by law, and whether the project meets the requirements of the Act of Congress above referred to; that after such examination, the Federal Emergency Administrator of Public Works, with the approval of the President, has included in the comprehensive program of public works many thousands of useful public projects, and has approved the making of loans or grants, or both, to aid in financing the construction thereof, having first determined that each such loan or grant meets the requirements of the Emergency Relief Appropriation Act of 1935, and Executive Orders of the President pursuant thereto, and will effectuate the purposes of said Act.

Said defendants further say that the projects included in such comprehensive program have not been limited to a particular section of the country, the comprehensive program being national in scope; that the projects have not been limited to any particular type or class, but have been greatly diversified; that defendants have not solicited urged, or induced the construction of any particular type of useful public project, but have acted only at the instance and request of the municipality concerned; that where application is made for a loan or grant, or both, to finance or aid in financing the construction of a project which will involve competition between a municipality and a privately owned utility company, the Administrator has taken the position that it was the intention of Congress that the question of whether such competition is desirable should be left entirely to the municipality concerned; that where a grant only is made, the Administrator has not given any consideration to the question of rates to be charged by a municipality; that where, as in these cases, loans are made to be repaid out of the revenues of the project and not out of local taxes, the Administrator, in determining
502 whether the loans are reasonably secured, has considered the prospective earnings of the projects, and solely for that purpose, the rates which the municipalities proposed to charge; that the loans and grants to the cities

of Guntersville, Hartselle and Russellville were made pursuant to the policy outlined herein; that the sole aim and desire of these defendants is to carry out the mandate of Congress as set forth in the Statutes herein referred to.

The PWA defendants further allege that their activities under and pursuant to said statutes and Executive Orders have resulted in a vast increase in employment and an improvement in the national prosperity, including, among other things, a vast improvement in the credit of municipalities, an increase in the value of municipal bonds and a consequent increase in the assets of national banks and other financial institutions throughout the United States.

The PWA defendants admit that Press Release No. 989, a copy of which is attached to the second amended bill of complaint, was issued by the Press Section of the Public Works Administration on September 17, 1934, and that on July 11, 1934, the Administrator dispatched a telegram to Hon. Lee Glenn, Mayor of Florence, Alabama, a copy of which is set forth in the bill of complaint; said defendants say that such press release and telegram were not intended to and do not adequately set forth the policy of PWA with respect to municipal electric projects and at most, set forth an incomplete statement of such policy; that the true and correct policy of PWA with respect to such projects is as set forth herein.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XIII of the bill of complaint, and demand strict proof thereof.

503

XIV.

The PWA defendants admit that applications were filed by the cities of Russellville, Guntersville and Hartselle, in the State of Alabama, for loans and grants to aid such cities in financing the construction of municipal electric distributing systems in such cities; that loans and grants for such purposes have been approved by the Administrator and the President in the following amounts:

	Loan	Grant
Guntersville,	$48,000.00	$39,272.00
Hartselle,	33,000.00	27,000.00
Russellville,	69,000.00	56,454.00

Said defendants deny each and every allegation of Paragraph XIV of the bill of complaint, except as herein specifically admitted or qualified, and further say that plaintiff has been afforded an opportunity to present its objections to the proposed projects, and that such objections were given careful consideration.

The Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XIV of the bill of complaint, and demand strict proof thereof.

XV.

The PWA defendants aver that PWA has agreed in writing to make loans and grants to the cities of Guntersville, Hartselle, and Russellville, in the State of Alabama, to aid in financing the construction of municipal electric distributing systems; that all of the conditions of such loans and grants are contained in the Government offers, dated December 4th, 1935, and that there are no conditions, express or implied, except as set forth therein; that true and accurate copies of said offers are appended hereto and marked Exhibits "A", "B", and "C".

Said defendants deny each and every allegation contained in Paragraph XV of the bill of complaint, except as hereinabove admitted or qualified.

The Treasury defendants say that they are without
504 knowledge as to any of the allegations contained in Paragraph XV of the bill of complaint, and demand strict proof thereof.

XVI.

The PWA defendants deny each and every allegation of fact contained in Paragraph XVI of the bill of complaint.

The Treasury defendants are without knowledge as to any of the allegations of Paragraph XVI of the bill of complaint, and demand strict proof thereof.

XVII.

These defendants deny each and every allegation of fact contained in Paragraph XVII of the bill of complaint:

XVIII.

Defendants deny each and every allegation contained in Paragraph XVIII of the bill of complaint, and say that the funds of the United States are not so allocated that borrowed moneys can be distinguished from the other moneys in the Treasury.

XIX.

The PWA defendants deny each and every allegation of fact contained in Paragraph XIX of the bill of complaint, and, further answering, say that the proposed action of the cities in constructing municipal electric distributing systems and issuing obligations of the type described in Exhibits "A", "B", and "C" has been upheld as valid by the Courts of Alabama in similar cases.

The Treasury defendants deny each and every allegation of fact contained in Paragraph XIX, in so far as it pertains to them, and say that they are without knowledge of every other allegation contained therein, and demand strict proof thereof.

505

XX.

These defendants deny each and every allegation of fact contained in Paragraph XX of the bill of complaint.

XXI.

These defendants deny each and every allegation of fact contained in Paragraph XXI of the bill of complaint.

XXII.

The PWA defendants say that they are without knowledge as to the allegations contained in the first, second, and last sub-paragraphs of Paragraph XXII of the bill of complaint. They also say that they are without knowledge of the allegations of the third subparagraph of Paragraph XXII of the bill of complaint, except that they deny the allegations in the last sentence thereof.

Said defendants deny each and every allegation contained in Paragraph XXII of the bill of complaint, except as hereinabove qualified.

The Treasury defendants deny the allegations contained in the fifth subparagraph of Paragraph XXII of the bill

of complaint. They say that they are without knowledge as to each and every other allegation of the bill of complaint, and demand strict proof thereof.

XXIII.

The PWA defendants admit that, unless restrained, they will make loans and grants to the cities of Guntersville, Hartselle and Russellville, in accordance with the terms of the offers (Exhibits A, B, and C), but deny all other allegations of Paragraph XXIII of the bill of complaint.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on moneys appropriated by Congress, but deny each and every other allegation of fact pertaining to them,
506 contained in Paragraph XXIII of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

XXIV.

The PWA defendants deny each and every allegation of fact contained in Paragraph XXIV of the bill of Complaint; but the Treasury defendants say that they are without knowledge as to any of said allegations and demand strict proof thereof.

XXV.

The PWA defendants deny each and every allegation of fact contained in Paragraph XXV of the bill of complaint; but the Treasury defendants say that they are without knowledge as to any of said allegations and demand strict proof thereof.

XXVI.

These defendants admit that the cities of Guntersville, Hartselle, and Russellville, and members of their governing bodies are without the jurisdiction of this court and that service of process cannot be had upon them in the District of Columbia.

They further admit that unless restrained they will make loans and grants to such cities in acordance with the terms of the offers (Exhibits A, B, and C).

They deny each and every allegation of fact contained in Paragraph XXVI of the Bill of Complaint except as expressly admitted herein.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on moneys appropriated by the Congress, but deny each and every other allegation of fact pertaining to them,
507 contained in Paragraph XXVI of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

WHEREFORE, the premises considered, these defendants jointly and severally pray that the bill of complaint be dismissed, with proper costs and charges.

JAMES W. MORRIS,
Assistant Attorney General.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

JOHN W. SCOTT,
Special Assistant to the Attorney General.

JEROME N. FRANK,
Counsel for Federal Emergency Administration of Public Works.

Attorneys for Defendants.

Receipt of copy of the foregoing answer is hereby acknowledged on the 24th day of March, 1936.

HOWARD C. WESTWOOD
24th of March, '36.
Counsel for Plaintiff.

508 *Exhibit A to answer to seconded amended bill of complaint.*

Copy Conformed to
Executed Original

Legal Division, P. W. A. P. W. 46103-2

Checked Rice Date Dec 6 1935.

Federal Emergency Administration
of Public Works

Washington, D. C.,
December 4, 1935.

PWA Docket No. 7341.

City of Guntersville,
Marshall County, Alabama.

Filed March 24, 1936
Frank E. Cunningham
Clerk

1. The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric distribution system, substation and street lights (herein called the "Project") by making a loan and grant to the City of Guntersville, Alabama (herein called the "Applicant") in an amount not exceeding in the aggregate the sum of $87,272.

2. The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $48,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Guntersville;

(b) Type: Special obligations, electric revenue, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: December 1, 1935;

(e) Interest rate and interest payment dates: Four percent per annum, payable semiannually on June 1 and December 1 in each year;

(f) Place of payment: At the office of the City Treasurer, Guntersville, Alabama;

(g) Registration privileges: At the option of the holder; as to principal only;

(h) Maturities: On December 1 in years and amounts as follows:

1939-1940, inclusive	$1,000,
1941-1944, inclusive	2,000,
1945-1950, inclusive	3,000,
1951-1955, inclusive	4,000;

(i) Security: Payable as to both principal and in-
509 terest solely from and secured by a first pledge of the revenues derived from the operation of the Project, after the deduction of sums sufficient to provide for the reasonable cost of operation and maintenance thereof.

3. The Government will make the grant in an amount equal to forty-five percent (45%) of the cost of the Project upon completion, but not to exceed, in any event, the sum of $39,272.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as heretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the project for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificates of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificates of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with the Emergency Relief Appropriation Act of 1935 in all other respects.

5. *Interest of Member of Congress.* No member of or Delegate to the Congress of the United States of America shall be allowed to participate in any agreement arising from the performance of this offer or in the funds hereby made available for the construction of the Project, or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or Commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government of any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 15 percent of the estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands,

easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 25 percent of said previously estimated cost of the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 35 percent of the cost of the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after com-
511 pleting the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 45 percent of the actual cost of the Project upon completion, but not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete

and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grant, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest possible bidder pursuant to public advertisement and that every oppor-

tunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. When such a specification
512 is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the project, except in those cases in which it is required by the law of Alabama that the protection for labor and materialmen be provided by a bond separate from the performance bond. In such case a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance

shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract document. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions therefor, may, if the applicant so desires, be inserted verbatim in such construction contract).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the Project, excepting only such rights as they may have as holder of such bonds under the laws and Constitution of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understand-
513 ing that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project, or to the financing or the construction thereof.

UNITED STATES OF AMERICA

Federal Emergency Administrator of Public Works

By (Sgd.) HORATIO B. HACKETT
Assistant Administrator.

514 P.W.-L-Form No. 48.

EXHIBIT "A"

1. *Employment Services and Labor Preferences.* With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2 (Executive Order No. 7060, approved by the President June 5, 1935):

(a) Such persons shall be referred for assignment to such work by the United States Employment Service, and

(b) Preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least 90 percent of the persons employed on any project shall have been taken from the public relief rolls:

Provided, however, that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

2. *Qualifications for Employment.* (a) No persons currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) No person under the age of sixteen (16) years, and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety or others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(c) Except as specifically provided above, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever. The contractor may dismiss any employee not qualified to perform the work for which he has been referred, subject to disapproval by the Owner.

(d) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

3. *Hours of Work.* (a) Except in case of emer-
515 gency:

(1) The maximum hours of work for manual labor shall be 8 hours per day and 130 hours per month. On projects located at points so remote and inaccessible that camps or floating plants are necessary, the maximum hours of work for manual labor shall be 8 hours per day and 40 hours per week.

(2) The maximum hours of work for cooks, camp assistants, and clerical and other nonmanual employees such as watchmen, policemen, and messengers, shall be 8 hours per day and 40 hours per week.

(3) Administrative and supervisory employees, including executive employees, timekeepers, and storekeepers, who perform in a work-week not more than 15 hours of manual labor (or, in case the project is being constructed on a 40-hour week basis, not more than 20 hours) shall not be subject to any limitation of hours of work.

(4) Wherever practicable, the contractor shall perform the work in at least double shifts of labor, unless otherwise provided in this contract. The contractor shall not knowingly employ under this contract any person engaged in any other gainful occupation whose weekly hours of labor on such occupation, together with his hours of labor on the project, exceed the limitations of hours prescribed for employees of his classification under this contract.

(b) Nothing in these regulations is intended to authorize hours or days of work in excess of the limitations of any applicable law or regulation.

4. *Wages and Pay Rolls.* (a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade or Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

....

....

If after the award of this contract it becomes nec-
516 essary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classification of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full, at least once each week within 3 days after the close of the pay roll period, in lawful money of the United States: Provided, however, that this paragraph shall not be construed to prohibit deductions required by law and collection of obligations by legal process.

(d) A clearly legible statement of the minimum wage rate to be paid each trade and occupation employed under this contract and of the authorized deductions therefrom, if any, shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

(e) The contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the day following the payment of the wages a certified legible copy of each pay roll, whether paid by the contractor or any subcontractor, shall be transmitted by the contractor to such office as may be designated by the Works Progress Administration. The contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project. Such payrolls shall be sworn to in accordance

with the "Regulations Issued Pursuant to So-called Kickback Statute", issued jointly by the Secretary of the Treasury and the Secretary of the Interior on January 12, 1935, a copy of which is herein elsewhere set forth.

5. *Accident Prevention.* Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

6. *Insurance.* The contractor shall not commence
517 work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.* The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection afforded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide, and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.* The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise

from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $, on account of one accident, and Property Damage Insurance in an amount not less than $

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under subparagraph (b) hereof or by separate policies of insurance in amounts as follows:

....

....

7. *Materials.* (a) *Domestic.* Unless contrary to
518 law, in the performance of this contract the contractor, subcontractors, materialmen or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100 per cent will apply;

On purchases where the foreign bid exceeds $100, but is less than $10,000, a differential of 25 per cent will apply;

On purchases where the foreign bid is $10,000 or more, a differential of 15 per cent will apply.

(b) *Convict Made.* No materials manufactured or produced in a penal or correctional institution shall be used on or incorporated in the project, unless required by law.

8. *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

9. *Department of Labor Reports.* The contractor and each subcontractor shall report to the United States Department of Labor monthly, within five days after the close of each calendar month upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls and the man-hours worked, and an itemized statement of the total expenditures for materials. The contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

10. *Payments.* (a) The contractor shall provide
519 all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the Project, and the balance of

the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within five days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

(c) Within the first 15 days of each calendar month the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector. Except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and the Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates will be paid in full unless otherwise provided in this contract.

(d) Compliance with the provisions of subparagraphs (a) and (b) of this paragraph is a condition precedent to partial payment under sub-paragraph (c) hereof.

11. *Wage Claims and Adjustments.* In cases of underpayment of wages, the Owner will withhold from the contractor out of payments due an amount sufficient to pay persons employed on the work covered by this contract the difference between the wages required to be paid under this contract and the wages actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the Owner, for and on account of the contractor, to the respective employees to whom they are due.

12. *Signs.* The contractor shall furnish signs
520 bearing the legend:

"Federal Works Project No. .....
Public Works Administration"

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

13. *Subcontracts.* (a) The contractor shall perform, directly and without subcontracting, not less than 25 per cent of the construction, to be calculated on the basis of the total contract price. No part of this contract shall be sublet without the approval of the Owner.

(b) If the contractor shall sublet any part of this contract, the contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractor and of the persons either directly or indirectly employed by his subcontractor, as he is for the acts and omissions of persons directly employed by himself.

(c) Paragraphs 1 to 5 inclusive, 7 to 10 inclusive, 11 (a) and (b), 17, 18, 19, the Regulations Issued Pursuant to So-called "Kick Back Statute" and the penalty clauses set forth in Section 9 of the Act and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

14. *Assignment of Contract.* The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.* In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any ex-

cess cost occasioned the Owner thereby, and in such
521 event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Priority of Construction Regulations.* Any provisions of this contract in conflict or inconsistent with the requirements of Exhibit "A" except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.

17. *Definitions.* The follow .g terms as used in this contract are respectively defined as follows:

"Act": The Emergency Relief Appropriation Act of 1935.

"P. W. A." or "Public Works Administration": The Federal Emergency Administration of Public Works.

"Administrator": The Federal Emergency Administrator of Public Works.

"State Director": State Director (P.W.A.), his duly authorized representative or any person designated by the Administrator to perform his duties or functions.

"Owner": The public body, agency or instrumentality which is a party hereto and for which this contract is to be performed.

"Emergency": A temporary unforeseen occurrence or combination of circumstances which endangers life or property and calls for immediate action or remedy.

"Material": Materials incorporated in the project, or used or consumed in the performance of the work.

"Subcontractor": A person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

"Work at Site of Project": Work to be performed, including work normally done, on the location of the project.

18. *Paragraphs 1, 2(a), (b) and (c), 3(a) (1) and (2), 4(e), 8(a) and 10 incorporate rules and regulations issued by the President under the authority of section 6 of the Act. Any willful violation of any such rule or regulation is punishable by fine of not to exceed $1,000.*

522 REGULATIONS ISSUED PURSUANT TO SO-CALLED "KICK-BACK STATUTE"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....

County of....., *ss:*

I, ... (name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full
523 weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of .....(project), for the weekly pay roll period from the .... day of ....., 193 , to the .... day of ....., 193 ; that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this .... day of ....., 193 ..

Section 3. Said affidavit shall be executed and sworn to by the officer of employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be

filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective 524 on January 15, 1935.

The clause in the pay-roll affidavit which reads "* * * that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kickback Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unem-

ployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

PENALTY

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both".

Section 35 of the Criminal Code, as amended, pro-
525 vides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

526 *Exhibit B to Answer to Second Amended Bill of Complaint*

Copy conformed to
Executed Original
Legal Division, P. W. A.
Checked Rice Date Dec 6 1935

P. W. 46103-4

Federal Emergency Administration
of Public Works

Washington, D. C.,
December 4, 1935.
PWA Docket No. 6611.

City of Hartselle,
Morgan County, Alabama.

Filed March 24, 1936
Frank E. Cunningham
Clerk

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric distribution and street lighting system (herein called the "Project") by making a loan and grant to the City of Hartselle (herein called the "Applicant") not exceeding in the aggregate the sum of $60,000.

2. *Method of Making Loan.* The Government will purchase at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $33,000 less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Hartselle;

(b) Type: Negotiable, special obligation, serial, coupon bonds;

(c) Denomination: $1,000; (d) Date: October 1, 1935;

(e) Interest rate and interest payment dates: Four percent (4%) per annum, payable semi-annually on the first days of April and October in each year until maturity;

(f) Place of payment: At the office of the Treasurer of the City of Hartselle, Alabama;

(g) Registration privileges: At the option of the holder as to principal only;

(h) Maturities: On the first day of October in years, all inclusive, and amounts as follows:

Years	Amounts
1937 to 1941,	$1,000,
1942 to 1955,	2,000;

527 (i) Security: Payable as to both principal and interest solely from and secured by a first-pledge of the revenues derived from the operation of the Project after the deduction of sums sufficient to provide for the reasonable cost of operation and maintenance thereof.

3. The Government will make the grant in an amount equal to forty-five (45%) per cent of the cost of the Project upon completion, but not to exceed, in any event, the sum of $27,000.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with the Emergency Relief Appropriation Act of 1935 in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in any agreement arising

from the performance of this offer or in the funds hereby made available for the construction of the Project, or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 per
528 cent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per cent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 15 per cent of the estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, boring and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-ways. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 25 per cent of said previously estimated cost of the Project. When the Project shall be approximately 70 per cent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 35 per cent of the cost of the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be hon-
529 ored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 45 per cent of the actual cost of the Project upon completion, but not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account")

shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a Project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise
530 of the name of a proprietary product or the name

of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, them term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons suplying labor and furnishing materials for the construction of the project, except in those cases in which it is required by the law of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desire, be inserted verbatim in such construction contract).

13. The Administrator and the Government shall
531 have no rights or power of any kind with respect to the rates to be fixed or charged by the Project, excepting only such rights as they may have as a holder of such bonds under the laws and Constitution of Alabama and the lawful proceedings of the applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project, or to the financing or the construction thereof.

UNITED STATES OF AMERICA
Federal Emergency Administrator of Public Works

By (Sgd.) HORATIO B. HACKETT,
Assistant Administrator.

P. W.-L-Form No. 48.

532 EXHIBIT "A"

1. *Employment Services and Labor Preferences.* With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2 (Executive Order No. 7060, approved by the President June 6, 1935):

(a) Such persons shall be referred for asignment to such work by the United States Employment Service, and

(b) Preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least 90 per cent of the persons employed on any project shall have been taken from the public relief rolls:

Provided, however, that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

2. *Qualifications for Employment.* (a) No persons currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) No person under the age of sixteen (16) years, and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(c) Except as specifically provided above, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever. The contractor may dismiss any employee not qualified to perform the work for which he has been referred, subject to disapproval by the Owner.

(d) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

3. *Hours of Work.* (a) Except in case of emer-
533 gency:

(1) The maximum hours of work for manual labor

shall be 8 hours per day and 130 hours per month. On projects located at points so remote and inaccessible that camps or floating plants are necessary, the maximum hours of work for manual labor shall be 8 hours per day and 40 hours per week.

(2) The maximum hours of work for cooks, camp assistants, and clerical and other nonmanual employees such as watchmen, policemen, and messengers, shall be 8 hours per day and 40 hours per week.

(3) Administrative and supervisory employees, including executive employees, timekeepers, and storekeepers, who perform in a work-week not more than 15 hours of manual labor (or, in case the project is being constructed on a 40-hour week basis, not more than 20 hours) shall not be subject to any limitation of hours of work.

(4) Wherever practicable, the contractor shall perform the work in at least double shifts of labor, unless otherwise provided in this contract. The contractor shall not knowingly employ under this contract any person engaged in any other gainful occupation whose weekly hours of labor on such occupation, together with his hours of labor on the project, exceed the limitations of hours prescribed for employees of his classification under this contract.

(b) Nothing in these regulations is intended to authorize hours or days of work in excess of the limitations of any applicable law or regulation.

4. *Wages and Pay Rolls.* (a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade or Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

.....	.....
.....	.....

534 If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates

and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classification of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full, at least once each week within 3 days after the close of the pay roll period, in lawful money of the United States: Provided, however, that this paragraph shall not be construed to prohibit deductions required by law and collection of obligations by legal process.

(d) A clearly legible statement of the minimum wage rate to be paid each trade and occupation employed under this contract and of the authorized deductions therefrom, if any, shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

(e) The contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the day following the payment of the wages a certified legible copy of each pay roll, whether paid by the contractor or any subcontractor, shall be transmitted by the contractor to such office as may be designated by the Works Progress Administration. The contractor and each subcontractor shall submit reports at such time and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project. Such pay rolls shall be sworn to in accordance with the "Regulations Issued Pursuant to So-called Kick-back Statute", issued jointly by the Secretary of the Treasury and the Secretary of the Interior on January 12, 1935, a copy of which is herein elsewhere set forth.

5. *Accident Prevention.* Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety

provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

6. *Insurance.* The contractor shall not commence
535 work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.* The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection afforded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide, and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.* The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $, on account of one accident, and Property Damage Insurance in an amount not less than $

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under subparagraph (b) hereof or by separate policies of insurance in amounts as follows:

....
....

536 7. *Materials.* (a) *Domestic.* Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100 per cent will apply;

On purchases where the foreign bid exceeds $100, but is less than $10,000, a differential of 25 per cent will apply;

On purchases where the foreign bid is $10,000 or more, a differential of 15 per cent will apply.

(b) *Convict Made.* No materials manufactured or produced in a penal or correctional institution shall be used on or incorporated in the project, unless required by law.

8. *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this con-

tract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

9. *Department of Labor Reports.* The contractor and each subcontractor shall report to the United States Department of Labor monthly, within five days after the close of each calendar month upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls and the man-hours worked, and an itemized statement of the total expenditures for materials. The contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

10. *Payments.* (a) The contractor shall provide all
537 labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the Project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within five days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

(c) Within the first 15 days of each calendar month the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector. Except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and the Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates will be paid in full unless otherwise provided in this contract.

(d) Compliance with the provisions of subparagraphs (a) and (b) of this paragraph is a condition precedent to partial payment under subparagraph (c) hereof.

11. *Wage Claims and Adjustments.* In cases of underpayment of wages, the Owner will withhold from the contractor out of payments due an amount sufficient to pay persons employed on the work covered by this contract the difference between the wages required to be paid under this contract and the wages actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the Owner, for and on account of the contractor, to the respective employees to whom they are due.

12. *Signs.* The contractor shall furnish signs
538 bearing the legend:

"Federal Works Project No.....
Public Works Administration"

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

13. *Subcontracts.* (a) The contractor shall perform, directly and without subcontracting, not less than 25 per cent of the construction, to be calculated on the basis of the total contract price. No part of this contract shall be sublet without the approval of the Owner.

(b) If the contractor shall sublet any part of this contract, the contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractor and

of the persons either directly or indirectly employed by his subcontractor, as he is for the acts and omissions of persons directly employed by himself.

(c) Paragraphs 1 to 5 inclusive, 7 to 10 inclusive, 11 (a) and (b), 17, 18, 19, the Regulations Issued Pursuant to So-called "Kick Back Statute" and the penalty clauses set forth in Section 9 of the Act and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

14. *Assignment of Contract.* The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.* In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such security of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the
539 Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Priority of Construction Regulations.* Any provisions of this contract in conflict or inconsistent with the requirements of Exhibit "A", except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.

17. *Definitions.* The following terms as used in this contract are respectively defined as follows:

"Act": The Emergency Relief Appropriation Act of 1935.

"P. W. A." or "Public Works Administration": The Federal Emergency Administration of Public Works.

"Administrator": The Federal Emergency Administrator of Public Works.

"State Director": State Director (P.W.A.), his duly authorized representative or any person designated by the Administrator to perform his duties or functions.

"Owner": The public body, agency or instrumentality which is a party hereto and for which this contract is to be performed.

"Emergency": A temporary unforeseen occurrence or combination of circumstances which endangers life or property and calls for immediate action or remedy.

"Material": Materials incorporated in the project, or used or consumed in the performance of the work.

"Subcontractor": A person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

"Work at Site of Project": Work to be performed, including work normally done, on the location of the project.

18. *Paragraphs 1, 2(a), (b) and (c), 3(a) (1) and (2), 4(e), 8(a) and 10 incorporate rules and regulations issued by the President under the authority of section 6 of the Act. Any willful violation of any such rule or regulation is punishable by fine of not to exceed $1,000.*

540 *Regulations Issued Pursuant to So-Called "Kick-Back Statute"*

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....

County of....., ss:

I, ... (name the party signing affidavit) .....: ..... (Title), do hereby certify that I am (the employee of)..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the
541 attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of..... (project), for the weekly pay roll period from the ..... day of ....., 193 , to the ..... day of ....., 193 ; that no rebates or deductions from any wages due any such person as set out on

the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement, or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ....., 193 .

Section 3. Said affidavit shall be executed and sworn to by the officer of employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the

Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective
542 on January 15, 1935.

The clause in the pay-roll affidavit which reads "* * * that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kickback Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

Penalty

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any money appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits

to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both".

Section 35 of the Criminal Code, as amended, pro-
543 vides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

544 *Exhibit C to Answer to Second Amended Bill of Complaint.*

Copy Conformed to
Executed Original

Legal Division, P. W. A. P. W. 46103-3
Checked Rice Date Dec 6 1935

Federal Emergency Administration of Public Works

Washington, D. C.,
December 4, 1935,
PWA Docket No. 7032.

City of Russellville,
Franklin County, Alabama.

Filed March 24, 1936.
Frank E. Cunningham,
Clerk.

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of an electric distribution, street lighting and whiteway system (herein called the "Project") by making a loan and grant to the City of Russellville, Alabama (herein called the "Applicant") in an amount not exceeding in the aggregate the sum of $125,454.

2. *Method of Making Loan.* The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth

below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $69,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: City of Russellville;

(b) Type: Special obligation, electric revenue, serial, coupon bond;

(c) Denomination: $1,000; (d) Date: December 1, 1935;

(e) Interest rate and interest payment dates: Four percent per annum, payable semi-annually on June 1 and December 1 in each year;

(f) Place of payment: At the office of the City Treasurer, Russellville, Alabama;

(g) Registration privileges: At the option of the holder, as to principal only;

(h) Maturities: On December 1 in years and amounts as follows:

1939-1940, inclusive	$2,000;
1941-1943, inclusive	3,000;
1944-1947, inclusive	4,000;
1948-1955, inclusive	5,000;

(i) Security: Payable as to both principal and
545 interest solely from and secured by a first pledge of the revenues derived from the operation of the Project, after the deduction of sums sufficient to provide for the reasonable cost of operation and maintenance thereof.

3. The Government will make the grant in an amount equal to forty-five percent (45%) of the cost of the Project upon completion, but not to exceed in any event the sum of $56,454.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it hereinoffers to purchase or to make any grant:

(a) *Financial Condition.* If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.* If it appears that the Applicant will not be able to complete the Project for the sum allotted by the Government, or that the Applicant will not be able

to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purpose as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with the Emergency Relief Appropriation Act of 1935 in all other respects.

5. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in any agreement arising from the performance of this offer or in the funds hereby made available for the construction of the Project, or to any benefit arising therefrom.

6. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.* The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.* The Applicant shall furnish all
546 such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.* The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Advance Grant.* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 15 percent of the estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings, and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used.

(b) *Payment for Bonds.* A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete.

(c) *Intermediate Grant Requisitions.* Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 25 percent of said previously estimated cost of the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 35 percent of the cost of the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof. The intermediate grant
547 requisitions will be honored if the documents neces-

sary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto.

(d) *Final Grant Payment.* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount not in excess of 45 per cent of the actual cost of the Project upon completion, but not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto.

(e) *Construction Account.* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any, of the bonds are then held by the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.* Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under
548 contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal" is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the project, except in those cases in which it is required by the law of Alabama that protection for labor and materialmen be provided by a bond separate from the performance bond. In such case, a performance bond in an amount equal to 100% of the contract price sup-

plemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of Alabama or local ordinance shall be predetermined by the applicant in accordance therewith, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, the applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly
549 as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the applicant so desire, be inserted verbatim in such construction contract).

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the Project, excepting only such rights as they may have as a holder of such bonds under the laws and Constitution of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and

the Government or any of its agencies in any way relating to said Project, or to the financing or the construction thereof.

UNITED STATES OF AMERICA
Federal Emergency Administrator of Public Works

By (Sgd.) HORATIO B. HACKETT,
Assistant Administrator.

P. W.-L-Form No. 48.

550 *Exhibit "A"*

1. *Employment Services and Labor Preferences.* With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2 (Executive Order No. 7060, approved by the President June 5, 1935):

(a) Such persons shall be referred for assignment to such work by the United States Employment Service, and

(b) Preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least 90 percent of the persons employed on any project shall have been taken from the public relief rolls:

Provided, however, that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

2. *Qualifications for Employment.* (a) No persons currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) No person under the age of sixteen (16) years, and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(c) Except as specifically provided above, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever. The contractor may dismiss any employee not

qualified to perform the work for which he has been referred, subject to disapproval by the Owner.

(d) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

3. *Hours of Work.* (a) Except in case of emer-
551 gency:

(1) The maximum hours of work for manual labor shall be 8 hours per day and 130 hours per month. On projects located at points so remote and inaccessible that camps or floating plants are necessary, the maximum hours of work for manual labor shall be 8 hours per day and 40 hours per week.

(2) The maximum hours of work for cooks, camp assistants, and clerical and other nonmanual employees such as watchmen, policemen, and messengers, shall be 8 hours per day and 40 hours per week.

(3) Administrative and supervisory employees, including executive employees, timekeepers, and storekeepers, who perform in a work-week not more than 15 hours of manual labor (or, in case the project is being constructed on a 40-hour week basis, not more than 20 hours) shall not be subject to any limitation of hours of work.

(4) Wherever practicable, the contractor shall perform the work in at least double shifts of labor, unless otherwise provided in this contract. The contractor shall not knowingly employ under this contract any person engaged in any other gainful occupation whose weekly hours of labor on such occupation, together with his hours of labor on the project, exceed the limitations of hours prescribed for employees of his classification under this contract.

(b) Nothing in these regulations is intended to authorize hours or days of work in excess of the limitations of any applicable law or regulation.

4. *Wages and Pay Rolls.* (a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade or Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

.....	.....
.....	.....

If after the award of this contract it becomes
552 necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classification of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full, at least once each week within 3 days after the close of the pay roll period, in lawful money of the United States: Provided, however, that this paragraph shall not be construed to prohibit deductions required by law and collection of obligations by legal process.

(d) A clearly legible statement of the minimum wage rate to be paid each trade and occupation employed under this contract and of the authorized deductions therefrom, if any, shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

(e) The contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the day following the payment of the wages a certified legible copy of each pay roll, whether paid by the contractor or any subcontractor, shall be transmitted by the contractor to such office as may be designated by the Works Progress Administration. The

contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project. Such pay rolls shall be sworn to in accordance with the "Regulations Issued Pursuant to So-called Kick-back Statute", issued jointly by the secretary of the Treasury and the Secretary of the Interior on January 12, 1935, a copy of which is herein elsewhere set forth.

5. *Accident Prevention.* Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

6. *Insurance.* The contractor shall not commence
553 work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.* The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection afforded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide, and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.* The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $, on account of one accident, and Property Damage Insurance in an amount not less than $

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under subparagraph (b) hereof or by separate policies of insurance in amounts as follows:

....

....

7. *Materials.* (a) *Domestic.* Unless contrary to
554 law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased if the foreign materials, articles, or supplies are lower in

cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100 per cent will apply;

On purchases where the foreign bid exceeds $100, but is less than $10,000, a differential of 25 per cent will apply;

On purchases where the foreign bid is $10,000 or more, a differential of 15 per cent will apply.

(b) *Convict Made.* No materials manufactured or produced in a penal or correctional institution shall be used on or incorporated in the project, unless required by law.

8. *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

9. *Department of Labor Reports.* The contractor and each subcontractor shall report to the United States Department of Labor monthly, within five days after the close of each calendar month upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls and the man-hours worked, and an itemized statement of the total expenditures for materials. The contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

10. *Payments.* (a) The contractor shall provide
555 all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month fol-

lowing the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the Project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within five days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

(c) Within the first 15 days of each calendar month the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector. Except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and the Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates will be paid in full unless otherwise provided in this contract.

(d) Compliance with the provisions of subparagraphs (a) and (b) of this paragraph is a condition precedent to partial payment under subparagraph (c) hereof.

11. *Wage Claims and Adjustments.* In cases of underpayment of wages, the Owner will withhold from the contractor out of payments due an amount sufficient to pay persons employed on the work covered by this contract the difference between the wages required to be paid under this contract and the wages actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the Owner, for and on account of the contractor, to the respective employees to whom they are due.

12. *Signs.* The contractor shall furnish signs bear-
556 ing the legend:

"Federal Works Project No.....
Public Works Administration"

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

13. *Subcontracts.* (a) The contractor shall perform, directly and without subcontracting, not less than 25 per cent of the construction, to be calculated on the basis of the total contract price. No part of this contract shall be sublet without the approval of the Owner.

(b) If the contractor shall sublet any part of this contract, the contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractor and of the persons either directly or indirectly employed by his subcontractor, as he is for the acts and omissions of persons directly employed by himself.

(c) Paragraphs 1 to 5 inclusive, 7 to 10 inclusive, 11 (a) and (b), 17, 18, 19, the Regulations Issued Pursuant to So-called "Kick Back Statute" and the penalty clauses set forth in Section 9 of the Act and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

14. *Assignment of Contract.* The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.* In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the

date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occa-
557 sioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Priority of Construction Regulations.* Any provisions of this contract in conflict or inconsistent with the requirements of Exhibit "A", except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.

17. *Definitions.* The following terms as used in this contract are respectively defined as follows:

"Act": The Emergency Relief Appropriation Act of 1935.

"P.WA." or "Public Works Administration": The Federal Emergency Administration of Public Works.

"Administrator": The Federal Emergency Administrator of Public Works.

"State Director": State Director (P.W.A.), his duly authorized representative or any person designated by the Administrator to perform his duties or functions.

"Owner": The public body, agency or instrumentality which is a party hereto and for which this contract is to be performed.

"Emergency": A temporary unforeseen occurrence or combination of circumstances which endangers life or property and calls for immediate action or remedy.

"Material": Materials incorporated in the project, or used or consumed in the performance of the work.

"Subcontractor": A person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

"Work at Site of Project": Work to be performed, including work normally done, on the location of the project.

18. *Paragraphs 1, 2(a), (b) and (c), 3(a) (1) and (2), 4(e), 8(a) and 10 incorporate rules and regulations issued by the President under the authority of section 6 of the Act. Any willful violation of any such rule or regulation is punishable by fine of not to exceed $1,000.*

558 *Regulations Issued Pursuant to So-Called "Kick-Back Statute"*

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....
County of ....., ss:

I, ... (name the party signing affidavit) ..... (Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (sub-
559 contractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (project), for the weekly pay roll period from the ..... day of ....., 193 , to the ..... day of ..... , 193 ; that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ....., 193 .

Section 3. Said affidavit shall be executed and sworn to by the officer of employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the some promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be

filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

560 Section 6. These regulations shall become effective on January 15, 1935.

The clause in the pay-roll affidavit which reads "* * * that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * * that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kickback Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unem-

ployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

Penalty

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both".

561 Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

562 *Memorandum.*

MARCH 31, 1936.

Plaintiffs' motion to consolidate causes 58927, 59071 and 59671, in Equity, for trial, filed.

Order Consolidating Causes.

Filed March 3, 1936

No. 58927 IN EQUITY

TEXAS UTILITIES COMPANY,

v.

HAROLD L. ICKES, Administrator, etc., et al.

Nos. 59071 and 59671 IN EQUITY

ALABAMA POWER COMPANY,

v.

HAROLD L. ICKES, Administrator, etc., et al.

Upon consideration of the motion of the plaintiffs filed in the above-entitled causes, it is by the Court this 31st day of March, 1936,

ADJUDGED, ORDERED and DECREED, That said causes be and the same are hereby consolidated for trial.

PEYTON GORDON,
Justice.

No objection.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

563 *Opinion of Chief Justice Wheat.*

Filed June 5, 1936

* * * * * * * *

The plaintiffs in these five suits are public utility corporations owning or operating electric plants in their respective communities, and at the present time they have the field exclusively to themselves. The defendant, Ickes, is the Administrator of the Federal Administration of Public Works, and the other defendants are officers of the United States.

The object of the suits is to enjoin the defendants from furnishing money to the respective communities for the purpose of enabling them to construct municipal electric plants which, if constructed, will come into direct competition with those of the plaintiffs. In some cases, the

plaintiffs are operating under franchises which have some years to run. In some cases the franchises have expired and the companies are operating by consent or acquiescence of the local authorities. No serious claim is made
564 that there is any difference in the status of these companies so far as their right to sue is concerned. In no case does the plaintiff have an exclusive franchise. In each case it is subject to regulation by the appropriate local authority. In each case the plaintiff has a substantial investment in its plant and is furnishing satisfactory service and if subject to the competition which will result from a municipally-owned plant it will, beyond question, suffer serious damage and in some cases its business will be destroyed. It was frankly conceded by counsel for the plaintiffs that the municipalities have the legal power and right, if they proceed lawfully, to build competing municipal plants and that prior to the enactment of the statutes involved they had a desire to build such plants.

While the cases involve some differences of detail, both sides seem to agree that but three questions are involved in each. These questions are:

First: Have the plaintiffs a right to sue?

Second: Are the statutes involved constitutional?

Third: If constitutional, are the acts contemplated by the defendants authorized by the statute?

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(1) Have the plaintiffs a right to sue?

It is urged that plaintiffs have no standing to bring these actions as no legal or equitable right of theirs will be infringed by the making of the loans; that the injuries which they will suffer will result, not from the making of the loans, but from the competition which will come when the municipal plants begin to operate, and inasmuch as the plaintiffs have no exclusive franchises, and as the
565 municipalities may lawfully build competing plants, the plaintiffs are in no position to complain because they are acquiring the funds wherewith to finance them in an unlawful manner. Such was the view taken by the United States Circuit Court of Appeals for the Fourth Circuit in *Greenwood County* v. *Duke Power Company*, 81 Fed.

(2nd) 986, and there is much authority to support it. It seems to me, however, that such a position is rather too narrow; that the furnishing of the funds by the Government and the resulting competition are so closely connected that, if the statute under which the funds are supplied is unconstitutional, or if the officer furnishing the funds is not authorized to do so, then the plaintiffs may test those questions on the merits.

There is a difference sometimes overlooked between the right to be heard and the right after hearing to prevail. My conclusion is that the plaintiffs have a standing as litigants which requires the Court to hear their claims and decide them on the merits. This seems to me to be consistent with what was held in *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515.

(2) Are the statutes involved constitutional?

There are two statutes to be considered: The National Industrial Recovery Act, of June 16, 1933 (Title II, 48 Stat. 200), and the Emergency Relief Appropriation Act of April 8, 1935 (H. J. Res. 117).

The National Industrial Recovery Act contains the following provisions:

Section 202 provides (48 Stat. 201):

"The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conser-
566 vation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control * * *; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character here-

tofore eligibile for loans under sub-section (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; * * *."

Section 203 provides:

"(a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase * * *; Provided, that in deciding to extend any aid or grant hereunder to any state, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several states, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands."

The Emergency Relief Appropriation Act of 1935 provides:

"That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated"

to be available for the following classes of projects:

"(a) Highways, roads, streets, and grade-crossing
567 elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation, $500,000,000; (c) rural electrification, $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000; *Provided further,* That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or more of the foregoing limitations if he finds it necessary to do so in order to effectuate the purpose of this joint resolution:" (49 Stat. 115, 6 unbound).

The contracts involved in these cases were made in December, 1935, from funds allotted under the Act of 1933, which had then expired, except as it had been continued by the Act of 1935. Section 12 of the latter Act provided:

"SEC. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purpose of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution,

for the making of further loans under said Act or under this joint resolution." (49 Stat. 119, unbound).

One of counsel for the plaintiffs, in his closing argument, said:

"There are two ways of construing this later act. You can say that after NIRA expires, all action is taken under a later act; or you can say that action is taken on the earlier act as extended by the President. It does not make the slightest difference at all, because, in either case, it rested entirely in the hands of the President as to what he should continue from NIRA, and what he should not continue." (Transcript of Proceedings, Vol. 14, pp. 1777, 1778).

While both Acts have been referred to in the argu-
568 ments, the provisions of the Act of 1933 seem to me to be the ones with which we are principally concerned, although I do not think the question is of much importance.

If the projects herein involved be deemed authorized by the Act of 1933, the authority must be found under Section 202 as part of the Public Works Program described in subdivision (a):

"(a) Construction * * * of publicly owned instrumentalities and facilities"

for which under Section 203

"With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered * * * (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; * * *."

Under the Act of 1935, we have an appropriation available for

"(g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and

self-lquidating projects of public bodies thereof, where in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; * * *".

The constitutionality of the provisions of the Act of 1933 was sustained by the United States Circuit Court of Appeals for the Fourth Circuit in the case of *Greenwood County* v. *Duke Power Company,* decided February 22, 1936, supra, which was a suit brought by the Duke Power Company to enjoin the South Carolina County of Greenwood from constructing an electric power plant on the Saluda River and from obtaining a loan and grant from the Federal Public Works Administration for the purpose of constructing it.

The Act was also sustained by the Circuit Court
569 of Appeals for the Tenth Circuit in *Kansas Gas & Electric Co.* v. *City of Independence* (79 Fed. (2nd) 32, 44). See also *Langer et al.* v. *United States,* (76 Fed. (2nd) 817).

The provisions of the Emergency Relief Appropriation Act of 1935, in so far as they provide for "housing" projects were held unconstitutional by our Court of Appeals in *The Township of Franklin* v. *Tugwell,* decided May 18, 1936, on the ground that they violated Section 1 of Article 1 of the Constitution as a delegation of legislative power to the President. If it could fairly be said that that case had gone so far as to hold all the provisions of the Act to be unconstitutional, I would, of course, feel bound by it, but the only class of projects considered was "housing", and counsel for the plaintiffs do not claim that it goes further. In his opinion, Mr. Justice Van Orsdel said:

"In what we have said we do not lose sight of our duty to construe the Act so as to avoid, if fairly possible, the conclusion that it is unconstitutional. In an effort to carry out this judicial obligation, we have endeavored to find in the Act language which would enable us to say that Congress had declared a legislative policy with relation to 'housing' with sufficient definiteness to avoid the charge of an unconstitutional delegation of legislative power. But, as we have pointed out, this is not to be found. We are not

here confronted with an appropriation for internal improvements of a national character or importance, or for the erection of public buildings, or the grant of loans to a state or municipality to carry out public works projects. As to these we might find in the nature of the objective a well-beaten path by which to supply the omitted means to that end. But here we have neither path nor program."

We have in the present cases grants or loans to municipalities to carry out public works projects, as to which it is easy to find the "well-beaten path".

It has not been argued that the relief of unemployment is an unconstitutional use of funds of the United States. The constitutionality of the statutes was attached on two grounds:

First: That there was an invasion of the reserved
570 powers of the States in violation of the 10th Amendment, and

Second: That there was a delegation of legislative power to the President in violation of Section 1 of Article I of the Constitution.

Both these grounds were considered in *Greenwood County v. Duke Power Company*, supra, and held to be without merit. After pointing out that the statute contemplated not the construction of isolated projects but of a "vast program of public works" intended to relieve unemployment and that such expenditures are justifiable and for the general welfare, the Court said at p. 994:

"And we do not think that it can be said that Congress is invading the reserved powers of the states, or is making expenditures for matters essentially local in character, merely because the project for which expenditure is made is not connected with interstate commerce and, when considered alone, is local in character. It cannot be said to invade the reserved powers of a state to make loans or grants of money to municipal corporations which the state continues to control, and which are at liberty to reject the loans and grants if they see fit to do so. And a program of works for relieving nationwide unemployment does not lose it national character and become local merely because each of the public works projects is constructed in some particular locality."

That the program is nationwide appears from the testimony of Administrator Ickes, who said that it extended to every county of the United States, except 3, and that there were 260 electric power projects though but 85 of them were in places where there were privately-owned facilities. In the present cases, the Federal Government retains no regulatory power over the operation of the projects for which it makes loans. I am unable to see how any reserved power of a State is infringed.

On the question of an unconstitutional delegation of legislative power, the Court said, p. 994:

571 "Nor do we think that the pertinent portion of the Act can be condemned as an unconstitutional delegation of legislative power within the rule laid down in *Panama Refining Co. v. Ryan* 293 U. S. 388; and *L. A. Schechter Poultry Corporation v. United States* 295 U. S. 495. It was out of the question for Congress to prescribe the details of an extended program of public works. It appropriated the money for the purpose, laid down the principles which were to guide the President and the Administrator of Public Works in its expenditure, and left to them the working out of the details. The making of loans and grants in carrying out the policy thus laid down by Congress is the exercise of administrative, not legislative, discretion. As said in *Wilmington & Zanesville Railroad Co. v. Commissioner,* 1 Ohio St. 77, 88, and quoted with approval by the Supreme Court in *Hampton & Co. v. United States,* 276 U. S. 394, 407: 'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' "

The Court also points out that the question was fully considered by the Circuit Court of Appeals of the Tenth Circuit in *Kansas Gas & Electric Co. v. City of Independence,* supra, and expresses itself as in accord with what was said by Judge Phillips in that case.

I think the reasoning of the Court in these cases is sound. The statutory provisions are in my opinion valid.

(3) Are the acts contemplated by the defendants authorized by the statute?

The action contemplated by the defendants is attacked as being beyond the authority conferred by the statute on various grounds, which seem to me to be without merit. Some of them were considered at length in *Greenwood County v. Duke Power Co.*, supra.

One ground of attack is that the Administrator did not at the start prepare "a comprehensive program". It is undoubtedly true that in a literal sense no definite program was at first formulated. The program was worked out slowly and progressively and considerable time was occupied in effecting an organization and in the examination of many proposed projects. The defendant, Ickes,
572 in response to a question asking his administrative interpretation of the provisions of the statute relating to a comprehensive program of public works, answered:

"We had two duties to perform, as I saw it. One was to prepare a comprehensive program of public works. The other was to get men in as large numbers as possible to work as quickly as possible. In any conflict between the two, we felt that the latter took precedence.

"We soon realized that to prepare a comprehensive program of public works would require months—perhaps a year or two—and that if we literally set about the preparation of a comprehensive program of public works, the very purpose of the Act itself would be defeated. So, we satisfied ourselves by developing the program of desirable public works as we progressed. We did not treat it academically at all, but practically." (Transcript of Proceedings, Vol. 12, p. 1468).

This I think was a reasonable, practical and substantial compliance with the statute. It appears from the evidence that on March 20, 1934, pursuant to a Resolution (Sen. Res. 190, 73rd Cong.) calling upon the Administrator to furnish the Senate with information, including a general survey of the public works program and an account of the organization of the Public Works Administration and a statement of its policies, the Administrator submitted a report to Congress a document of some 300 pages in length, giving the information called for by the Resolution. Thereafter

Congress passed the Emergency Relief Act of 1935, with full information in regard to what had been done and what was being done under the Act of 1933. It seems to me that this must be regarded as Congressional approval of the Administrator's program.

It has been argued that some of the projects are not useful or are not self-liquidating, or are not primarily for the relief of unemployment. I feel, however, that the determination of such matters is within the discretion of the President, or the Administrator acting under him. Beyond all question, the Act confers upon these Executive
573 Officers a very wide discretion, and I believe that their decisions upon such matters of detail are not subject to judicial review.

My conclusion upon the whole case is that the bills should be dismissed upon the merits.

ALFRED A. WHEAT
Chief Justice

June 5, 1936

574 *Defendants' Proposed Findings of Fact and Conclusions of Law*

Filed June 26, 1936

* * * * * * * * *

In the above-entitled cause heard before the undersigned, the Chief Justice of this Court, sitting in Equity Division No. 3, the Court, from the pleadings and exhibits filed and from the hearings had and the evidence taken before it, makes the following findings of fact and reaches the following conclusions of law:

575 *Findings of Fact*

Description of Parties.

1.

The plaintiff Oklahoma Utilities Company is a corporation organized and existing under the laws of the State of Oklahoma, with one of its places of business in the City of Hominy, Osage County, Oklahoma. It is engaged in the

business, among other things, of purchasing, transmitting, selling and distributing electricity in several communities in the State of Oklahoma and, in particular, has been and now is engaged in such business in the City of Hominy, State of Oklahoma. This plaintiff is the only agency existing in the City of Hominy for the distribution of sale therein of electricity.

2.

The plaintiff Texas Utilities Company is a corporation organized and existing under the laws of the State of Texas, and has its principal office in the City of Plainview, Hale County, Texas. This plaintiff is engaged in the business of generating and distributing electricity in the State of Texas. It is the only agency now existing for the sale and distribution of electrical energy in the said City.

3.

The plaintiff Alabama Power Company is a corporation organized and existing under the laws of the State of Alabama, and has its principal office in the City of Attalla, Alabama. The Alabama Power Company owns and operates a generating, transmission and distribution system in the State of Alabama and distributes electrical energy to numerous communities in that State, including the cities of Florence, Decatur, Sheffield, Tuscumbia, Hartselle, Russellville, and Guntersville. This plaintiff is the only agency now engaged in supplying electric light and power to the said cities, except for the City of Sheffield, which is now engaged in the distribution and sale of electrical
576 energy on a limited scale.

The Alabama Power Company owns and operates hydro-electric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, the construction of which was permitted by an Act of Congress approved March 4, 1907 (34 Stat. 1288); Mitchell Dam and Jordan Dam, likewise on the Coosa River, Alabama; and Martin Dam on the Tallapoosa River, Alabama, which latter three dams were constructed under licenses granted by the Federal Power Commission.

4.

The plaintiff Iowa City Light & Power Company is a corporation organized and existing under the laws of the State of Delaware, is qualified to do business in the State of Iowa as a foreign corporation, and has its principal office in said State, in the City of Iowa City, Iowa. This plaintiff is engaged in the generation of gas and electrical energy and in the transmission, distribution and sale thereof in the City of Iowa City, and in the incorporated towns of Coralville and University Heights, Johnson County, Iowa. This plaintiff is the only agency now selling and distributing electrical energy in the said towns.

5.

The defendant Harold L. Ickes (hereinafter sometimes called the "Administrator") is the duly qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called "PWA") appointed by Executive Order of the President of the United States of America, dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title 55 of "The National Industrial Recovery Act," approved June 16, 1933.

6.

The defendant Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of PWA.

577

7.

The defendant John J. Madigan is a duly appointed, qualified and acting Executive Officer of PWA.

8.

The defendant F. E. Schnepfe is the duly appointed, qualified and acting Director of the Projects Division of PWA.

9.

The defendant Harry L. Hopkins is the duly appointed, qualified and acting Administrator of the Works Progress Administration, and was appointed such by an Executive

Order of the President of the United States (No. 7034), dated May 18, 1935.

10.

The defendant Henry Morgenthau, Jr. is the duly appointed, qualified and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of public funds of the United States.

11.

The defendant W. A. Julian is the duly appointed, qualified and acting Treasurer of the United States and, as such, is in control of the payment of checks drawn upon him by disbursing officers of the United States.

12.

The defendant Guy F. Allen is the duly appointed, qualified and acting Chief Disbursing Officer, Division of Disbursement, Treasury Department of the United States and, as such officer, is in control of drawing and issuing checks on behalf of the United States, and the disbursement of the public funds of the United States.

The Franchises of the Plaintiffs

13.

The ultimate predecessor of the plaintiff Oklahoma Utilities Company was granted a non-exclusive franchise by the City of Hominy on March 12, 1914, to engage in
578 the electrical business in the said City for twenty years. The franchise was assigned to this plaintiff's immediate predecessor on May 1, 1926. The franchise expired on March 12, 1934, and has not been renewed or extended. This immediate predecessor, a corporation, was reorganized on October 1, 1934, and the reorganized corporation is the plaintiff Oklahoma Utilities Company, which is now operating in the City of Hominy at sufferance.

14.

On or about the 15th day of April, 1909, the City Council of the City of Plainview, Texas, granted to the predecessor

of the plaintiff Texas Utilities Company, a non-exclusive franchise to construct, operate and maintain an electric light and power plant and distribution system in the City of Plainview, Texas, for a period of fifty years. This franchise was assigned to the Texas Utilities Company on November 17, 1915.

15.

In the year 1902 the Cities of Florence, Sheffield and Tuscumbia, each granted to the predecessor in interest of the plaintiff Alabama Power Company a non-exclusive franchise to construct and operate an electric power plant. These franchises were assigned to the plaintiff Alabama Power Company in 1925. By their terms, the franchises so granted by the Cities of Sheffield and Tuscumbia expired in October, 1932, and the franchise granted by the City of Florence expired in March, 1933.

On October 16, 1919, the City of Decatur granted to the plaintiff a similar non-exclusive franchise which on January 27, 1920, became effective for a period of thirty years.

On August 10, 1915, the Town of Hartselle granted to the plaintiff Alabama Power Company an intermediate non-exclusive franchise to construct, maintain and operate throughout said town an electric distribution system and business.

On July 5, 1915, the Town of Guntersville granted a similar non-exclusive franchise to the plaintiff Alabama Power Company.

On June 28, 1923, the Town of Russellville granted
579 a similar non-exclusive franchise to the plaintiff Alamaba Power Company.

16.

In the year 1909 Iowa City, Iowa, granted to the predecessor in interest of the plaintiff Iowa City Light and Power Company a non-exclusive electric franchise for a period of twenty years. In the year 1912 this franchise was assigned to the Iowa City Light and Power Company. In the year 1932 this plaintiff made an application to the City for a renewal of its franchise. An election was held in Iowa City on October 11, 1932, at which time the ques-

tion as to whether the franchise should be renewed was submitted to a popular vote. A majority of those voting voted against such renewal. The franchise thereafter expired in accordance with its terms on January 11, 1934 (Martin, 1226).

In the year 1934 the Town of Coralville, Iowa, granted to this plaintiff a non-exclusive franchise extending for the term of twenty-five years, and in the year 1935, the Town of University Heights, Iowa, granted to this plaintiff a non-exclusive franchise for a term of fifteen years.

Plaintiffs as Taxpayers

17.

Each of the plaintiffs annually pays substantial amounts of money in taxes to the United States, and to the States and municipalities in which they operate.

The plaintiff Alabama Power Company paid annual license and privilege taxes on the operation of its business to the Cities of Florence, Sheffield and Tuscumbia, Alabama, up to January 1, 1936. In January, 1936, the Cities of Florence and Sheffield refused to accept any privilege and license tax for the year 1936 from the Alabama Power Company.

18.

580 *Authority of Cities to Build Plants*

19.

The Cities of Florence, Decatur, Sheffield, Tuscumbia, Hartselle, Russellville, Guntersville, in the State of Alabama, the City of Hominy, Oklahoma, the City of Plainview, Texas, are authorized by the laws of their respective States to construct and operate municipal electric plants and distribution systems. In the Cities of Plainview, Texas, and Decatur, Hartselle, Russellville and Guntersville, Alabama, the municipalities are authorized to engage in competition with the existing power company, and in the Cities of Hominy, Oklahoma, Iowa City, Iowa, and Florence, Sheffield and Tuscumbia, Alabama, where the franchises of the existing power company have expired, the Cities may either compete with or supplant the existing plants of the power company.

Each of the Cities involved in these suits is authorized to issue bonds for the purpose of financing the construction of their respective plants and to receive grants for that purpose.

Events Leading to Applications of Cities

20.

Florence.

In March, 1933, the City of Florence employed engineers to appraise the existing system belonging to the Alabama Power Company which was supplying it with electrical power (149). During 1933, an election was held to determine whether the City should engage in the municipal electric business. The proposition carried by a vote of 14½ to 1. On or about November 16, 1933, the City of Florence and the Alabama Power Company entered into negotiations for the purchase by the City of the plant of the Company at Florence. These negotiations were terminated because of the wide divergence between the price offered by the City and the amount asked by the Power Company for its plant (151).

On December 20, 1933, the City of Florence filed an application with the Public Works Administration for a loan and grant, under Title II of the National Industrial
581 Recovery Act, for the purpose of constructing a municipal power plant, and sometime later an allotment for a loan and grant to the City was made by the Public Works Administration and approved by the President.

Subsequently to these proceedings, the Tennessee Valley Authority attempted to persuade the City of Florence to enter into a plan whereby the Authority would exercise its option (later abandoned) to purchase distribution systems in Florence, Alabama, and several other communities, from the Alabama Power Company, rehabilitate them, and turn them over to the communities. This plan was inaugurated in an attempt by the Tennessee Valley Authority to prevent duplication of existing facilities of the power company and for the purposes of protecting the investment of the Alabama Power Company. The City of Florence rejected this proposal as disadvantageous to itself, and made a counterproposal that it purchase the existing facilities of the Ala-

bama Power Company at Florence, and use funds to be supplied by the Public Works Administration for rehabilitation and extensions. Later this plan was abandoned by the Tennessee Valley Authority. PWA refused to make a loan or grant to the City of Florence until this plan had been abandoned.

21.

On December 28, 1934, the Public Works Administration entered into a loan and grant agreement with the City of Florence, whereby the United States agreed to aid the City in financing the construction of a municipal electric distribution system. A copy of this agreement appears as Exhibit F-1; Part 2-a, of Stipulation Agreement No. 1 in the cases of Alabama Power Company v. Ickes, et al., Equity Nos. 59071 and 59671.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between the City of Florence and the Public Works Administration. A copy of this new agreement appears as Exhibit F-3 in the said Stipulation Agreement No. 1.

582 22.

Sheffield.

In June, 1933, the City of Sheffield, Alabama, held an election to determine whether the City should erect a municipal power plant (Greer-210). The result of this election was 630 in favor of the establishment of a municipal electric system, and 96 against such a system.

Thereafter, on December 20, 1933, the City of Sheffield, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and the Public Works Administration. A copy of this agreement appears as Exhibit S-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between

the City of Sheffield, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit S-3 of the said Stipulation Agreement No. 1.

23.

Tuscumbia.

On August 30, 1933, the City of Tuscumbia, Alabama, held an election to determine whether the City should erect a municipal power plant (Parr-205). The result of this election was 336 in favor of the establishment of a municipal electric system, and 8 against such a system.

Thereafter, on December 20, 1933, the City of Tuscumbia, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and PWA. A copy of this agreement appears as Exhibit T-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into be-
583 tween the City of Tuscumbia, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit T-3 of the said Stipulation Agreement No. 1.

24.

Decatur.

On October 1, 1933, the City of Decatur, Alabama, held an election to determine whether the City should erect a municipal power plant (Hendrix-215). The result of this election was 1415 in favor of the establishment of a municipal electric system, and 501 against such a system.

Thereafter, on December 20, 1933, the City of Decatur, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and the Public Works Administration. A copy of this agreement appears as Exhibit D-1; Part 3-b, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between the City of Decatur, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit D-3 of the said Stipulation Agreement No. 1.

25.

Hartselle.

Sometime in 1933, the City of Hartselle, Alabama, held an election to determine whether the City should erect a municipal power plant (Livingstone-176). The result of this election was 296 in favor of the establishment of a municipal electric system, and 18 against such a system.

Thereafter, on December 20, 1933, the City of Hartselle, Alabama, filed an application with the Public Works Administration for a loan and a grant of funds for the erection of a municipal power plant, and a loan and grant
584 agreement, dated December 4, 1935, was entered into between the City of Hartselle, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit H-1, Part 2-a, of the aforementioned Stipulation Agreement No. 1.

26.

Russellville.

In December, 1933, the City of Russellville, Alabama, held an election to determine whether the City should erect a municipal power plant (Porter-182). The result of this election was 405 in favor of the establishment of a municipal electric system, and 103 against such a system.

Thereafter, on December 20, 1933, the City of Russellville, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant, and a loan and grant agreement, dated December 4, 1935, was entered into between the City of Russellville, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit R-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

27.

Guntersville.

On September 4, 1933, the City of Guntersville, Alabama, held an election to determine whether the City should erect a municipal power plant (Scruggs-200). The result of this election was 240 in favor of the establishment of a municipal electric system, and 70 against such a system.

Thereafter, on December 20, 1933, the City of Guntersville, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant and a loan and grant agreement, dated December 4, 1935, was entered into between the City of Guntersville, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit G-1; Part 2-a, of the aforementioned Stipulation Agreement No. 1.

585

28.

Hominy.

Sometime in the year 1930, the Mayor and City Council of the City of Hominy, Oklahoma, became interested in the construction of a municipal electric light plant (Hall-7), and on December 16, 1930, the City held an election to determine the question of the issuance of bonds to be used for the purpose of constructing a municipal plant and distribution system. The vote was 373 in favor of the issuance of the bonds and 42 against.

The validity of the proposed bond issue was contested in the courts of Oklahoma; a contract was let for the construction of the proposed municipal plant; the performance of this contract was enjoined by the Federal Court in a suit brought by the Oklahoma Utilities Company. The City then began negotiations for the sale of its bonds to the Reconstruction Finance Corporation.

On August 24, 1933, the City filed an application with PWA for a loan and grant to erect the proposed municipal power plant, and a loan and grant agreement dated January 10, 1935, was entered into between the PWA and the City of Hominy. A copy of this agreement is attached to plaintiff's Exhibit 92 and marked Exhibit C.

During the month of September, 1935, this contract was terminated and thereafter a new agreement, dated December 14, 1935, was entered into between the parties. A copy of this agreement is attached to plaintiff's Exhibit 92 and marked Exhibit F.

At the present time work is actually being carried on in the construction of the municipal power plant in Hominy without the use of Federal funds (Hall-14).

29.

Plainview.

On July 20, 1931, the Council of the City of Plainview, Texas, adopted a resolution favoring the erection of a municipal light and power plant. (Dysart-23). On November 15, 1932, the Council adopted an ordinance to the same effect and on the same date authorized the Mayor and the City Secretary to enter into a contract with Mont-
586 gomery & Ward, Engineers, of Wichita Falls, Texas, for the erection of a municipal light and power plant.

On April 4, 1933, a municipal election was held to determine whether the City Council should be authorized to issue revenue bonds for the purpose of erecting a municipal power plant (Dysart-25). The result of this election was 438 in favor of the issuance of such bonds, and 100 against such issurance.

On August 17, 1935, a loan and grant agreement was entered into between the City of Plainview and the Public Works Administration. A copy of this agreement is attached to plaintiff's Exhibit 24, marked Exhibit D. This contract was terminated by mutual agreement, dated December 2, 1935, and on December 4, 1935, a new loan and grant agreement was entered into between the City of Plainview and the Public Works Administration. A copy of this new agreement is attached to plaintiff's Exhibit 24, marked Exhibit F-1.

30.

Iowa City.

On April 19, 1934, an election was held in Iowa City, Iowa, on the question of the construction of a municipal electric system, and the issuance of revenue bonds there-

for. The result of this election was 2959 in favor of such construction and issuance and 2804 against such construction and issuance.

On January 8, 1934, Iowa City made application to PWA for a loan and grant for the construction of a municipal electric project. The project was approved by the Administration and the President and a loan and grant agreement was forwarded to the City. On October 5, 1934, the City returned the loan and grant agreement unexecuted and withdrew its application. On April 5, 1935, after a change in the City administration, the application was reinstated. On June 17, 1935, the application was amended so as to apply for a grant only. On January 8, 1936, pursuant to said application, PWA made an offer in writing to aid the City by way of grant in financing the construction of a municipal power plant; a copy of this offer is set forth in plaintiff's Exhibit 52. This offer was accepted by resolution of the City Council on March 6, 1936.

587 31.

Procedure for Handling Applications

Organization of PWA.

At the head of PWA is the Administrator, whose powers are plenary and subject only to the control of the President. He has complete supervision and direction of the Public Works Administration. The Public Works Administration is composed of a number of Divisions, among which are the Legal Division, the Engineering Division, the Financial Division, and the Projects Division. The first three of the foregoing are examining divisions, and their function is to examine and make recommendations to the Administrator with respect to applications for projects. The Projects Division coordinates the reports of the examining divisions, and records and routes applications.

In addition there existed at one time in the Public Works Administration a Technical Board of Review to consider projects against which an adverse report or protest had been lodged, and an Electric Power Board of Review established May 9, 1934, which considered adverse reports or protests with respect to electric power projects. The Elec-

tric Power Board of Review was dissolved by order of the Administrator on March 16, 1935.

The PWA has a field office in every State in the country. The chief official in each of these offices was at one time known as the State Engineer for the Public Works Administration, who usually was the Chairman of a State Advisory Board. This official is now designated as the State Director, and the State Advisory Board has been abolished.

By Executive Order of June 16, 1933, the President of the United States appointed a Special Board for Public Works, consisting of the Secretary of the Interior as Chairman, and certain other Government officials as members. One of the functions of this Board was to pass upon all recommendations for allotments of funds appropriated pursuant to Title II of the National Industrial Recovery Act, for loans and grants for public works projects.

Applications.

Applications for loans and grants for PWA projects are governed by two separate statutes,—Title II of the National Industrial Recovery Act, and the Emergency
588 Relief Appropriation Act of 1935, and the procedure for handling applications is slightly different under each statute.

Applications for funds appropriated by Title II of the National Industrial Recovery Act, such as are involved in the projects in the Cities of Florence, Sheffield, Tuscumbia, Decatur, Hominy and Plainview were received in the first instance at the State PWA office. Such applications were examined in such offices. The State Engineer made a report to the Public Works Administrator, recommending approval or disapproval of the application. The application and State Engineer's report were received by the Projects Division of the central office in triplicate, a copy of which was transmitted to each of the examining divisions for study and recommendation.

The recommendations of the three examining divisions were then sent to the Special Board for Public Works, which passed a resolution, recommending approval or disapproval of an allotment. If the Administrator of Public Works agreed with the recommendation for an allotment

for the project he signed the resolution in approval thereof. An allotment of funds was not intended to create, and did not create, a legal obligation to make a loan or grant. The Administrator then presented a list of projects to the President with his recommendation. The President gave a final approval or disapproval to the application by making notations on and signing the list.

Applications for funds appropriated by the Emergency Relief Appropriation Act of 1935, such as are involved in projects for the Cities of Hartselle, Russellville, Guntersville and Iowa City are handled in a slightly different manner. The applications are received in the first instance by the State Director of PWA. At the State office, representatives of the Legal, Engineering and Financial Divisions examine the application and prepare reports. The applications and the reports are forwarded in triplicate to the central office in Washington, and are there reviewed by the three examining divisions, and approval or disap-
589 proval is recommended by the Director of each examining division. If the application is approved by the Administrator and by the President of the United States the allotment is complete.

Before approving any project and before executing or authorizing the execution of a loan and grant agreement under either statute the Administrator received advice from his subordinates with respect to the facts bearing upon whether the making of the loan and grant would comply with the pertinent provisions of the statutes and Executive Orders of the President. In some instances he also relied upon data received through oral conferences, the results of which were not always reduced to writing. The Administrator submitted the approved projects to the President for his consideration and approval; in some instances the President acted on the basis of oral discussions which were not reduced to writing.

32.

Loans and grants for the financing of municipal electric projects were dealt with in the same manner and judged by the same tests as other projects.

Each of the applications submitted by the Cities herein involved were handled in accordance with the procedure outlined in Finding 31.

33.

Functions of PWA Subordinates Advisory

The State Engineers or Directors, the State Advisory Boards, each of the examining divisions of the PWA, the Projects Division, the Special Board for Public Works, the Technical Board of Review, and the Electric Power Board of Review, have at all times had only advisory powers with respect to the approval of applications for loans and grants. None of these agencies had any power either by original authorization or subsequent ratification to make allotments or contracts or to make commitments with respect thereto, or to do anything whatsoever except to obtain information and to make advisory reports and recommendations to the Administrator. The power of approval or disapproval rested entirely with the Administrator and the President.

590

34.

Cities Propose to Build Plants

With the proceeds of the sale of its bonds, and of the grant by PWA, each of the cities herein involved proposes to construct a municipal electric light plant. The result will be competition with the plants of the Plaintiffs which in all probability will thereby suffer substantial financial loss.

35.

Inducement.

The determination of whether municipal competition with privately-owned utilities, or the elimination of competition by privately-owned utilities where their franchises had expired, was desirable, was made by the cities involved and not by PWA.

Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the

part of any of the defendants, their agents or subordinates. There was and is no conspiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to, nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regulate their rates or electric rates generally, or to foster municipal ownership of utilities.

The expenditures under these statutes involve no purchase of, nor contract providing for, regulation by the United States. The failure of any city to apply for or receive loans or grants under those statutes will impose upon it no disadvantage or financial loss.

36.

Rates.

The defendants have not reserved any right or power to influence or control rates to be charged by the proposed municipal power plants. Provisions of earlier contracts in any way inconsistent with the facts found herein were eliminated before any action was taken pursuant thereto by any of the municipalities.

591

37.

Neither the United States nor any of the defendants has reserved any right or power under the existing contracts, or in any other way, to require any of the municipalities to eliminate competition or to designate the person or agency from whom the municipality must purchase its power. Provisions of earlier contracts in any way inconsistent with the facts found herein were eliminated before any action was taken pursuant thereto by any of the municipalities.

The rights of the United States with respect to the construction of the projects are fully set forth in the contracts. These contracts are subject to no terms or conditions except as specifically set forth therein.

38.

Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed.

39.

Comprehensive Program

Upon his determination to approve a project, include it in the comprehensive program of public works, and make a loan and grant therefor, the Administrator submitted it to the President for his approval. When the action of the Administrator was approved by the President, funds were allocated for the specific project. On March 20, 1934, pursuant to a Resolution (Sen. Res. 190, 73rd Cong.) calling upon the Administrator to furnish the Senate with information including "a general survey of the public works program," an account of the organization of the Public Works Administration and a statement of its policies, the Administrator submitted a report to Congress, a document some three hundred pages in length, giving the information called for by the Resolution, including a detailed list containing the name, location, and type of each approved project and the amount of funds allocated therefor.

Thereafter, on June 19, 1934, Congress enacted the Emergency Appropriation Act, Fiscal Year of 1935 (Pub.
592 No. 412, 73rd, Cong., 2d Sess.), which, among other things authorized not exceeding $500,000,000 for public works under Title II of the National Industrial Recovery Act. On April 8, 1935, Congress enacted the Emergency Relief Appropriation Act of 1935, which, among other things, authorized the continuance of the Public Works Administration and the performance of its functions, and made available additional sums for loans and grants to States, municipalities, and other public bodies.

40.

Public Works Administration Program National in Scope.

A total of 7,957 projects, of many different types and extending into every county in the United States except three, have been approved by the Public Works Administration and funds allocated therefor. Of this number, 260 are electric power projects, 85 being located in places where privately-owned electric facilities are now being operated. The amount allotted for all non-Federal PWA projects is $1,222,636,961. The total allotted for the 85 competing

electric projects is $58,768,800, representing 1.1% of the total number of allotments and 4.8% of the total amount of allotments.

41.

General Welfare.

Each of the projects herein involved is a part of a program of national scope, is designed to relieve unemployment, and promotes the general welfare of the United States.

42.

Loans Reasonably Secured.

No attempt was made by the plaintiffs in any case except with respect to Plainview, Texas, to prove that the loans were not reasonably secured and that the projects were not self-liquidating. In the case of Plainview, Texas, there is substantial evidence to support the determination of the Administrator that the Plainview project is self-
593 liquidating and that the loan is reasonably secured.

As to all other projects involved in this litigation, except that in Iowa City which involved a grant only, the Administrator has made a determination that the loans are reasonably secured.

43.

Projects Approved.

Each of the projects herein involved has been approved by the Administrator and by the President of the United States.

44.

Work on Projects

The President of the United States has determined that in the case of the projects to be constructed in the Cities of Iowa City, Iowa, and Hartselle, Russellville, and Guntersville, Alabama, with funds appropriated under the Emergency Relief Appropriation Act of 1935, 25% of the loan or grant, or the aggregate thereof, will be expended for work on each project.

45.

The Court judicially notices that the census of 1930 indicates that in the years 1923-1925 there were approximately forty-one million people over the age of ten years gainfully employed in the United States. This number included agricultural and industrial workers. Of this group eight million were employed in industry. These are subdivided into workers in the durable and non-durable industries. The durable goods industries include firms manufacturing such products as iron and steel, machinery, transportation equipment, railroad repair shops, non-ferrous metals, lumber and allied products, stone, clay and glass products. In the non-durable goods groups are textiles and their products, such as clothing, leather and its products, such as boots and shoes, food and kindred products, tobacco manufacturers, paper, printing, chemicals, and rubber products.

During the period 1923-1925 the average number of persons employed in the durable goods group and the
594 non-durable group was approximately equal, there being over four million persons in each group.

From data computed by the Bureau of Labor Statistics of the Department of Labor, it appears that if the average monthly number of persons employed during the years 1923-1925 be taken as normal and indicated by the index number 100, then both the durable goods and the non-durable goods industries stood together in August of 1929 at the figure 107. From the year 1923 to the year 1929 there was very small variation in the movement of employment in the durable and non-durable goods groups. Beginning with the latter part of 1929 employment in both groups decreased, but in the durable goods industries it decreased more rapidly than in the consumers' or non-durable goods industries.

During the first six months of the year 1933, the index of employment in the durable group varied between approximately 45 and 50, while during the same period the index of employment in the non-durable group varied between approximately 75 and 85.

46.

Pursuant to the provisions of PWA Contracts, contractors engaged in furnishing materials and labor on public works projects are required to furnish reports to the Bureau of Labor Statistics giving data in regard to the number of people on the payroll, the amount of the payroll, the man hours of work at the site of the construction project and the expenditures for construction materials. Upon the basis of information so received, a study was undertaken by the Bureau of Labor Statistics of six power projects already completed with funds furnished by the Public Works Administration. The total expenditure for labor and materials amounted to $461,628. The study shows that this amount of labor at the site accounted for 13.2% of the total expenditure, and materials for 86.7%. There were 85,529 man-hours created by these projects and 380,000 man-hours of indirect labor in fabricating, transporting, and producing the materials. Four and four-595 tenths man-hours of indirect labor were created for each man-hour of labor at the site. The conclusions of the Bureau of Labor Statistics as to indirect labor are approximations based upon carefully worked-out averages, and do not purport to be precise.

From July, 1933, until March, 1936, a total of $1,177,000,000 was advanced by the Public Works Administration for the purchase of materials for public works projects.

47.

The fundamental purpose of PWA was and is to relieve existing widespread unemployment, and to increase purchasing power through the construction of useful public works.

48.

Public Works projects are particularly adapted to relieving unemployment in the durable goods industries, by providing both direct employment, which is work at the site of the project, and indirect employment, which is work in industries supplying materials for use at the site, mining industries, and transportation facilities.

49.

50.

The discretionary powers authorized by Section 203 (d) of Title II of the National Industrial Recovery Act have never been exercised.

596 *Conclusions of Law*

1.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935 and the contracts and the loans and grants involved in these units are valid and constitutional.

2.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contracts and the loans and grants involved in these suits involve valid expenditures for the general welfare, and involve no improper delegation of legislative power and no exercise of any improperly delegated power, and do not violate the Tenth Amendment or any other provisions of the Constitution.

3.

4.

Title II of the National Industrial Recovery Act sets forth definite standards with respect to the purposes of the expenditures by the Administrator and the means by which such expenditures should be made. These standards, as administratively interpreted, were reaffirmed by the Emergency Relief Act, Fiscal year of 1935, approved June 19, 1934, and were also reaffirmed by and incorporated in Section 12 of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935.

5.

If the making of the loans and grants results in lower rates, such result is but the incidental effect of what the

States and their municipalities voluntarily decide to do, and therefore cannot have the effect of making such loans and grants invalid.

6.

Under the contracts involved in these cases the United States will have no control of the rates charged by, or the operation and management of, the plants of the several cities, and no rights with respect thereto other than
597 those which any other holder of the bonds of any such cities would have under the laws of the States in which the cities are situated. The rates charged by the several cities, and the operation and management of their plants will in all respects continue to be subject to regulation by the several States in which the several cities are situated. The United States is in no way attempting to and will in no way be able to regulate commerce within any of the States, as a result of said contracts.

7.

The contracts and the proposed loans and grants involved in these suits are made and being made in full compliance with the applicable statutes.

8.

Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935 authorize the making of loans and grants by PWA to municipalities for the purpose of financing the construction of municipally-owned generating plants and distribution systems, regardless of whether or not they compete with plants or distribution systems owned by privately-owned public utility companies, or will supplant the same where the franchises of such companies have expired.

9.

The provision of the Emergency Relief Appropriation Act of 1935 requiring that the President determine that, in the case of loans or grants to cities, not less than twenty-five per cent thereof would be expended for work under such particular project should be construed as referring

not only to work on the site of the particular project, but also to include indirect labor resulting from the expenditures for such project.

10.

The administrative interpretation of the provisions of Title II of the National Industrial Recovery Act with reference to the preparation of a comprehensive pro-
598 gram of public works, as set forth in Finding of Fact No. 30, and the inclusion of projects therein was a reasonable, practical and proper interpretation. Moreover, that interpretation has been adopted, ratified and approved by the Congress by the subsequent statutes above referred to.

11.

The execution and performance by the defendants of the contracts with the Cities of Florence, Sheffield, Tuscumbia, Decatur, and Plainview are authorized by Title II of the National Industrial Recovery Act as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, and execution and performance by the defendants of the contracts with the Cities of Hartselle, Russellville, Guntersville and Iowa City are authorized by the Emergency Relief Appropriation Act of 1935.

12.

13.

The execution and performance of these contracts are in all respects lawful under the Constitution and laws of the United States, and as to the cities other than Iowa City, under the laws and constitutions of the States in which the respective cities are situated. As to Iowa City, all questions of state law set forth in the Bill of Complaint were by stipulation withdrawn from consideration in these suits.

14.

The acts of the President and the Administrator in these cases were not unreasonable and were within the range of sound discretion.

The acts of the President and the Administrator in approving and making the contracts and the loans and grants called for the exercise of administrative discretion not subject to judicial review unless arbitrary and unreasonable.

15.

Each of the cities involved herein except Iowa City has the right under the Constitution and statutes of its State to build it proposed plant, to issue the proposed
599 bonds, and to receive the proposed grants for financing the construction of such plant.

16.

The plaintiffs have a standing as litigants in accordance with *Frost* v. *Corporation Commission*, 278 U. S. 315, which required the Court to hear their claims and decide them on the merits.

17.

The plaintiffs are not entitled to the injunctions prayed for in the bills of complaint, or any other equitable relief in these actions.

18.

The bills of complaint should be dismissed on the merits with costs, and a decree should be entered accordingly.

19.

Each city involved in these suits has a right to engage in competition with plaintiff utility company operating within that city, and to require that plaintiff to discontinue its operations in such city when its franchise has expired.

20.

The provisions of the contracts relating to wages and hours and conditions of labor in the construction of the projects are stipulated by the contracts, and cannot be changed by any of the defendants.

21.

The contracts contain no provisions constituting any delegation by any of the cities involved in these suits of their powers to the defendants or to the United States.

22.

June 26, 1936

ALFRED A. WHEAT
Chief Justice.

600 *Decree Dismissing Bills, etc.*

Filed June 26, 1936

* * * * * * * * *

These causes come on to be heard at this term on the merits and after the taking of testimony on behalf of all parties, were argued by counsel; and upon consideration thereof, it is this 26th day of June, 1936,

ORDERED, ADJUDGED and DECREED that the bill of complaint in each of the above causes be and it is hereby dismissed on the merits, with costs.

(s) ALFRED A. WHEAT
Chief Justice.

From the foregoing decree the plaintiffs in each cause give notice of appeals in open court to the United States Court of Appeals for the District of Columbia, which appeals are hereby allowed, and undertaking for costs is fixed at $100, or $50 cash in each case.

(s) ALFRED A. WHEAT
Chief Justice.

601 *Memoranda:*

July 10, 1936

$50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 58927.

July 10, 1936

$50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 59071.

July 10, 1936

$50.00 deposited in lieu of cost bond on appeal in Equity Cause No. 59671

In the District Court of the United States for the District of Columbia

Holding an Equity Court

Equity No. 58927

TEXAS UTILITIES COMPANY, *Plaintiff*,

v.

HAROLD L. ICKES, ET AL., *Defendants*.

602 *Assignment of Errors*

Filed August 14 1936.

. . . . . .

Now comes the plaintiff and assigns as errors the action of the Court in the following particulars:

1. The Court erred in dismissing the bill of complaint and in making its conclusions of law numbered 17 and 18.

2. The Court erred in making its conclusions of law nummered 1, 2 and 4, the error being that in so far as Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 were construed to authorize the acts of the defendants herein said statutes violate the Constitution of the United States in the following respects:

(a) Neither Article I, Section 8, Clauses 1 or 2, nor any other Section or Clause thereof grants to Congress the power to authorize the acts of the defendants; among other things the general welfare of the United States is not subserved thereby, but the benefits, if any, of the proposed action are purely local and not national.

(b) The Tenth Amendment denies to Congress the
603 power to authorize the acts of the defendants in that

(i) they regulate and affect matters of purely local concern in Plainview, Texas, wholly within the police power of the State of Texas, and not subject, directly or indirectly, to Federal control;

(ii) their primary purpose and necessary effect is to regulate and lower intrastate electricity rates and to promote public ownership of electricity facilities;

(iii) their purpose and effect is to effectuate control by the Federal Government over working conditions and other details of the construction and operation of an electricity project in Plainview, Texas.

(c) Both Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 delegate power beyond the limitations of Article I, Section 1; Article I, Section 8, Clauses 1, 2, and 18; Article I, Section 9, Clause 7; Article II, Section 1; and the other provisions of the Constitution contemplating a division of

power among the independent branches of the Government of the United States.

(d) Neither the said statutes nor the acts of the defendants have provided the plaintiff with an adequate hearing, and they otherwise arbitrarily provide for and seek the taking of the plaintiff's property without the due process guaranteed by the Fifth Amendment.

3. The Court erred in making its conclusion of law numbered 5, the error being that:

(a) The lowering of rates is not the incidental effect of what the States and municipalities decide to do, but is the paramount, desired and necessary effect of the defendants' actions;

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4. The Court erred in making its conclusion of law numbered 6, the error being that the defendants, through control over allotted funds and otherwise, retain unlimited power with respect to the Plainview project, and that the defendants are exercising and will in the future exercise this control, as well as their other powers, to effectuate regulation of commerce within the State of Texas and other States, in derogation of the police power of the States.

5. The Court erred in making its conclusions of law numbered 7, 8, 9, 10, 11, 14, the error being that the action of the defendants is not authorized by Title II of the National Industrial Recovery Act or The Emergency Relief Appropriation Act of 1935 for the following reasons:

(a) The comprehensive program required by Sections 202 and 203 of the National Industrial Recovery Act has never been prepared.

(b) The loan to the City of Plainview is not reasonably secured as required by Section 203 of the National Industrial Recovery Act.

(c) The arrangement between the City of Plainview and the defendants conveys to the defendants local municipal powers and otherwise violates Article I, Section 17; Article II, Article III; and Article III, Section 53 of the Constitution of the State of Texas; of Title 28; and of Articles 2368-a, 2559-2566, 1138, and 1638 of the Texas Revised Civil Statutes; and other provisions of the law, statutes, and Constitution of the State of Texas reposing power in the City of Plainview and regulating its affairs.

605

(d) The Plainview project is not reasonably designed to increase employment quickly as required by Section 203 of the National Industrial Recovery Act and Section 1 of The Emergency Relief Appropriation Act of 1935.

(e) The Plainview project is not "useful" in the sense required by law, but is wasteful and useless.

(f) The project is designed to effectuate the reduction of and control over intrastate electricity rates at the defendants' direction and the furthering of public ownership of electricity facilities.

6. The Court erred in making the first clause of its conclusion of law numbered 13 for the reasons set forth in Assignments 2 and 5, *supra.*

7. The Court erred in making its conclusions of law numbered 13, 15, and 21 for the reasons set forth in Assignments 2 and 5, *supra,* notably in subparagraph (c) of the latter.

8. The Court erred in making its conclusion of law numbered 20 for the reason that the defendants may impose such changes.

9. The Court erred in making its conclusion of law numbered 14 for the reason among others, in addition to those set forth in Assignment 5, *supra,* that thus to limit judicial review deprives the plaintiff of the privilege of the full and complete judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed it by the due process clause of the Fifth Amendment, by Article III, Sections 1 and 2 of the Constitution, and by Title 18, ch. 3, Secs. 41, 43, 44, and 47 of the Code of the District of Columbia.

10. The Court erred in making its finding of fact
606 numbered 19, the error being that there is no evidence to justify a finding that the City of Plainview is authorized to receive a grant for the purpose stated.

11. The Court erred in making its finding of fact numbered 29, the error being that the Council authorized a contract with Montgomery & Ward, Esquires, for the designing not the erection, of a plant.

12. The Court erred in making its seventh paragraph of finding of fact numbered 31, the error being that the action of the Special Board for Public Works upon applications was taken subsequent to action by the Administrator.

13. The Court erred in making its finding of fact numbered 32, the error being that in the case of electricity projects, including that for Plainview, preferential treatment was given by PWA, and through the Electric Power Board of Review private utilities were given an opportunity to escape competition by lowering their rates to a point satisfactory to Federal officials who had no legal interest in the matter; and that in the case of electricity projects, including that of Plainview, a peculiar test of social desirability was applied by PWA and the defendants, to-wit, the lowering of electricity rates and extension of public ownership. The Court erred further in the said finding in that in the case of the Plainview project there was no examination of or report upon the Plainview application by the State Engineers or other State PWA officers.

14. The Court erred in making its finding of fact numbered 33, the error being that certain of the subordinate bodies of PWA and agents of defendants were authorized to solicit applications through publicity and otherwise and to enter into negotiations with private utilities relative to electricity rates.

607

15. The Court erred in making its finding of fact numbred 35, the error being that PWA and the defendants did make the determination that competition with the plaintiff was desirable, the error further being that PWA and the defendants solicited applications for projects through widespread publicity and offers of free gifts and otherwise, that the defendants have sought injury to the plaintiff and the lowering of rates in Plainview and in other intrastate localities throughout the nation, and that the arrangement with Plainview does purchase control by defendants over matters of local concern.

16. The Court erred in making its findings of fact numbered 36, 37, and 38, the error being that they have no support in the evidence.

17. The Court erred in making its finding of fact numbered 41, the error being that the finding is in truth a conclusion of law and, further, is contrary to the evidence.

18. The Court erred in making its finding of fact numbered 42, the error being that there is no substantial evidence to support a conclusion that the project is self-liqui-

dating or the loan reasonably secured, and that the Administrator never so determined.

19. The Court erred in making its finding of fact numbered 47, the error being the same as that in the
608 case of finding numbered 41, *supra;* and being further that the purpose and necessary effect of the defendants' acts was to regulate and lower intrastate electricity rates and to further public ownership of electricity facilities by encouraging municipalities to undertake such projects, by threatening private utilities, including the plaintiff, with competition unless rates were reduced, and by other means; and being further that the relief of unemployment did not enter into the defendants' consideration, and projects were not financed for that purpose or with that effect.

20. The Court erred in making its finding of fact number 48, the error being that there is no evidence that electricity projects such as that in Plainview are particularly adapted to the relief of unemployed persons, but the evidence shows that the direct labor furnished by such projects is negligible in amount, and such as is furnished is at greatly higher cost than in the case of any other type of project financed by PWA, that the indirect labor involved is uncertain and speculative in amount, location, and character, that all labor involved will not necessarily or probably go to unemployed persons but will go to any persons whom private contractors may choose to employ, and chiefly to skilled workers in crafts wherein there is, and, at the time the bills herein were filed, there was little if any unemployment.

21. The Court erred in failing to find that the plaintiff adequately and well served the needs of Plainview and its residents under the regulation of Plainview itself,
609 and that the defendants' project will not serve new users or promote any other useful purpose but will merely duplicate present service and destroy existing facilities, adversely affecting electricity service both in Plainview and in the surrounding region of Texas.

22. The Court erred in failing to find that no comprehensive program of public works has ever been prepared, and that the defendants have merely financed individual projects from time to time without regard to any compre-

hensive program, unless it be a program to reduce electricity rates and further public ownership of electricity facilities.

23. The Court erred in failing to find that the defendants, through control over the funds wherewith projects are financed, through their power of rescission of agreements and allotments, through their inspectors, and otherwise, require the construction of projects according to plans and specifications, construction policies, standards of materials, etc., imposed and fixed by the defendants.

24. The Court erred in failing to find that neither the defendants, the President of the United States, nor anyone else, ever made any findings of facts with respect to whether public works projects, and specifically the Plainview project, came within the statutory authorization of Congress.

25. The Court erred in failing to find that funds borrowed by the United States are to be a source for the funds to be used to finance the Plainview electricity project.

26. The Court erred in failing to find that neither
610 the defendants, nor anyone else, ever afforded to the plaintiff any opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing upon its rights, with respect to the proposed loan and grant to the City of Plainview.

27. The Court erred in failing to find the facts set forth in Assignments 13, 14, 15, 19, and 20 herein.

28. The Court erred in refusing to require the defendants to produce a memorandum from Henry Hunt, Chairman PWA Electric Power Board of Review to Harold L. Ickes, Administrator, a letter from said Administrator to the President, and a memorandum from the President to the Administrator, all subpoenaed by the plaintiff and by which plaintiff offered to prove that the conduct of the Electric Power Board of Review was in accordance with instructions of the Administrator and the President.

29. The Court erred in excluding testimony of the witness Rau by which the plaintiffs offered to prove that the Electric Power Board of Review was governed by instructions from the Administrator and the President; that when an application for a loan and grant for a municipal electric

project came before it, the Board considered first whether the project would reduce rates paid for electric energy; that if it would not, the Board would disapprove the application; that private utilities were notified that if they lowered their rates below the proposed city rates the project would be disapproved; that the city applicant was then given a further chance to reduce the proposed rates; and that applications were in many instances disapproved by
the Board if the City could not meet the private
611 utility reduced rates.

30. The Court erred in excluding testimony of the witnesses Vennard, Cary, Board, Kennedy and Byerly and documentary evidence by which plaintiffs offered to prove in specific instances the practices mentioned in Assignment 29, the final action taken in such cases by PWA, and admissions relevant thereto binding upon the defendants.

31. The Court erred in excluding telegraphic correspondence between the defendant Ickes and one F. T. Post (Plaintiff's Exhibits for identification 231 and 232) by which plaintiffs sought to show an admission by the defendant that the PWA Electric Power Board of Review engaged in such negotiations as are set forth in Assignment 29 with his knowledge and approval.

32. The Court erred in ruling that the defendants need not produce in response to a subpoena the findings, recommendations or reports of the Electric Power Board of Review, the examining divisions of PWA, or any agency whatever of PWA, except the Special Board of Public Works, upon the projects here involved.

33. The Court erred in ruling that the defendants need not produce in response to subpoena the resolutions and other proceedings of the Special Board for Public Works determining the principles to govern the allotment and expenditure of funds under Title II of the National Industrial Recovery Act.

34. The Court erred in excluding from evidence a book and certain magazine articles written by the defendant
Ickes and certain passages therefrom (Plaintiff's
612 Exhibits for identification Nos. 123, 141, 143) and certain documents and letters issued and written by PWA (Plaintiffs' Exhibits for identification Nos. 140, 217-

230, inclusive, and 254) offered as admissions by the defendants of the truth of the facts stated by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of was to regulate and control the intrastate business of the plaintiff in generating and selling electric energy and the rates charged by it, to establish yardsticks to measure charges for such energy sold in intrastate commerce, to promote public ownership of electric generating and distributing systems—all in accord with the so-called National Power Policy of the Federal Administration—; and that the defendants solicited and promoted the cooperation of political subdivisions of States in undertaking such projects, that the plaintiff and other privately owned utilities were denied a hearing with respect to such projects, and, by the control of the funds expended, that the defendants controlled the execution of such projects.

35. The Court erred in excluding from evidence certain publications of the National Power Policy Committee, addresses of the President, publications of the Tennessee Valley Authority, (Plaintiffs' Exhibits for identification Nos. 165-170, inclusive, 175-179, inclusive, 181, 183, 184), setting forth the so-called National Power Policy of the Administration referred to by the defendant Ickes, by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of were as set
613 forth in Assignment 34.

36. The Court erred in refusing to receive the testimony of the witnesses Lawrence, Field and Byerly, and the depositions of the witnesses Hiss, Harvey, Hoffman, Dysart and Rowell and documentary evidence (Plaintiffs' Exhibits for identification 21, 22, 268, 269, 270) by which plaintiff sought to prove that the offer of PWA to make a grant of from 30 to 45 per centum of the cost of construction of municipal electric projects and to lend the remainder of the cost to be repaid only out of the earnings of the proposed project had the effect of inducing certain of the municipalities here involved and municipalities generally to undertake such projects and that in elections held to vote upon such projects the proponents thereof represented said offer as a gift imposing no liability upon the recipients.

37. The Court erred in permitting the witness Ickes to testify as to action he took concerning correspondence by Mr. Hunt relating to an application of Hiram, Ohio, and in receiving in evidence Defendants' Exhibit No. 11.

38. The Court erred in permitting the witness Ickes, upon his redirect examination, to answer the following question: "Your purpose in making these contracts for those competitive projects always was to increase employment quickly as the statute required, and these other considerations were only incidental and collateral?"

39. The Court erred in excluding testimony offered by the plaintiff through the witness Veatch to show (a) the cost of labor at the site of the proposed Plainview project
614 and (b) the amount of the Plainview business which the proposed municipal plant would secure.

40. The Court erred in making its conclusion of law numbered 4 the error being, in addition to that set forth in Assignment 2, *supra*, that neither the Emergency Relief Act of 1935 nor Section 12 of The Emergency Relief Appropriation Act of 1935 reaffirmed any standards, as administratively interpreted or otherwise, set forth in Title II of the National Industrial Recovery Act, and in none of the said three statutes were there any adequate legisla[illegible]e standards whatever for the guidance of administrative action.

41. The Court erred in making its conclusion of law numbered 19, the error being that the City of Plainview may not compete with or supplant plaintiff in an illegal manner and particularly by means of a loan and grant from the United States on the terms and conditions involved in this case.

EDWARD B BURLING
Attorney for Plaintiff.

Received a copy of the foregoing Assignment of Errors this.....day of....., 1936.

ALEXANDER HOLTZOFF
Attorney for Defendants.

615 In the District Court of the United States for the District of Columbia

Signed copy.

In Equity No. 59071

ALABAMA POWER COMPANY,

v.

HAROLD L. ICKES ET AL.,

Assignments of Error

Filed August 14 1936

* * * * * * * * * * *

Now comes the plaintiff and assigns as errors the action of the Court in the following particulars:

1. The Court erred in dismissing the bill of complaint and in making its conclusions of law numbered 17 and 18.

2. The Court erred in making its conclusions of law numbered 1, 2 and 4, the error being that in so far as Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935 were construed to authorize the acts of the defendants herein said statutes violate the Constitution of the United States in the following respects:

(a) Neither Article 1, Section 8, Clauses 1 or 2, nor any other Section or Clause thereof grants to Congress the power to authorize the acts of the defendants; among other things the general welfare of the United States is not subserved thereby but the benefits, if any, of the proposed action are purely local and not national.

(b) The Tenth Amendment denies to Congress the power to authorize the acts of the defendants in that

(i) they regulate and affect matters of purely local
616 concern in Florence, Sheffield, Tuscumbia and Decatur, Alabama, wholly within the police power of the State of Alabama, and not subject, directly or indirectly, to federal control;

(ii) their primary purpose and necessary effect is to regulate and lower intrastate electricity rates and to promote public ownership of electricity facilities;

(iii) Their purpose and effect is to effectuate control by the Federal Government over working conditions and other details of the construction and operation of electricity proj-

ects in Florence, Sheffield, Tuscumbia and Decatur, Alabama.

(c) Both Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 delegate power beyond the limitations of Article I, Section 1; Article I, Section 8, Clauses 1, 2 and 18; Article I, Section 9, Clause 7; Article II, Section 1; and the other provisions of the Constitution contemplating a division of power among independent branches of the Government of the United States.

(d) Neither the said statutes nor the acts of the defendants have provided the plaintiff with an adequate hearing, and they otherwise arbitrarily provide for and seek the taking of the plaintiff's property without the due process guaranteed by the Fifth Amendment.

3. The Court erred in making its conclusion of law numbered 5, the error being that the lowering of rates is not the incidental effect of what the States and municipalities decide to do, but is the paramount, desired and necessary effect of the defendants' actions.

4. The Court erred in making its conclusions of
617 law numbered 6, the error being that the defendants, through control over allotted funds and otherwise, retain unlimited power with respect to the Florence, Sheffield, Tuscumbia and Decatur projects, and that the defendants are exercising and and will in the future exercise this control, as well as their other powers, to effectuate regulation of commerce within the State of Alabama and other States in derogation of the police power of the States.

5. The Court erred in making its conclusions of law numbered 7, 8, 9, 10, 11, 14 the error being that the action of the defendants is not authorized by Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935 for the following reasons:

(a) The comprehensive program required by sections 202 and 203 of the National Industrial Recovery Act has never been prepared.

(b) The Florence, Sheffield, Tuscumbia and Decatur projects are not reasonably designed to increase employment quickly as required by Section 203 of the National Industrial Recovery Act and Section 1 of The Emergency Relief Appropriation Act of 1935.

(c) The Florence, Sheffield, Tuscumbia and Decatur projects are not "useful" in the sense required by law but are wasteful and useless.

(d) These projects are designed to effectuate the reduction of and control over intrastate electricity rates at the defendants' direction and the furthering of public ownership of electricity facilities.

6. The Court erred in making the first clause of its conclusion of law numbered 13 for the reasons set forth in Assignments 2 and 5, *supra.*

618 7. The Court erred in making its conclusions of law numbered 13, 15, and 21 for the reasons set forth in Assignments 2 and 5, *supra.*

8. The Court erred in making its conclusion of law numbered 20 for the reason that the defendants may impose such changes.

9. The Court erred in making its conclusion of law numbered 14 for the reason, among others, in addition to those set forth in Assignment 5, *supra,* that thus to limit judicial review deprives the plaintiff of the privilege of the full and complete judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed it by the due process clause of the Fifth Amendment, by Article III, Section 1 and 2 of the Constitution, and by Title 18, ch. 3, Sec. 41, 43, 44, 47 of the Code of the District of Columbia.

10. The Court erred in making its finding of fact numbered 19, the error being that there is no evidence to justify a finding that the Cities of Florence, Sheffield, Tuscumbia and Decatur are authorized to receive grants for the purpose stated.

11. The Court erred in making its seventh paragraph of finding of fact numbered 31, the error being that the action of the Special Board for Public Works upon applications was taken subsequent to action by the Administrator.

12. The Court erred in making its finding of fact numbered 32, the error being that in the case of electricity projects, including those for Florence, Sheffield, Tuscumbia, and Decatur, preferential treatment was given by PWA, and through the Electric Power Board of Review private utilities were given an opportunity to escape competition by lowering their rates to a point satisfactory to federal officials who had no legal interest in the matter;

619 and that in the case of electricity projects, including those of Florence, Sheffield, Tuscumbia and Decatur, a peculiar test of social desirability was applied by PWA and the defendants, to wit, the lowering of electricity rates and extension of public ownership.

13. The Court erred in making its finding of fact numbered 35, the error being that certain of the subordinate bodies of PWA and agents of defendants wer authorized to solicit applications through publicity and otherwise and to enter into negotiations with private utilities relative to electricity rates.

14. The Court erred in making its finding of fact numbered 35, the error being that PWA and the defendants did make the determination that competition with the plaintiff was desirable, the error further being that PWA and the defendants solicited applications for projects through widespread publicity and offers of free gifts and otherwise, that the defendants have sought injury to the plaintiff and the lowering of rates in Florence, Sheffield, Tuscumbia and Decatur, and in other intrastate localities throughout the Nation, and that the arrangements with Florence, Sheffield, Tuscumbia and Decatur do purchase control by defendants over matters of local concern.

15. The Court erred in making its findings of fact numbered 36, 37 and 38, the error being that they have no support in the evidence.

16. The Court erred in making its findings of fact numbered 41, the error being that the finding is in truth a conclusion of law, and, further, is contrary to the evidence.

17. The Court in making its finding of fact numbered 42 erred, the error being that the Administrator did
620 not determine that the loans to Florence, Sheffield, Tuscumbia and Decatur are reasonably secured.

18. The Court erred in making its finding of fact numbered 47, the error being the same as that in the case of finding numbered 41, *supra;* and being further that the purpose and necessary effect of the defendants' acts was to regulate and lower intrastate electricity rates and to further public ownership of electricity facilities by encouraging municipalities to undertake such projects, by threatening private utilities, including the plaintiff, with competition unless rates were reduced, and by other means; and

being further that the relief of unemployment did not enter into the defendants' consideration, and projects were not financed for that purpose or with that effect.

19. The Court erred in making its finding of fact numbered 48, the error being that there is no evidence that electricity projects such as the Florence, Sheffield, Tuscumbia and Decatur projects are particularly adapted to the relief of unemployed persons, but the evidence shows that the direct labor furnished by such projects is negligible in amount, and such as is furnished is at greatly higher cost than in the case of any other type of project financed by PWA, that the indirect labor involved is uncertain and speculative in amount, location, and character, that all labor involved will not necessarily or probably go to uneemployed persons but will go to any persons whom private contractors may choose to employ, and chiefly to skilled workers in crafts wherein there is, and, at the time the bills herein were filed, there was little if any unemployment.

20. The Court erred in failing to find that the plaintiff adequately serves the electricity needs of Florence Sheffield, Tuscumbia and Decatur, Alabama, and their
621 residents under the regulation of the Alabama Public Service Commission, a body created by the law of Alabama with general and exclusive power and jurisdiction to regulate and supervise electric utilities, and, that the defendants' project will not serve new users or promote any other useful purpose, but will merely duplicate present service, destroy the existing facilities and completely eliminate the plaintiff from the Cities of Florence, Sheffield, Tuscumbia and Decatur, thereby causing the unemployment of a number of employees of the plaintiff, and, further, adversely affect electricity service in the State of Alabama which the plaintiff has for some time supplied at progressively reduced rates.

21. The Court erred in failing to find that no comprehensive program of public works has ever been prepared, and that the defendants have merely financed individual projects from time to time without regard to any comprehensive program, unless it be a program to reduce electricity rates and further public ownership of electricity facilities.

22. The Court erred in failing to find that the defendants, through control over the funds wherewith projects are financed, through their power of rescission of agreements and allotments, through their inspectors, and otherwise, require the construction of projects according to plans and specifications, construction policies, standards of materials, etc., imposed and fixed by the defendants.

23. The Court erred in failing to find that neither the defendants, the President of the United States, nor anyone else, ever made any findings of facts with respect to whether public works projects, and specifically the Florence, Sheffield, Tuscumbia and Decatur projects, came within the statutory authorization of Congress.

622 24. The Court erred in failing to find that funds borrowed by the United States are to be a source for the funds to be used to finance the electricity projects of Florence, Sheffield, Tuscumbia and Decatur, Alabama.

25. The Court erred in failing to find that in making those loans and grants to Florence, Sheffield, Tuscumbia and Decatur, Alabama, for the purpose of financing the construction of these distribution systems, the defendants are cooperating with the Tennessee Valley Authority to effectuate a plan to promote public ownership of electric utilities and to control and regulate intrastate electric rates.

26. The Court erred in failing to find that neither the defendants nor anyone else ever afforded to the plaintiff any opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing upon its rights with respect to the proposed loans and grants to the Cities of Florence, Sheffield, Tuscumbia and Decatur, Alabama.

27. The Court erred in failing to find the facts set forth in Assignments 12, 13, 14, 18 and 19 herein.

28. The Court erred in making its finding of fact 20, the error being that the City of Florence did not reject this proposal of the Tennessee Valley Authority but formally accepted this proposal of the Tennessee Valley Authority.

29. The Court erred in refusing to require the defendants to produce a memorandum from Henry Hunt, Chairman PWA Electric Power Board of Review to Harold L.

Ickes, Administrator, a letter from said Administrator to the President, and a memorandum from the President to the Administrator, all subpoenaed by the plaintiff and by which plaintiff offered to prove that the conduct of the Electric Power Board of Review was in accordance
623 with instructions of the Administrator and the President.

30. The Court erred in excluding testimony of the witness Rau by which the plaintiff offered to prove that the Electric Power Board of Review was governed by instructions from the Administrator and the President; that when an application for a loan and grant for a municipal electric project came before it, the Board considered first whether the project would reduce rates paid for electric energy; that if it would not, the Board would disapprove the application; that private utilities were notified that if they lowered their rates below the proposed city rates the project would be disapproved; that the city applicant was then given a further chance to reduce the proposed rates; and that applications were in many instances disapproved by the Board if the city could not meet the private utility reduced rates.

31. The Court erred in excluding testimony of the witnesses Vennard, Cary, Board, Kennedy and Byerly and documentary evidence by which plaintiffs offered to prove in specific instances the practices mentioned in Assignment No. 30 the final action taken in such cases by PWA, and admissions relevant thereto binding upon the defendants.

32. The Court erred in excluding telegraphic correspondence between the defendant Ickes and one F. T. Post (Plaintiffs' Exhibits for identification 231 and 232) by which plaintiff sought to show an admission by the defendant that the PWA Electric Power Board of Review engaged in such negotiations as are set forth in Assignment No. 30 with his knowledge and approval.

33. The Court erred in ruling that the defendants need not produce in response to a subpoena the findings, recommendations or reports of the Electric Board of
624 Review, the examining divisions of PWA or any agency whatever of PWA, except the Special Board of Public Works, upon the projects here involved.

34. The Court erred in ruling that the defendants need

not produce in response to subpoena the resolutions and other proceedings of the Special Board for Public Works determining the principles to govern the allotment and expenditure of funds under Title II of the National Industrial Recovery Act.

35. The Court erred in excluding from evidence a book and certain magazine articles written by the defendant Ickes and certain passages therefrom (Plaintiffs' Exhibits for identification Nos. 123, 141, 143) and certain documents and letters issued and written by PWA (Plaintiffs' Exhibits for identification Nos. 140, 217-230 inclusive, and 254) offered as admissions by the defendants of the truth of the facts stated by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of was to regulate and control the intrastate business of the plaintiff in generating and selling electric energy and the rate charged by it, to establish yardsticks to measure charges for such energy sold in intrastate commerce, to promote public ownership of electric generating and distributing systems—all in accord with the so-called National Power Policy of the Federal Administration—; and that the defendants solicited and promoted the cooperation of political subdivisions of States in undertaking such projects, that the plaintiff and other privately owned utilities were denied a hearing with respect to such projects, and, by the control of the funds expended, that the defendants controlled the execution of such projects.

36. The Court erred in excluding from evidence certain publications of the National Power Policy Committee, addresses of the President, publications of the Tennessee Valley Authority (Plaintiffs' Exhibits for identification Nos. 165-170, inclusive, 175-179, inclusive, 181, 183, 184), setting forth the so-called National Power Policy of the Administration referred to by the defendant Ickes, by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of were as set forth in Assignment Nos. 25, 35.

625

37. The Court erred in refusing to receive the testimony of the witnesses Lawrence, Field, and Byerly, and the depositions of the witnesses Hiss, Harvey, Hoffman, Dysart and Rowell and documentary evidence (Plaintiffs' Ex-

hibits for identification 21, 22, 268, 269, 270) by which plaintiffs sought to prove that the offer of PWA to make a grant of from 30 to 45 per centum of the cost of construction of municipal electric projects and to lend the remainder of the cost to be repaid only out of the earnings of the proposed project had the effect of inducing certain of the municipalities here involved and municipalities generally to undertake such projects and that in elections held to vote upon such projects the proponents thereof represented said offer as a gift imposing no liability upon the recipients.

38. The Court erred in permitting the witness Ickes to testify as to action he took concerning correspondence by Mr. Hunt relating to an application of Hiram, Ohio, and in receiving in evidence Defendants' Exhibit No. 11.

39. The Court erred in permitting the witness Ickes, upon his redirect examination, to answer the following question: "Your purpose in making these contracts for these competitive projects always was to increase employment quickly as the statute required, and these other considerations were only incidental and collateral?"

626 40. The Court erred in making its conclusion of law numbered 4, the error being, in addition to that set forth in Assignment 2, *supra,* that neither the Emergency Relief Act of 1935 nor Section 12 of the Emergency Relief Appropriation Act of 1935 reaffirmed any standards, as administratively interpreted or otherwise, set forth in Title II of the National Industrial Recovery Act, and in none of the said three statutes were there any adequate legislative standards whatever for the guidance of administrative action.

41. The Court erred in making its conclusion of law numbered 19, the error being that the Cities of Florence, Sheffield, Tuscumbia and Decatur, Alabama, may not compete with or supplant plaintiff in an illegal manner and particularly by means of a loan and grant from the United States on the terms and conditions involved in this case.

EDWARD B. BURLING,
Attorney for Plaintiff.

Received a copy of the foregoing Assignment of Errors this ..... day of ....., 1936.

ALEXANDER HOLTZOFF,
Attorney for Defendants.

In the District Court of the United States for the District of Columbia

Holding an Equity Court

Equity No. 59671

ALABAMA POWER COMPANY, *Plaintiff*,

v.

HAROLD L. ICKES, ET AL., *Defendants*.

627 *Assignments of Error* Signed copy

Filed August 14 1936

Now comes the plaintiff and assigns as errors the action of the Court in the following particulars:

1. The Court erred in dismissing the bill of complaint and in making its conclusions of law numbered 17 and 18.

2. The Court erred in making its conclusions of law numbered 1, 2, and 4, the error being that in so far as Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 were construed to authorize the acts of the defendants herein said statutes violate the Constitution of the United States in the following respects:

(a) Neither Article I, Section 8, Clauses 1 or 2, nor any other Section or Clause thereof grants to Congress the power to authorize the acts of the defendants; among other things the general welfare of the United States is not subserved thereby, but the benefits, if any, of the proposed action are purely local and not national.

628 (b) The Tenth Amendment denies to Congress the power to authorize the acts of the defendants in that

(i) they regulate and affect matters of purely local concern in Hartselle, Russellville and Guntersville, Alabama, wholly within the police power of the State of Alabama, and not subject, directly or indirectly, to Federal control;

(ii) their primary purpose and necessary effect is to regulate and lower intrastate electricity rates and to promote public ownership of electricity facilities;

(iii) their purpose and effect is to effectuate control by the Federal Government over working conditions and other details of the construction and operation of electricity projects in Hartselle, Russellville, and Guntersville, Alabama.

(c) Both Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 delegate power beyond the limitations of Article I, Section 1; Article I, Section 8, Clauses 1, 2, and 18; Article 1, Section 9, Clause 7; Article II, Section 1; and the other provisions of the Constitution contemplating a division of power among independent branches of the Government of the United States.

(d) Neither the said statutes nor the acts of the defendants have provided the plaintiff with an adequate hearing, and they otherwise arbitrarily provide for and seek the taking of the plaintiff's property without the due process guaranteed by the Fifth Amendment.

3. The Court erred in making its conclusion of law numbered 5, the error being that the lowering of rates
629 is not the incidental effect of what the States and municipalities decide to do, but is the paramount, desired and necessary effect of the defendants' actions.

4. The Court erred in making its conclusion of law numbered 6, the error being that the defendants, through control over allotted funds and otherwise, retain unlimited power with respect to the Hartselle, Russellville and Guntersville projects, and that the defendants are exercising and will in the future exercise this control, as well as their other powers, to effectuate regulation of commerce, within the State of Alabama and other States, in derogation of the police power of the States.

5. The Court erred in making its conclusions of law numbered 7, 8, 9, 10, 11, and 14, the error being that the action of the defendants is not authorized by Title II of the National Industrial Recovery Act or The Emergency Relief Appropriation Act of 1935 for the following reasons:

(a) The comprehensive program required by Sections 202 and 203 of the National Industrial Recovery Act has never been prepared.

(b) The Hartselle, Russellville and Guntersville projects are not reasonably designed to increase employment quickly as required by Section 203 of the National Industrial Recovery Act and Section 1 of The Emergency Relief Appropriation Act of 1935.

(c) The Hartselle, Russellville and Guntersville projects are not "useful", in the sense required by law, but are wasteful and useless.

(d) These projects are designed to effectuate the
630 reduction of and control over intrastate electricity rates at the defendants' direction and the furthering of public ownership of electricity facilities.

6. The Court erred in making the first clause of its conclusion of law numbered 13 for the reasons set forth in Assignments 2 and 5, *supra.*

7. The Court erred in making its conclusions of law numbered 13, 15, and 21 for the reasons set forth in Assignments 2 and 5, *supra*.

8. The Court erred in making its conclusion of law numbered 20 for the reason that the defendants may impose such changes.

9. The Court erred in making its conclusion of law numbered 14 for the reason among others, in addition to those set forth in Assignment 5, *supra*, that thus to limit judicial review deprives the plaintiff of the privilege of the full and complete judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed it by the due process clause of the Fifth Amendment, by Article III, Sections 1 and 2 of the Constitution, and by Title 18, ch. 3, Sec. 41, 43, 44, and 47 of the Code of the District of Columbia.

10. The Court erred in making conclusion of law numbered 9, the error being that the term "works" as used in The Emergency Relief Appropriation Act of 1935 does not include indirect labor resulting from the expenditures for such projects, but only includes direct labor at the site of the projects.

11. The Court erred in making its finding of fact numbered 19, the error being that there is no evidence to justify a finding that the Cities of Hartselle, Russellville,
631 and Guntersville are authorized to receive grants for the purpose stated.

12. The Court erred in making its seventh paragraph of finding of fact numbered 31, the error being that the action of the Special Board for Public Works upon applications was taken subsequent to action by the Administrator.

13. The Court erred in making its finding of fact numbered 32, the error being that in the case of electricity projects, including those for Hartselle, Russellville and Guntersville, preferential treatment was given by PWA, and through the Electric Power Board of Review private utilities were given an opportunity to escape competition by lowering their rates to a point satisfactory to Federal officials who had no legal interest in the matter; and that in the case of electricity projects, including those of Hartselle, Russellville and Guntersville, a peculiar test of social desirability was applied by PWA and the defendants, to-wit,

the lowering of electricity rates and extension of public ownership.

14. The Court erred in making its finding of fact numbered 33, the error being that certain of the subordinate bodies of PWA and agents of defendants were authorized to solicit applications through publicity and otherwise and to enter into negotiations with private utilities relative to electricity rates.

15. The Court erred in making its finding of fact numbered 35, the error being that PWA and the defendants did make the determination that competition with the plaintiff was desirable, the error further being that PWA and the defendants solicited applications for proj-
632 ects through widespread publicity and offers of free gifts and otherwise, that the defendants have sought injury to the plaintiff and the lowering of rates in Hartselle, Russellville and Guntersville and in other intrastate localities throughout the nation, and that the arrangements with Hartselle, Russellville and Guntersville do purchase control by defendants over matters of local concern.

16. The Court erred in making its findings of fact numbered 36, 37, and 38, the error being that they have no support in the evidence.

17. The Court erred in making its finding of fact numbered 41, the error being that the finding is in truth a conclusion of law and, further, is contrary to the evidence.

18. The Court erred in making its finding of fact numbered 42, the error being that the Administrator did not determine that the loans to Hartselle, Russellville and Guntersville are reasonably secured.

19. The Court erred in making its finding of fact numbered 47, the error being the same as that in the case of finding numbered 41, *supra*, and being further that the purpose and necessary effect of the defendants' acts was to regulate and lower intrastate electricity rates and to further public ownership of electricity facilities by encouraging municipalities to undertake such projects, by threatening private utilities, including the plaintiff, with competition unless rates were reduced, and by other means; and being further that the relief of unemployment did not enter into the defendants' consideration, and projects were not financed for that purpose or with that effect.

20. The Court erred in making its finding of fact numbered 48, the error being that there is no evidence
633 that electricity projects such as those in Hartselle, Russellville and Guntersville are particularly adapted to the relief of unemployed persons, but the evidence shows that the direct labor furnished by such projects is negligible in amount, and such as is furnished is at greatly higher cost than in the case of any other type of project financed by PWA, that the indirect labor involved is uncertain and speculative in amount, location, and character, that all labor involved will not necessarily or probably go to unemployed persons but will go to any persons whom private contractors may choose to employ, and chiefly to skilled workers in crafts wherein there is, and, at the time the bills herein were filed, there was little if any unemployment.

21. The Court erred in failing to find that the plaintiff adequately serves the electricity needs of Hartselle, Russellville and Guntersville, Alabama, and their residents under the regulation of the Alabama Public Service Commission, a body created by the law of Alabama with general and exclusive power and jurisdiction to [illegible]ite and supervise electric utilities, and, that the [illegible]nts' project will not serve new users or promote a[illegible]er useful purpose but will merely duplicate present service, destroy the existing facilities and completely eliminate the plaintiff from the Cities of Hartselle, Russellville and Guntersville, thereby causing the unemployment of a number of employees of the plaintiff, and, further, adversely affect electricity service in the State of Alabama which the plaintiff has for some time supplied at progressively reduced rates.

22. The Court erred in failing to find that no com-
634 prehensive program of public works has ever been prepared, and that the defendants have merely financed individual projects from time to time without regard to any comprehensive program, unless it be a program to reduce electricity rates and further public ownership of electricity facilities.

23. The Court erred in failing to find that the defendants, through control over the funds wherewith projects are financed, through their power of rescission of agreements and allotments, through their inspectors, and otherwise,

required the construction of projects according to plans and specifications, construction policies, standards of materials, etc., imposed and fixed by the defendants.

24. The Court erred in failing to find that neither the defendants, the President of the United States, nor anyone else, ever made any findings of facts with respect to whether public works projects, and specifically the Hartselle, Russellville, and Guntersville projects, came within the statutory authorization of Congress.

25. The Court erred in failing to find that funds borrowed by the United States are to be a source for the funds to be used to finance the electricity projects of Hartselle, Russellville and Guntersville.

26. The Court erred in failing to find that in making these loans and grants to Hartselle, Russellville and Guntersville, Alabama, for the purpose of financing the construction of these distribution systems, the defendants are cooperating with the Tennessee Valley Authority in effectuating a plan to promote public ownership of electric utilities and to control and regulate intrastate electric rates.

635 27. The Court erred in failing to find that neither the defendants, nor anyone else, ever afforded to the plaintiff any opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing upon its rights with respect to the proposed loans and grants to the Cities of Hartselle, Russellville and Guntersville.

28. The Court erred in failing to find the facts set forth in Assignments 13, 14, 15, 19 and 20 herein.

28a. The Court erred in making its finding of fact 15, the error being that the franchises of the plaintiff in Hartselle, Russellville and Guntersville, Alabama, are not "intermediate" franchises but are franchises of perpetual duration.

29. The Court erred in making its finding of fact 44, the error being that there is no evidence to support the finding that 25% of the defendants' loan or grant or the aggregate thereof to the Cities of Hartselle, Russellville and Guntersville, Alabama, will be expended for work in each of these projects.

30. The Court erred in refusing to require the defendants to produce a memorandum from Henry Hunt, Chairman

PWA Electric Power Board of Review to Harold L. Ickes, Administrator, a letter from said Administrator to the President, and a memorandum from the President to the Administrator, all subpoenaed by the plaintiff and by which plaintiff offered to prove that the conduct of the Electric Power Board of Review was in accordance with instructions of the Administrator and and the President.

31. The Court erred in excluding testimony of the witness Rau by which the plaintiff offered to prove that
636 the Electric Power Board of Review was governed by instructions from the Administrator and the President; that when an application for a loan and grant for a municipal electric project came before it, the Board considered first whether the project would reduce rates paid for electric energy; that if it would not, the Board would disapprove the application; that private utilities were notified that if they lowered their rates below the proposed city rates the project would be disapproved; that the city applicant was then given a further chance to reduce the proposed rates; and that applications were in many instances disapproved by the Board if the city could not meet the private utility reduced rates.

32. The Court erred in excluding testimony of the witnesses Vennard, Cary, Board, Kennedy and Byerly and documentary evidence by which plaintiffs offered to prove in specific instances the practices mentioned in Assignment 31, the final action taken in such cases by PWA, and admissions relevant thereto binding upon the defendants.

33. The Court erred in excluding telegraphic correspondence between the defendant Ickes and one F. T. Post (Plaintiffs' Exhibits 231 and 232) by which plaintiff sought to show an admission by the defendant that the PWA Electric Power Board of Review engaged in such negotiations as are set forth in Assignment 31 with his knowledge and approval.

34. The Court erred in ruling that the defendants need not produce in response to a subpoena the findings, recommendations or reports of the Electric Power Board of Review, the examining divisions of PWA or any agency whatever of PWA, except the Special Board of Public Works, upon the projects here involved.

637 35. The Court erred in ruling that the defendants need not produce in response to subpoena the resolutions and other proceedings of the Special Board for Public Works determining the principles to govern the allotment and expenditure of funds under Title II of the National Industrial Recovery Act.

36. The Court erred in excluding from evidence a book and certain magazine articles written by the defendant Ickes and certain passages therefrom (Plaintiffs' Exhibits for identification Nos. 123, 141, 143) and certain documents and letters issued and written by PWA (Plaintiffs' Exhibits for identification Nos. 140, 217-230, inclusive, and 254) offered as admissions by the defendants of the truth of the facts stated by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of was to regulate and control the intrastate business of the plaintiff in generating and selling electric energy and the rate charged by it, to establish yardsticks to measure charges for such energy sold in intrastate commerce, to promote public ownership of electric generating and distributing systems,—all in accord with the so-called National Power Policy of the Federal Administration—; and that the defendants solicited and promoted the cooperation of political subdivisions of States in undertaking such projects, that the plaintiff and other privately owned utilities were denied a hearing with respect to such projects, and, by the control of the funds expended, that the defendants controlled the execution of such projects.

37. The Court erred in excluding from evidence certain publications of the National Power Policy Committee, addresses of the President, publications of the Tennes-
638 see Valley Authority, (Plaintiffs' Exhibits for identification Nos. 165-170, inclusive, 175-179, inclusive, 181, 183, 184), setting forth the so-called National Power Policy of the Administration referred to by the defendant Ickes, by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of were as set forth in Assignments 26, 36.

38. The Court erred in refusing to receive the testimony of the witnesses Lawrence, Field and Byerly, and the depositions of the witnesses Hiss, Harvey, Hoffman, Dysart and Rowell and documentary evidence (Plaintiffs' Exhibits for

identification 21, 22, 268, 269, 270) by which plaintiff sought to prove that the offer of PWA to make a grant of from 30 to 45 per centum of the cost of construction of municipal electric projects and to lend the remainder of the cost to be repaid only out of the earnings of the proposed project had the effect of inducing certain of the municipalities here involved and municipalities generally to undertake such projects and that in elections held to vote upon such projects the proponents thereof represented said offer as a gift imposing no liability upon the recipients.

39. The Court erred in permitting the witness Ickes to testify as to action he took concerning correspondence by Mr. Hunt relating to an application of Hiram, Ohio, and in receiving in evidence Defendants' Exhibit No. 11.

40. The Court erred in permitting the witness Ickes upon his redirect examination to answer the following question: "Your purpose in making these contracts for these competitive projects always was to increase employment quickly as the statute required; and these other con-
639 siderations were only incidental and collateral?"

41. The Court erred in making its finding of fact numbered 44, the error being that the action of the President in stating that 25% of the loan or grant to each of the Cities of Hartselle, Russellville, and Guntersville, or the aggregate thereof, will be expended for work on each project was not a determination of such facts.

42. The Court erred in failing to find that the action of the President referred to in its finding of fact numbered 44 was taken with no evidence or information before him supporting such a determination, and that there will not be spent for work on each of the projects of the Cities of Hartselle, Russellville, and Guntersville 25% of the loan or grant or aggregate thereof.

43. The Court erred in making its conclusion of law numbered 4, the error being, in addition to that set forth in Assignment 2, *supra,* that neither the Emergency Relief Act of 1935 nor Section 12 of The Emergency Relief Appropriation Act of 1935 reaffirmed any standards, as administratively interpreted or otherwise, set forth in Title II of the National Industrial Recovery Act, and in none of the said three statutes were there any adequate legislative

standards whatever for the guidance of administrative action.

44. The Court erred in making its conclusion of law numbered 19, the error being that the Cities of Hartselle, Russellville, and Guntersville may not compete with or supplant plaintiff in an illegal manner and particularly by means of a loan and grant from the United States
640 on the terms and conditions involved in this case.

EDWARD B. BURLING,
Attorney for Plaintiff.

Received a copy of the foregoing Assignment of Errors this ..... day of ....., 1936.

ALEXANDER HOLTZOFF,
Attorney for Defendants.

641 District Court of the United States
for the District of Columbia.

Saturday, August 15, 1936.

The Court resumes its session pursuant to adjournment, Mr. Justice Bailey, presiding.

* * * * * * * * *

Equity Nos. 58927, 59071 and 59671

Come now the parties hereto by their respective attorneys of record; and thereupon, the plaintiffs by their attorneys present to the Court their Statement of Evidence taken at the trial of these causes, and pray that the same be signed and made of record, *nunc pro tunc,* which is hereby accordingly done.

642 *Designation of Record*

Filed July 24 1936

* * * * * * * * *

The Clerk will please prepare the record on appeal in the above entitled causes and include therein the following:

In Equity No. 58927

1. Memorandum: Order of Court of Appeals remanding cause filed in Supreme Court of District of Columbia December 30, 1933.

2. Decree setting aside decree dismissing bill of complaint filed on December 30, 1933.

3. Answer to second amended bill of complaint filed on January 9, 1936, and exhibit.

4. Amendment to second amended bill of complaint filed on April 9, 1936.

5. Amendment to answer to second amended bill of complaint filed on April 20, 1936.

643 In Equity No. 59071

6. Memorandum: Order of Court of Appeals remanding cause filed in Supreme Court of District of Columbia Dec. 30, 1935.

7. Decree setting aside decree dismissing bill of complaint filed on Dec. 30, 1935.

8. Third amended bill of complaint and exhibit filed March 2, 1936.

9. Answer to third amended bill of complaint and four exhibits filed March 24, 1936.

In Equity No. 59671

10. Memorandum: Order of Court of Appeals remanding cause filed in Supreme Court of District of Columbia Dec. 30, 1935.

11. Decree setting aside decree dismissing the bill of complaint filed on Dec. 30, 1935.

12. Second amended bill of complaint and exhibit filed on March 2, 1936.

13. Answer to second amended bill of complaint and three exhibits filed on March 24, 1936.

In Consolidated Causes

14. Memorandum: Plaintiffs' Motion to consolidate causes filed March 31, 1936.

15. Order consolidating causes for trial entered March 31, 1936.

16. Memorandum opinion filed by Chief Justice Wheat on June 5, 1936.

17. Findings of fact and conclusions of law filed
644 on June 26, 1936.

18. Final decree with notation of appeal filed June 26, 1936.

19. Memorandum: Deposit of Fifty Dollars ($50.00) for costs on appeal in lieu of bond, made by each of the plaintiffs in Equity No. 58927, Equity No. 59071, and Equity No. 59671 on July 10, 1936.

20. Assignments of error.

21. Memorandum: The filing of, and orders with reference to, statement of evidence.

22. This designation of record.

DEAN G. ACHESON
HOWARD C. WESTWOOD
Attorneys for Plaintiffs

Received a copy of the foregoing this 24th day of July, 1936.

ALEXANDER HOLTZOFF
Attorney for Defendants

645 In the District Court of the United States for the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 330, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Equity No. 58927, wherein Texas Utilities, a corporation, &c. is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al, are Defendants; in Equity No. 59071, wherein Alabama Power Company, a corporation is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al, are Defendants and Equity No. 58671, wherein Alabama Power Company, a corporation is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al, are Defendants, as the same remain upon the files and of record in said Court

IN TESTIMONY WHEREOF, I hereunto subscribe my

name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of August, 1936.

(Seal)

CHARLES E. STEWART,
Clerk.

By ELIZABETH WILSON
Assistant Clerk.

646 United States Court of Appeals for the District of Columbia

No. 6579
No. 6580
No. 6583

TEXAS UTILITIES COMPANY, ALABAMA POWER COMPANY, ALABAMA POWER COMPANY, *Appellants,*

v.

HAROLD L. ICKES, et al., *Appellees.*

Designation for Printing and Binding of Records

The Clerk will please secure the printing of the items as indicated below and will have bound in the order given below both those items designated for printing and those items which need not now be printed but of which the Clerk is furnished with printed copies.

1. The printed record in the case of Texas Utilities Company v. Ickes, et al., upon the previous appeal to this Court in No. 6579. This item is not again to be printed; appropriately printed copies are furnished the Clerk.

2. Motion of defendants to remand cause upon the previous appeal in No. 6579. This item shall be printed except for Exhibits 1, 2 and 3 attached to the said motion; instead of printing these Exhibits it is to be noted that they are the same, respectively, as Exhibits D, E, and F attached to the stipulation between Texas Utilities Company and the defendants which appears at p. 235 of the typewritten Statement of Evidence herein, the said Exhibits re-
647 spectively appearing at pp. 257, 267, and 268 of the said typewritten Statement.

3. The printed record in the case of Alabama Power Company v. Ickes, et al., upon the previous appeal to this

Court in No. 6580. This item is not again to be printed; appropriately printed copies are furnished the Clerk.

4. Motion of the defendants to remand the cause upon the previous appeal in No. 6580. This item, with its exhibits, shall be printed except for Exhibits 3, 6, 9 and 12 attached to the said motion; instead of printing these Exhibits it is to be noted that they are the same, respectively, as Exhibits C, D, A, and B attached to the defendants' answer to the third amended bill of complaint in Equity No. 59071 in the United States District Court for the District of Columbia.

5. The printed record in the case of Alabama Power Company v. Ickes, et al., upon the previous appeal to this Court in No. 6583. This item is not again to be printed; appropriately printed copies are furnished the Clerk.

6. Motion of the defendants to remand the cause upon the previous appeal in No. 6583. This item shall be printed except for Exhibits 1, 2 and 3 attached to the said motion; instead of printing these Exhibits it is to be noted that they are the same, respectively, as Exhibits A, B and C attached to the defendants' answer to the second amended bill of complaint in Equity No. 59671 in the United States District Court for the District of Columbia.

7. The opinion of this Court rendered upon granting the motions of the defendants referred to in items 2, 4 and 6 supra. This item shall be printed.

648 8. The order of this Court remanding the causes upon the aforesaid motions of the defendants. This item shall be printed.

9. The entire record in Equity Nos. 58927, 59071, and 59671 of the United States District Court for the District of Columbia, as certified to this Court on August 18, 1936. This item shall be printed except for the Exhibit attached to the answer to the second amended bill of complaint in Equity No. 58927; instead of printing the said Exhibit it is to be noted that it is the same as Exhibit F to the stipulation as described in item 2 supra.

10. The entire Statement of Evidence in Equity Nos. 58927, 59071, 59671, and 60245 of the United States District Court for the District of Columbia, as certified to this Court on August 18, 1936. This item shall be printed except for the plaintiffs' Exhibit 262, and the Defendants' Ex-

hibits 10 and 12, attached thereto; appropriately printed copies of such Exhibits are furnished the Clerk.

It is requested that item 10, shall be bound in a volume separate from the preceding items.

HOWARD C. WESTWOOD
Attorney for Appellants

Received a copy of the foregoing this 18th day of August, 1936. Appellees have no further designations.

ALEXANDER HOLTZOFF
Attorney for Appellees

649 Back page: Nos. 6579-80-83, Texas Utilities Co., Alabama Power Co., Alabama Power Co., Appellants, vs. Harold L. Ickes et al. Designation for printing record. United States Court of Appeals for the District of Columbia. Filed Aug. 18 1936. Moncure Burke, Clerk.

Endorsed on cover: District Court of the United States, District of Columbia. No. 6579, Texas Utilities, a corporation organized and existing under the laws of the State of Texas, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. No. 6580, Alabama Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. No. 6583, Alabama Power Company, a corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. United States Court of Appeals for the District of Columbia. Filed Aug. 18 1936. Moncure Burke, Clerk.

[fol. 1277] Monday, February 15th, A. D. 1937.

No. 6580

ALABAMA POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

No. 6583

ALABAMA POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof, et al.

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

The argument of the above entitled causes was commenced by Messrs. Dean G. Acheson and Newton D. Baker, attorneys for appellants, and was continued by Messrs. Jerome N. Frank and John W. Scott, attorneys for appellees, and was concluded by Mr. Newton D. Baker, attorney for appellants. On motion, the appellants are allowed to file a reply brief in five days, and appellees allowed five days to reply thereto. (Mr. Justice Stephens not sitting.)

[fol. 1278] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6580

ALABAMA POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., Appellees

No. 6583

ALABAMA POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof, et al., Appellees

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., Appellees

Appeals from the District Court of the United States for the District of Columbia

Edward B. Burling, Spencer Gordon, Dean G. Acheson, Walter B. Guy, Louis H. Mann and Howard C. Westwood, all of Washington, D. C., and Newton D. Baker, of Cleveland, Ohio, for Appellants.

Leslie C. Garnett, David A. Pine, Angus D. MacLean, John W. Scott, Alexander Holtzoff, James W. Morris and Jerome N. Frank, all of Washington, D. C., for Appellees.

Argued February 15, 1937. Decided May 10, 1937

Before Martin, Chief Justice; Robb, Van Orsdel, and Groner, Associate Justices.

VAN ORSDEL, Associate Justice:

These are appeals from decrees of the District Court dismissing in each case bills of complaint for injunction, after hearing on the merits, to restrain loans and grants by the Public Works Administration to aid in the construction of municipal electric light and power plants in certain cities [fol. 1279] and towns in the States of Alabama and Iowa. The cases were consolidated for hearing in the court below, and were argued as one appeal in this Court.

It appears that the Alabama Power Company, an Alabama corporation, owns and operates a generating, transmission and distribution system in the State of Alabama, and distributes electrical energy to numerous communities in that State, including the Cities of Florence, Decatur, Sheffield, and Tuscumbia, and the Towns of Hartselle, Russellville, and Guntersville, in each of which it owns and operates a local plant, in accordance with and by authority of the laws of the State of Alabama.

It also appears that the Iowa City Light & Power Company, a Delaware corporation, qualified to do business in the State of Iowa as a foreign corporation, is engaged in the generation of gas and electricity, and in the transmission, distribution and sale thereof in Iowa City, Iowa, and in the incorporated towns of Coralville and University Heights in Johnson County, Iowa. With the exception of a limited sale of electricity by the City of Sheffield, these companies are the only agencies engaged in supplying electric light and power to the cities and towns above named.

The "loan and grant" agreements, under which these municipalities are to construct independent light and power plants, provide that the United States is to aid in the construction of the projects by purchasing from the municipalities their bonds, secured by a first pledge of the revenues derived from the operation of the projects, over and above the reasonable cost of operation and maintenance thereof. The grants made in the Alabama cases are equal to 30% of the cost of the labor and materials employed upon the projects, the balance of the cost to be loaned by the Govern-

ment. In the Iowa case the grant is for 45% of the cost of the project. The "loan and grant" agreements further provided: "This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or the financing or the construction thereof."

These companies in their bills of complaint are challenging the authority of the defendants through the agency of the Public Works Administration to aid and assist, by use of the public monies of the United States, in the construction by the various municipalities named of competing municipal electric distribution systems. The Alabama Company charged a conspiracy between the Public Works Administration and the Tennessee Valley Authority to disrupt and destroy its business, and by the unlawful use of public funds of the United States to carry into effect the President's announced "National Power Policy" to make electricity "more broadly available at cheaper rates to industry, to domestic and to agricultural consumers," and to regulate the rates for interstate generation, distribution, and sale of electricity.

It is also charged that this plan of the Public Works Administration is effected by inducing political subdivisions [fol. 1280] of the States to conspire with them in the accomplishment of their illegal purposes and in the unconstitutional and illegal disbursements of public monies of the United States by joint action in carrying out as Federal Public Works projects the construction of electric generating and distributing plants and systems within such subdivisions, planned, built, and financed, under the control and direction of the Public Works Administration, and to be operated in such manner from time to time as directed by that agency. In the accomplishment of this end, it is charged that the defendants threaten private electric utilities in particular locations with the construction of projects with Federal money, unless the private utilities agree to establish rates satisfactory to the Public Works Administration.

It is then charged that if the defendants are permitted to carry out these unlawful agreements "the property right of

plaintiff to operate its property and to enjoy its franchise free from injurious competition brought about by unlawful means and to conduct its intrastate business and charge rates free from unconstitutional interference and domination by an agency or agencies of the federal government, will immediately be invaded and desroyed".

Plaintiff companies pray for injunctions to restrain the defendants from in any manner aiding in the construction or financing of electric distribution systems in the cities and towns named. The court below, upon a full hearing, dismissed the bills of the plaintiffs, and from the decrees entered this appeal was taken.

We find it unnecessary to discuss in detail the various contentions relied upon by plaintiffs to establish their right to injunctions, or to enter into any discussion of the authority of the Public Works Administrator or the constitutionality of the statutes under which he purports to act, since the right of plaintiffs to the relief sought is challenged on another ground which we think disposes of these cases.

It is urged that plaintiffs have not shown any legal or equitable right which will be infringed by the making of these loans, and consequently have no standing to maintain these actions. It is disclosed by the record, and indeed conceded, that in some instances plaintiffs are operating under franchises which have not expired, and in other cases, where the franchises have expired, they are operating by consent or acquiescence of the local authorities. It is not claimed, however, that there is any material difference in the status of these companies insofar as their standing to maintain these actions is concerned. In no case do the plaintiffs have an exclusive franchise. It seems clear, therefore, that any injury which these plaintiffs may sustain from the making of these loans will result from the competition which will arise when the municipal plants begin to operate, hence it is contended that plaintiffs are not in a position to question the source from which the municipalities may derive the funds to construct their plants, whether it be lawful or unlawful.

Defendants contend that no legal injury is threatened to plaintiffs; that the threatened loss of business will be due to lawful competition of the municipalities, and merely damnum absque injuria; that the loss sustained, if any, will be caused by competition, which is lawful, and from which plaintiffs have no legal right to relief. On the other hand, plaintiffs contend that the competition would not exist were

[fol. 1281] it not for the furnishing of the funds by the defendants; hence if the statute under which these funds are supplied is unconstitutional or if the officer furnishing the funds is not authorized to do so, then they may challenge the validity of the statute or the authority of the officer. The lower court adopted this view, with which we are not in accord.

This question has been twice ruled upon by the Circuit Courts of Appeals. In Arkansas-Missouri Power Company v. Kennett, 78 F. (2d) 911, 914, the suit was by a power company to restrain the City of Kennett, Missouri, and Secretary Ickes, as Public Works Administrator, from carrying out loan and grant agreements similar to those involved in this case. The Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said: "The court below was of the opinion that the power company was in no position to question the power of the federal government to loan or give money to the city of Kennett. We are in accord. The United States is not proposing to become a competitor of the power company. It will have no right, title, or interest in the plant when completed and nothing to do with operating it. The destruction of the power company's property will come about by reason of the city's operation of the plant when erected. The position of the United States is that of a lender of money, a buyer of bonds, and a giver of gifts. True, the money procured from the government will enable the city to build the plant, and, if the city builds the plant, it will no doubt operate it, and when it does operate the plant the city will take the customers of the power company, and the company's property in Kennett will become worthless or greatly impaired in value. We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it. In fact, the rule is to the contrary. Commonwealth of Massachusetts v. Mellon, Secretary of the Treasury et al., 262 U. S. 447; City of Allegan, Mich. v. Consumers' Power Co., 71 F. (2d) 477 (certiorari denied, 293 U. S. 586). It is true that in the cases cited the plaintiffs relied upon their status as taxpayers exclusively, while in this case the plaintiff relies, in addition, upon the injury which will be done to its property by municipal competition. That injury, however, is, so far as the government is concerned, clearly consequential and indirect, as we have pointed out."

In Greenwood County v. Duke Power Company, 81 F. (2d) 986, a case involving a similar loan and grant agreement, the Circuit Court of Appeals for the Fourth Circuit reversed a decree of the District Court which granted the power company an injunction. The Circuit Court, speaking through Judge Parker, said: "For the reasons heretofore stated, the plaintiffs are not entitled to an injunction; but, even if the statute were unconstitutional or the action of the administrator unauthorized, they would not be entitled to the injunction which they ask, for the reason that no legal right of theirs is infringed by any proposed action of the county or of the commissioner of public works. The county, in its proposed action, will not infringe any such right; for it is thoroughly settled that competition by a county or municipality violates no right of a public service corporation doing business therein which, as is the case of plaintiffs here, has no [fol. 1282] exclusive franchise. Puget Sound Com. v. Seattle, 291 U. S. 619; Madera Water-works v. Madera, 228 U. S. 454. The administrator will not infringe any such right in making the loan and grant to the county from funds of the United States; for it is equally well settled that no citizen or taxpayer has any such right in funds of the government. Frothingham v. Mellon, 262 U. S. 447. * * * As the county infringes no right of plaintiffs by entering into competition with them, and as the administrator infringes no right of theirs in making loans or grants of public funds, it would seem to follow necessarily that no such right is infringed when the administrator makes a loan and grant to the county in order that the county may engage in competition; for the addition of negative quantities can never result in a quantity that is positive."

The Supreme Court of the United States reversed the Circuit Court of Appeals in this case, 299 U. S. 259, because of "irregularities in practice", holding that the case was heard upon a record improperly made up, and remanded the cause for a retrial. The plaintiffs argue from this that the Supreme Court impliedly recognized the standing of the utility company to raise the question of the constitutionality of the statute. We think this contention is without merit. The legal interest of the utility was a question in that case, and it was fully and exhaustively treated in the opinion of the Circuit Court of Appeals. On so important a point it is not for us to speculate as to what the opinion of the Supreme Court might have been had it passed directly upon

it. Moreover, the Court clearly stated that it expressed "no opinion on the relevancy or effect of the evidence, or otherwise upon the merits".

Plaintiffs' right to be heard in a judicial tribunal resolves itself to the single question of whether or not there has been an invasion of some legal or equitable right. The mere damage that may arise from the competition of the municipalities does not amount to an abridgement or impairment of any such right, nor does the mere making of loans and grants by the Administrator of Public Works, although he may be acting beyond the warrant of law, amount to an impairment of the legal or equitable rights of the plaintiffs. New Orleans, M. & T. R. Co. v. Ellerman, 105 U. S. 166, 174.

In United States v. Dern, 63 App. D. C. 28, 68 F. (2d) 773, mandamus was sought to compel the Secretary of War to cancel certain leases of warehouses which were alleged to have been made contrary to law. Plaintiffs planted their right of action on the ground that they were engaged in direct competition with the lessee, and that by reason of the advantageous provisions of the alleged illegal lease agreements the lessee was able to underbid them in competing for business. We held that this gave plaintiffs no right to challenge the legality of the action of the Secretary of War in making the leases.

The lower court, in holding that plaintiffs were entitled to challenge the validity of the Administrator's acts and the constitutionality of these statutes, relied upon Frost v. Corporation Commission, 278 U. S. 515. We think that case does not support plaintiffs' position. In that case the plaintiff was the holder of a license to operate a cotton gin which the court held to be exclusive as against persons not similarly licensed. The State legislature attempted to grant [fol. 1283] a privilege to certain cooperative societies, which was held void because violative of the equal protection clause of the Fourteenth Amendment. It was held that plaintiff was entitled to enjoin one who attempted to operate in competition with him under a void permit issued under the unconstitutional statute. The court said that the holder of a valid license might "resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights". The vital distinction between that case and the instant suits is that the operation of power plants by these municipalities is not illegal, and plaintiff has no right to exclude them from any competition upon which they may see fit to enter.

These utilities have no exclusive franchises to furnish electricity to these municipalities. It is conceded that the municipalities may lawfully compete with the plaintiffs. Any damage which results to plaintiffs from such lawful competition is merely damnum absque injuria. The fact that, in furnishing the funds which will enable the municipalities to engage in such competition, the Administrator may have exceeded his authority, or may have acted under an unconstitutional statute, does not affect the situation. The thing which affects the plaintiffs is the competition, and that is lawful.

In our opinion, no legal or equitable right of plaintiffs has been invaded, and they are therefore without standing to challenge the validity of the Administrator's acts. This being so, there is no necessity for us to consider the other questions raised on these appeals.

The decree of the lower court dismissing the bills is affirmed.

Josiah A. Van Orsdel, Associate Justice.

GRONER, J.:

I concur in the conclusion reached on the basis of the trial court's findings of fact, by which I feel bound, namely:

That the municipalities concerned acted in the matters in question of their own free will and without coercion or solicitation by the United States or the Administrator;

Second, that there is no agreement or conspiracy between the United States and the municipalities to have the United States foster municipal ownership;

Third, that the United States has, in making the loan and grant, reserved no right to control municipal power rates, to suppress competition, or to regulate operation.

If these findings reflect the real position of the United States in the matters in issue here, then I agree that the United States is only a "buyer of bonds, and a giver of gifts", and that in the circumstances the threatened damage to plaintiffs' properties is consequential and indirect.

[fol. 1284] Monday, May 10th, A. D. 1937.

April Term, 1937

No. 6580

Alabama Power Company, a Corporation, Appellant,

vs.

Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

Appeal from the Supreme Court of the District of Columbia, Now District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court, now District Court, in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Van Orsdel.

May 10, 1937.

Concurring opinion by Mr. Justice Groner.

Mr. Justice Stephens took no part in the consideration or decision of this case.

[fol. 1285] Monday, May 10th, A. D. 1937.

April Term, 1937

No. 6583

Alabama Power Company, a Corporation, Appellant,

vs.

Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

Appeal from the Supreme Court of the District of Columbia, Now District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court, now District Court, in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Van Orsdel.

May 10, 1937.

Concurring opinion by Mr. Justice Groner.

Mr. Justice Stephens took no part in the consideration or decision of this case.

[fol. 1286] Monday, May 10th, A. D. 1937.

APRIL TERM, 1937

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, a Corporation, Appellant,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.

Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Van Orsdel.

May 10, 1937.

Concurring opinion by Mr. Justice Groner.

Mr. Justice Stephens took no part in the consideration or decision of this case.

[fol. 1287] Monday, May 17th, A. D. 1937.

No. 6580

ALABAMA POWER CO., Appellant,

vs.

HAROLD L. ICKES et al.

No. 6583

ALABAMA POWER CO., Appellant,

vs.

HAROLD L. ICKES et al.

No. 6865

IOWA CITY LIGHT AND POWER CO., Appellant,

vs.

HAROLD L. ICKES et al.

On consideration of the appellants' motion for a stay of the mandate herein, pending application for certiorari to the Supreme Court of the United States under Rule 24, It is ordered by the Court that the motion be, and it is hereby denied; and it is further ordered that should the petition for certiorari be filed with the Supreme Court within the fifteen-day period allowed that the mandate will be automatically stayed pending action of the Supreme Court thereon.

[fol. 1288] [Stamp:] United States Court of Appeals for the District of Columbia. Filed May 19, 1937. Moncure Burke, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6580

ALABAMA POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., Appellees

No. 6583

ALABAMA POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof, et al., Appellees

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, a Corporation, Appellant,

v.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., Appellees

DESIGNATION OF RECORD

The Clerk will please prepare for Appellants the following items, to be filed by them with their petitions to the Supreme Court of the United States for writs of certiorari to review the decision of this Court in the above entitled causes:

[fol. 1289] 1. The Transcript of Record in the cases of Alabama Power Company v. Ickes, Nos. 6580 and 6583, filed August 18, 1936, printed August 26, 1936. This item

is not again to be printed; appropriately printed copies are furnished the Clerk. This will be numbered Vol. I.

2. The Transcript of Record in the case of Iowa City Light and Power Company v. Ickes, No. 6865, filed October 20, 1936, printed December 3, 1936. This item is not again to be printed; appropriately printed copies are furnished the Clerk: This will be numbered Vol. 1A.

3. The Statement of Evidence in the cases of Alabama Power Company v. Ickes, Nos. 6580 and 6583, and the case of Iowa City Light and Power Company v. Ickes, No. 6865, filed August 18, 1936, printed on August 29, 1936. This item is not again to be printed; appropriately printed copies are furnished the Clerk. This will be numbered Vol. II. Plaintiffs' Exhibit 262, and Defendants' Exhibits 10 and 12 are printed under separate covers. It is suggested that the hereinafter listed items be bound at the end of the large volume containing the Statement of Evidence.

4. The Minute Entry of the argument in the Court of Appeals in the three above entitled causes on February 15, 1937.

5. The Opinion of the Court of Appeals in the three above entitled causes, rendered May 10, 1937.

6. The Decree of the Court of Appeals in the three above entitled causes.

7. The order of the Court of Appeals denying the Appellants' motion for stay of mandate as provided by Rule 24.

[fol. 1290] 8. This designation.

9. Clerk's certificate.

Dean Acheson, Attorney for Appellants.

Received a copy of the foregoing this 19th day of May, 1937.

John W. Scott, Attorney for Appellees.

[fol. 1291] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Moncure Burke, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 1290, inclusive, are a true copy of the transcripts of record and proceedings of said Court of Appeals as designated by counsel for Appellants in the cases of Alabama

Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al.; Alabama Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof, et al.; Iowa City Light and Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator Thereof; John Herrick, Executive Assistant Thereof, et al., excepting Plaintiffs' Exhibit 262 and Defendants' Exhibits 10 and 12, which are bound together and certified separately, Nos. 6580, 6583, 6865, April Term, 1937, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 20th day of May, A. D. 1937.

Moncure Burke, Clerk of the United States Court of Appeals for the District of Columbia. (Seal United States Court of Appeals for the District of Columbia.)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 84

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 85

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 86

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

Vol. IA

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 84

ALABAMA POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

No. 85

ALABAMA POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

No. 86

IOWA CITY LIGHT AND POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 26, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

Vol. I A

TRANSCRIPT OF RECORD

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1936.

No. 6865

SPECIAL CALENDAR

IOWA CITY LIGHT AND POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

FILED OCTOBER 26, 1936

PRINTED DECEMBER 3, 1936

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1936.

No. 6865

IOWA CITY LIGHT AND POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; JOHN J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; F. E. SCHNEPFE, DIRECTOR OF PROJECTS DIVISION THEREOF; HARRY L. HOPKINS, ADMINISTRATOR OF WORKS PROGRESS ADMINISTRATION; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; W. A. JULIAN, TREASURER OF THE UNITED STATES, AND GUY ALLEN, CHIEF DISBURSING OFFICER, DIVISION OF DISBURSEMENTS OF THE TREASURY OF THE UNITED STATES, DEFENDANTS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	a	1
Bill of complaint	1	2
Exhibit "A"	56	30
" "B"	105	64
" "C"	124	83
" "D"	125	83

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

	Original	Print
Memorandum: Preliminary Injunction filed	145	101
Answer to bill of complaint	146	102
Exhibit "A"	160	114
Order consolidating causes	176	131
Amendment and supplement to bill of complaint	177	132
Fiat of Chief Justice	180	135
Memorandum opinion	181	135
Defendants' proposed findings of fact	192	145
Conclusions of law	218	164
Decree dismissing bill, appeal noted and bond fixed	223	168
Order continuing preliminary injunction	224	169
Memoranda: Order extending time to file statement of evidence, $50 deposited in lieu of bond on appeal, statement of evidence and notice filed, statement of evidence signed	225	169
Assignments of error	226	170
Designation of record	238	180
Clerk's Certificate	240	181

United States Court of Appeals for the District of Columbia

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a District Court of the United States
for the District of Columbia.

In Equity No. 60245

IOWA CITY LIGHT AND POWER COMPANY, a corporation,
Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; JOHN HERRICK, Executive Assistant thereof; JOHN J. MADIGAN, Acting Executive Officer thereof; F. E. SCHNEPFE, Director of Projects Division thereof; HARRY L. HOPKINS, Administrator of Works Progress Administration; HENRY MORGENTHAU, JR., Secretary of the Treasury of the United States; W. A. JULIAN, Treasurer of the United States, and GUY ALLEN, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill of Complaint*

- Filed December 10 1935

In the Supreme Court of the District of Columbia

Holding an Equity Court

Equity No. 60245

IOWA CITY LIGHT AND POWER COMPANY a corporation,
Plaintiff,

vs.

HAROLD L. ICKES, Administrator of the Federal Emergency Administration of Public Works; HORATIO B. HACKETT, Assistant Administrator thereof; JOHN HERRICK, Executive Assistant thereof; JOHN J. MADIGAN, Acting Executive Officer thereof; F. E. SCHNEPFE, Director of Projects Division thereof; HARRY L. HOPKINS, Administrator of Works Progress Administration; HENRY MORGENTHAU, JR., Secretary of the Treasury of the United States; W. A. JULIAN, Treasurer of the United States, and GUY ALLEN, Chief Disbursing Officer, Division of Disbursements of the Treasury of the United States, *Defendants.*

Now comes the Plaintiff and files this its Bill of Complaint, and for its cause of action against the Defendants alleges:

Paragraph I.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware, and has its princi-
2 pal office in said state and its corporate domicile in the City of Wilmington, Delaware, but is qualified to do business in the State of Iowa as a foreign corporation, and has its principal office in said state in the City of Iowa City, Iowa, and sues in its own right.

Paragraph II.

The Defendants and each of them are administrative officers or employees of the United States of America, residing in the District of Columbia, and can be found within the District of Columbia, and are more particularly identified as herein specifically set forth:

Harold L. Ickes is the duly appointed, qualified, and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act".

Horatio B. Hackett is the duly appointed, qualified, and acting Assistant Administrator of PWA.

3 John Herrick is the duly appointed, qualified, and acting Executive Assistant of PWA.

John J. Madigan is the duly appointed and qualified Acting Executive Officer of PWA.

F. B. Schnepfe is the duly appointed, qualified, and acting Director of Projects Division of PWA.

Harry L. Hopkins is the duly appointed, qualified and Acting Administrator of the Works Progress Administration (herein called WPA) appointed by Executive Order of the President of the United States, numbered 7034, dated May 6, 1935, in pursuance of the provisions of Section 201 (a) of Title II of the National Industrial Recovery Act;

Henry Morgenthau, Jr. is the duly appointed, qualified, and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian is the duly appointed, qualified, and acting Treasurer of the United States and, as such, is, under the supervision of the Secretary of the Treasury, in control of the disbursement of the public funds of the United States.

Guy Allen is the duly appointed, qualified, and acting Chief Disbursing Officer of the Treasury Department

4 and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United States and the actual disbursements of the public funds of the United States.

Said defendants and each of them are, as hereinafter more specifically set forth, exercising and threatening to exercise, and are performing and threatening to continue to perform certain acts pursuant to alleged powers and

authority claimed by them and each of them to be conferred upon them and each of them in their aforesaid official capacities under the National Industrial Recovery Act and under the Emergency Relief Appropriation Act of 1935 and other Acts of Congress but which powers and authority are not actually, lawfully or constitutionally conferred upon or vested in them or in any of them thereby.

Paragraph III.

This is a civil cause in equity, arising under the Constitution and laws of the United States, and under the equity powers of the courts of the District of Columbia.

Paragraph IV.

The City of Iowa City, Iowa, is a municipal corporation organized and existing under the general municipal corporation laws of the State of Iowa, whose territorial
5 limits are now and at all other times hereinafter mentioned have been entirely within the County of Johnson in the State of Iowa.

Paragraph V.

Plaintiff institutes and brings this action both as a Federal, State, County and Municipal taxpayer suffering special and substantial damages not suffered by such taxpayers generally, and also as the owner of real and personal property and franchises which will be irreparably injured, damaged or destroyed, unless the relief prayed for herein is granted, and thereby Plaintiff will suffer direct pecuniary loss amounting to many thousands of dollars, all as more particularly set forth in the next succeeding paragraphs.

Paragraph VI.

Plaintiff is a taxpayer of the United States and of the State of Iowa and of the City of Iowa City, and is, in fact, the heaviest taxpayer in said City, being liable each year for Federal taxes of approximately Twenty Thousand Dollars ($20,000) exclusive of Federal excise taxes, and for state and local taxes of approximately Twenty-five Thousand Dollars ($25,000) exclusive of sales taxes; that
6 it is the owner of property in Johnson County, Iowa,

subject to taxation for state and city purposes and for all proper federal purposes. Plaintiff is subject to special tax burdens to which taxpayers generally are not subject, including among others, the tax upon electrical energy sold by Plaintiff for domestic and commercial consumption in an amount equal to three per cent (3%) of the price for which Plaintiff sells the same, imposed by Section 616 of the Federal Revenue Act of 1932 as amended.

Paragraph VII.

Plaintiff is now and for a number of years last past has been engaged in the manufacture and generation of gas and electrical energy and in the transmission, distribution and sale thereof to the City of Iowa City and the inhabitants thereof, to the incorporated Town of Coralville in Johnson County, Iowa, and its inhabitants, and to the incorporated Town of University Heights and its inhabitants, and to the unincorporated village known as Coralville Heights and its inhabitants, and to the inhabitants of rural territory adjoining and surrounding the City of Iowa City, Iowa.

7 Plaintiff owns a combined steam and hydro electric plant at Coralville in Johnson County, Iowa distant about two (2) miles from Iowa City and a gas plant and gas and electricity distribution systems in Iowa City, which plants and distribution systems are modern and efficient, and are sufficient to supply all the present and reasonably to be anticipated future needs of Iowa City and the territory now served by Plaintiff; that Plaintiff's present service is modern, adequate and efficient and of a high order, and that it adequately serves the territory aforesaid; that Plaintiff's entire business is wholly intrastate. The value of Plaintiff's electric plant and distribution system is $1,482,899, and the value of its gas plant and distribution system is $716,780. The gross revenue received by Plaintiff during the year 1934 from its electric service amounted to $464,363.80.

Paragraph VIII.

In the year 1934 the Town of Coralville granted Plaintiff an electric franchise extending for the term of twenty-five (25) years. In the year 1935 the incorporated Town of University Heights granted Plaintiff an electric franchise

for a term of fifteen (15) years. Such franchises are now in full force and effect. Plaintiff possesses valid
8 operating rights and franchises for serving all the rural territory contiguous to Iowa City. In the year 1909 Iowa City, Iowa granted Plaintiff's predecessor in interest an electric franchise which franchise was validly assigned to this Plaintiff in the year 1912. By its terms the franchise so granted by the City of Iowa City expired on the 11th day of January, 1934. Since the expiration of such franchise, the City of Iowa City has regulated the rates to be charged by Plaintiff in furnishing electric service. Plaintiff has continued to supply the City of Iowa City and the inhabitants thereof with electric service; and during such period has sold or contracted to sell to the City of Iowa City electric light and power for its sewage disposal system under contract entered into in November, 1935, which contract extends for the period of one year with a right of renewal thereof on the part of the City; and has sold light for lighting the streets and public buildings and other public places therein. The City of Iowa City has given Plaintiff no notice to cease the use of the streets, alleys and other public places in supplying it and its inhabitants with electric light and power, and has given no notice to Plaintiff to remove its poles and wires from
9 the streets, alleys and other public places therein, but has continued to utilize Plaintiff's facilities and to receive and avail itself of Plaintiff's service. Plaintiff is the only person, firm or corporation engaged in supplying electric light and power to the City of Iowa City and to the other communities served by it and to their inhabitants, and is the only person, firm or corporation now able to supply electric light and power to such communities and their inhabitants.

Paragraph IX.

Power to regulate rates for electric services in the City of Iowa City is vested by the laws of the State of Iowa in the City Council. The rates charged the consumer of electricity in Iowa City by Plaintiff are reasonable rates, and the average cost of electrical energy to the inhabitants of Iowa City has decreased over fifty per cent (50%) since 1922, and the rates now in force therein were established

by the City Council of said City in the month of July 1934, and are such that the average cost of electricity to the consumer is less than the average cost in any City in Iowa similarly situated and of comparable size.

10

Paragraph X.

Plaintiff has made its investment in its combined steam and hydro-electric plant at Coralville and in its electricity distribution system in Iowa City, and has incurred the risk thereof in the reasonable expectation that it would receive and continue to receive the patronage and business of Iowa City and its inhabitants until such time, if ever, as said City should lawfully terminate Plaintiff's right to serve the City and its inhabitants, and lawfully procure or provide for other sources of supply of electric energy, and until such time Plaintiff is entitled and is obligated by law to continue to render such services to such City and its inhabitants.

Paragraph XI.

Plaintiff's services are, and at all times have been, adequate and satisfactory, and there have been no complaints or proceedings of any sort instituted on account of any claimed inadequacy or insufficiency with respect thereto. Plaintiff's rates for each of its services do not yield a return in excess of a fair and lawful return on the fair

11 value of its property used and useful in rendering such service to the public. In the natural course of events said City and its inhabitants would continue to purchase from Plaintiff for a long time to come all requirements of electricity, at least to the extent now so purchased; and, in any event, they would do so unless and until said City might in a legal manner procure the authority and means of producing its own supply of electric energy.

Paragraph XII.

Plaintiff is informed, and believes, and so alleges, that PWA under the direction of Defendant Ickes and with the connivance and cooperation of the other Defendants herein, including the Defendant Hopkins and the WPA, has conceived, and for some time past has been executing throughout the country, a plan to promote municipal ownership

of local electric utilities and to set up such utilities to serve as "yardsticks" for the regulation of the
12 rates of privately owned utilities. This plan is not intended to be, and, in fact, is not a regulation of interstate commerce or of any commerce affecting interstate commerce, but is a regulation of purely intrastate commerce carried out without regard to local state policies as to the appropriate bounds of public ownership or as to the unreasonableness of existing rates, thereby extending Federal control over matters of intrastate commerce and local police power.

This plan is effectuated by a pretended resort to the powers allegedly given PWA and the Defendants herein by Title II of the National Industrial Recovery Act, supplemented more recently by the Emergency Relief Appropriation Act of 1935. Purporting to act thereunder PWA and the Defendants have made open offers and representations throughout the country that they will authorize, finance and construct electric systems as public works projects under said Acts upon the application of municipalities therefor. In order to induce municipalities in the
13 various states to make applications and to conspire and act in concert with the Defendants in the accomplishment of their illegal purpose and in the unconstitutional and illegal disbursement of public monies of the United States, PWA and the Defendants have publicly and privately offered to give outright to municipalities 30% of the cost of construction of local intrastate electric systems. More recently, pursuant to the unrestricted terms of the aforesaid Emergency Relief Appropriation Act of 1935, this offer has been liberalized to include, in many cases, a gift of 45% of such cost. It is also provided that, where necessary, the remainder of the cost of such PWA projects will be met by PWA through so-called "loans" at low interest rates of 3½% or 4%, which rates are, in many cases, much lower than those at which funds would be available from other sources to such municipalities for such purposes, the "loans" to be repaid over a long period of years; furthermore it is represented to the municipalities of the country that they may secure such "loans" as mere advances to be repaid if at all solely from the net earnings of such electric systems. In many cases PWA proceeds

with such a project with no prospect whatever that its so-called "loan" will ever be repaid. Further to in-
14 duce such applications, agents acting for PWA and the Defendants have repeatedly canvassed various sections of the country where PWA has, in accordance with its plan, deemed such projects especially desirable; such agents have met with municipal officials and have urged and suggested to them that they should make applications for such electric systems. Through newspaper and other publicity PWA has sought to induce such applications and to stimulate interest in the inauguration of such municipal systems. This plan is frankly acknowledged by PWA in public press releases, in public statements of Defendant Ickes, in instructions given to PWA and/or WPA agents charged with the administration of PWA and/or WPA functions, in negotiations with existing private utilities and otherwise.

Having induced municipalities to make such applications, PWA and the Defendants, and particularly the Defendant Ickes and his agents, select those which fit into their scheme of social planning. That is, those localities are selected wherein the presence of a publicly owned electric system seems to PWA to be most desirable and most effective as a so-called yardstick, the operations of which would drive down the rates of existing privately owned utilities
15 either by direct competition in the locality or by the fear on the part of the private utility in an adjacent locality that the operation of the PWA system would lead to demand for similar systems in its locality. In order most effectively to obtain its ends PWA will usually suspend its proposal to finance and construct such a system if the existing privately owned system will reduce its rates to a level deemed by PWA to be "socially desirable"; otherwise the project is financed and constructed. PWA has never definitely and publicly formulated the level to which it requires private utilities to conform their rates, but acts in an aribtrary, unforeseeable manner in each case. The rates so exacted, however, do not provide a reasonable return to such utilities upon their investment, are much less than those fixed by authorized state regulatory bodies, and are determined without hearing such utilities and without any consideration whatever of the elements required by the

due process clauses of the Fifth and Fourteenth Amendments to be considered in rate regulation.

In furtherance of said plan, among other things, PWA and the defendants have recently issued circulars designated PWA Circulars A, B, C, and D, setting forth a general, open, and unrestricted offer of PWA to make
16 loans, grants, or loans and grants of Federal funds, ostensibly under the National Industrial Recovery Act or under the Emergency Relief Appropriation Act of 1935, but which aim to effectuate and carry out the aforesaid plan. The terms embodied in said open offer include the terms and conditions which have been or will be in substance imposed upon the City of Iowa City, as hereinafter more particularly set forth, and such open offer constitutes the open and explicit parts of the plans of PWA and the defendants which, supplemented by implied understandings and obligations, enable PWA and the Defendants to bring the Federal Government into a field forbidden to it by the Federal Constitution, and by contract and economic power wholly to dominate such local electric utility service to the exclusion of state and local authorities and to the reckless and lawless destruction of the property and rights of the companies such as Plaintiff, lawfully supplying electric service in said municipalities.

In granting or rejecting applications induced as aforesaid, PWA has been especially freed by the Defendant Hopkins from the requirement that such projects may be undertaken only where there is labor for construc-
17 tion available on relief rolls, and PWA and defendants in fact proceed wholly without regard to the possibility that unemployed men in the vicinity or otherwise will be given employment even of a temporary nature, so that whether any, slight or much employment is given is purely fortuitous. Moreover the dependability and economic soundness of existing private facilities, the capacity of the areas to absorb increased electric production, and other considerations relating to the need for such electric systems are excluded entirely by PWA in making its decisions. On the contrary, the dominant, determining and in many cases the sole consideration entertained by PWA and the defendants is the rate level of the existing utilities and the question whether a PWA municipal system will fit in

most effectively with the aforesaid scheme and plan of PWA to control and lower electric rates throughout the country and to cover the country with publicly owned systems for the demonstraton of conceptions of social planning entertained by PWA and the Defendants.

Upon selection of a municipality for such a project PWA enters into negotiations with it, looking to an agreement or arrangement, similar to that entered or to be
18 entered into with the City of Iowa City hereinafter more particularly described. PWA affords such a municipality free engineering and legal advice, revises plans, specifications and drawings, and exerts every influence upon said City to secure compliance with its ideas of how the project should be designed, constructed and operated best to carry into effect PWA's and Defendants' unlawful plan herein set forth. The municipality becomes in fact, the mere tool of PWA and while the project is being carried out and constructed and thereafter operated, the PWA requires that every move be taken only with the specific approval, oversight, and direction of its agents, as will be apparent from the typical arrangement with the City of Iowa City above referred to. Where PWA considers it necessary to its scheme of control, as aforesaid, it retains absolute power over the rates to be charged by the proposed plant in order most effectively to carry out its aforesaid plan and to control and if possible to destroy any existing privately owned system directly competing with such PWA system. Where possible, PWA procures understandings from the municipality that the privileges and franchises of the existing system will be revoked and
19 terminated when the PWA project is ready for operation.

Paragraph XIIa.

Pursuant to and as part of the foregoing plan and scheme of the PWA and the Defendants, and their activities and the activities of their agents in furtherance of said plan or scheme, the City of Iowa City and the Mayor, members of the City Council and other officials of said City, acting both individually and jointly, were moved and induced to conspire, confederate and unlawfully agree with the Defendants, by and through unlawful means, including unlawful

use of public funds of the United States and in violation of Plaintiff's rights under the Constitution of the State of Iowa and of the United States of America and the statutes enacted pursuant thereto, to finance and to cause the construction in the City of Iowa City of a steam electric generating plant and an electric distribution system. Such facilities would completely duplicate and render useless Plaintiff's adequate, modern and efficient facilities by which such services were then and are now rendered to said City and its inhabitants, and would thereby deprive Plaintiff of the business of said City and its inhabitants and of all of its revenues therefrom, all of which would unlawfully destroy or greatly impair the value of Plaintiff's prop-
20 erty and franchises used in rendering such service.

Likewise, pursuant to and as a part of such scheme and conspiracy, on or about the 8th day of January, 1934, an application was made by said City of Iowa City to the PWA and Defendant Ickes for a loan and grant totaling $917,000, a copy of which application is hereto attached marked Exhibit "A" and by this reference made a part hereof. That in September, 1934, in further pursuance of such unlawful conspiracy, such application was approved by PWA, and PWA and Defendant Ickes submitted to the City Council of Iowa City a loan and grant agreement, a copy of which is hereto attached marked Exhibit "B" and by this reference made a part hereof; that under the terms of said loan and grant agreement provision was made for the advance to Iowa City of a total of $917,000, of which 30% of the cost of labor and materials to be used in said project would be a grant and the balance a loan at 4% interest to be evidenced by revenue bonds to be payable out of the future earnings of the plant; that thereafter on or about the 5th day of October, 1934, the City Council of Iowa City adopted a resolution to withdraw the City's applica-
tion for a loan and grant and to return said loan and
21 grant agreement to Defendant Ickes as Administrator of the Federal Emergency Administration of Public Works; that thereafter on the 5th day of April, 1935, the City Council of Iowa City made application for the renewal and reinstatement of its original application for a loan and grant, and Plaintiff is informed, and believes, and therefore alleges, that pursuant to and as a part of

such scheme and conspiracy such application was reinstated by PWA; that thereafter and on or about the 17th day of June, 1935, the City Council of Iowa City adopted a resolution to revive the City's application to PWA pursuant to which the City informed the Defendant Ickes and PWA that it desired only a grant of 45% of the cost of labor and material in connection with the proposed municipal plant project, the remaining cost to be defrayed by the issuance of bonds to be sold to some purchaser other than PWA.

Plaintiff is informed, and believes, and therefore alleges, that in pursuance of such illegal plan and undertaking PWA, acting through Defendant Horatio B. Hackett, on or about the 7th day of October, 1935 entered into an undertaking with the City of Iowa City in the form of a grant agreement, a copy of which is attached hereto under mark of Exhibit "C" and by this reference made a part
22 hereof, under the terms of which PWA offered to make an outright grant of 45% of the cost of the project, such grant, however, not to be in excess of $413,000; that the terms and conditions under which said grant will be extended are determined by Defendant Ickes and, as prescribed in said grant agreement, are set forth in PWA Circular D dated September 20, 1935, a copy of which is attached hereto marked Exhibit "D" and by this reference made a part hereof.

Paragraph XIIb.

The City of Iowa City, Iowa, is wholly without authority to establish a municipally owned and operated electric light and power plant and distribution system without obtaining the requisite authority therefor from the voters of said City at an election duly called and held. An election was held in said City on the 17th day of April, 1934, at which election the following question was submitted to the voters:

"Shall the City of Iowa City, Iowa, establish, erect, extend, maintain and operate within or without its corporate limits, an electric light and power plant, with all the necessary poles, wire, machinery, apparatus and other requisites of said plant; the maximum amount which may be
23 expended for the establishment, construction or ac-

quisition of such plant shall be $917,000 to be paid for out of the future earnings of said plant, and as provided by Sections 6134-d1 to 6134-d7, inclusive, of the Code of Iowa, 1931, as amended by Senate File No. 103, Chapter 74-55 G. A. Special, passed by the 45th General Assembly, Special Session?"

At such election there were cast a total of 5763 votes, of which 2804 were in the negative and 2959 were in the affirmative. The affirmative votes cast amounted to but 51% of the total votes cast. Said election failed to provide the requisite authorization to establish such a plant for the reasons set forth in Paragraph XVI hereof. However, independent of any claims of illegality with respect to such authorization, Plaintiff asserts the fact to be that the offer and prospect of a grant was the inducing cause of a favorable vote on the question submitted; that without such grant, or the prospect of such grant, no authorization to construct any municipally owned plant would have been given by the voters, the instigation of Defendants and the hope of obtaining a Federal gift being the sole cause of the present apparent desire on the part of certain members of the City Council, officials and voters of said City to construct said project; that without said grant the City of Iowa City would not and could not finance the establishment and construction of said plant. Plaintiff therefore alleges that unless the City of Iowa City receives said grant, it will not proceed with the construction of the proposed project.

Paragraph XIII.

The City of Iowa City has, in return for such grant and as a condition of its being made, become obligated and has undertaken and agreed, or is about to become obligated or to undertake or agree, that the proceeds of such grant will be made available to it upon requisition in such amounts as Defendant Ickes deems sufficient from time to time, and shall in no event be available beyond the amount which in the judgment of Defendant Ickes is needed to complete the project; that the proceeds of the bonds and grant shall be deposited by the City of Iowa City in such class of banks as Defendant Ickes chooses; that such

proceeds shall be expended by the City of Iowa City only as Defendant Ickes consents; that all details of plans, drawings, construction contracts, engineering, supervision, inspection, etc., shall be according to the will of Defendant Ickes; that all work on the project shall be done under the regulation of Defendant Ickes; that all contractors shall be equipped with bonds and insurance as Defendant Ickes desires; that Defendant Ickes may cancel the contract with the City of Iowa City at any time he wishes, if in his opinion the City of Iowa City has unreasonably delayed in carrying out any of its duties; that the aforesaid funds shall be available to the City of Iowa City only subject to the power of Defendant Ickes to withhold them if he is not satisfied that the City of Iowa City has complied with
26 all provisions of the agreement; and that in other respects the will of Defendant Ickes shall control the City of Iowa City's action, even to the extent of the naming of the project. Furthermore, the Defendant Ickes, or his agents, will be permitted to fix, and from time to time change, minimum rates of pay and minimum hours for all persons employed on such construction, to enforce employment preferences other than such preferences as are provided for under the laws of the State of Iowa, to designate agencies through which workmen may be employed, to require disclosure to PWA of all information which PWA may desire with respect to such construction work, and in other ways to regulate the construction of such plant and distribution system. That the proceeds of said grant will not be made available to the City of Iowa City until the conditions prescribed by law and by the regulations of the Federal Emergency Administration of Public Works are
27 complied with.

Paragraph XIV.

While the procedure pursued by PWA, Defendant Ickes, and his agents in passing upon applications of municipalities for loans and/or grants does not provide for a hearing on the part of those whose property and rights will be injured or destroyed through the authorization and construction of such municipal systems, Plaintiff requested and sought a hearing before PWA relative to said application of the City of Iowa City. Representatives of Plaintiff were

accorded the privilege of making oral protests not before PWA or before any of the Defendants, but before a single employee whose relationship to PWA was not disclosed, and such protests were made. Plaintiff has, however, constantly been denied the privilege of a hearing before PWA or any of the Defendants. Nevertheless, Plaintiff
28 filed with PWA a comprehensive written protest against the approval of the application of the City of Iowa City. There is no further board, agency or official of the United States to whom Plaintiff may apply to prevent the consummation of the project in the City of Iowa City. Plaintiff has exhausted all administrative remedies which it could possibly have to prevent such action. Notwithstanding Plaintiff's protests of the application of the City of Iowa City, Plaintiff is informed, believes and avers the facts to be that such protests were given no consideration whatsoever by PWA, but that for no purpose other than that of driving down Plaintiff's rates and destroying Plaintiff's business in accordance with the aforesaid plan of PWA and upon findings that the action of PWA would, in fact, destroy and drive out Plaintiff's business in the City of Iowa City, PWA approved the public works project for said City to be carried out under the pretended grant agreement as hereinbefore set out.

Paragraph XV.

If Defendants are permitted to consummate said unlawful plan and arrangement and make such pretended grant to the City of Iowa City Plaintiff is informed and be-
29 lieves, and therefore alleges, that Defendants will be successful in their attempt to instigate and encourage other municipalities which, or the inhabitants of which, are now served by Plaintiff to apply for loans and grants to construct duplicating and/or competing electric plants and/or distribution systems, and the Defendants will authorize and make to said cities and towns loans and grants for such purposes, and that electric plants so financed and constructed will be operated in ruinous competition with Plaintiff. Plaintiff's business consists of the business done by it in the City of Iowa City and in adjacent incorporated and unincorporated towns and in the rural areas served by it, all of which are served from its interconnected gen-

eration and transmission system. Each community served by Plaintiff enables Plaintiff better to serve the remaining communities, and none may be withdrawn without impairment of Plaintiff's ability to serve the remainder of its customers or without substantially increasing the cost of service to them. The loss, therefore, of a number of local businesses would destroy or render useless much of Plaintiff's modern efficient and valuable properties, and would thereby cripple Plaintiff in the exercise of its rights, privileges and duties under its franchises. In this manner if Defendants are permitted to carry out their plans Plaintiff's business will be completely destroyed and its property rendered useless and valueless, and Plaintiff will be forced into bankruptcy.

30

Paragraph XVI.

Proceedings for the authorization of a municipally owned electric light and power plant and distribution system in the City of Iowa City depend for validity upon the legality of an election held for such purpose on the 17th day of April, 1934, and upon the legality of the authorization given at such election. Such proceedings are wholly defective in that:

(a) No action was taken by the City Council to establish a municipally owned electric light and power plant and distribution system until April 5, 1935, and the authority, if any, given the City Council of Iowa City to establish such plant by the election of April 17, 1934 expired before the enactment of any ordinance establishing said plant when the City Council failed to establish said plant within a reasonable time after said election but on the contrary tabled the ordinance proposed for that purpose.

(b) The election of April 17, 1934 conferred no authority for the establishing of a municipally owned electric light and power plant and distribution system, or for the issuance of bonds therefor, because of the insufficient affirmative vote as required by Section 1171-d4 of the 1931 Code of Iowa.

(c) No valid election has ever been legally called by the filing of legal and proper petitions, or otherwise, for the purpose of submitting to the qualified electors of the City of Iowa City any question of establish-

31

ing a municipally owned electric light and power plant and distribution system, or for the purpose of issuing bonds therefor.

(d) No such legal notice of the election of April 17, 1934 was ever given as by law provided.

(e) Such notice of the election of April 17, 1934 as was given was never legally authorized, and the election held pursuant thereto was a nullity.

(f) The authorization for the election of April 17, 1934, if valid for any purpose, conferred authority only to establish a plant and distribution system to be paid for solely out of future earnings, and no such plant and distribution system may validly be established except in strict accordance with the terms and provisions of the petitions for such election.

(g) The question submitted to the voters of Iowa City at the election of April 17, 1934 was void for duality, repugnancy, ambiguity and confusion, and conferred no legal authority for the establishing of any municipally owned electric light and power plant and distribution system.

(h) The preelection inducements to voters to cast a favorable vote for the project upon the representation that if the project was approved the power existed to acquire Plaintiff's plant and/or distribution system voided the election and rendered it a nullity.

(i) The authority, if any, conferred by the election of April 17, 1934, did not authorize the acceptance of
32 any grant of Federal funds to defray any part of the cost thereof.

(j) The City of Iowa City has no power under the laws of Iowa, either with or without an election, to borrow from the Public Works Administration, or to accept a grant or gift of the Federal Government, or the Federal Emergency Administration of Public Works, and particularly a grant upon the terms and conditions proposed.

(k) Acceptance of the grant on the conditions imposed, and required to be agreed to, or required to be adhered to as a condition of any such grant, constitutes the abrogation and surrender and the delegation to Defendant Ickes and to PWA and its officials of sovereign legislative powers of the State of Iowa delegated by the legislature to the City, but not, under the Constitution of Iowa, delegable by it;

and the imposition and carrying out as an executive or administrative act of said conditions by Defendant Ickes and the officials of PWA constitutes an invasion by the Federal Government and its executive department and administrative officers of the reserved powers of the state in violation of the Tenth Amendment to the Constitution of the United States.

Paragraph XVII.

Plaintiff has repeatedly requested information as to the status of the City of Iowa City's application for a loan and/or grant, but was wholly unable, except as hereinafter stated, to procure any evidence with respect to the allowance of said application, or of the receipt by said City of any proceeds of any such grant from the public records of the City of Iowa City or otherwise. In pursuance of
33 the conspiracy hereinbefore set forth said City, and the Defendant herein, have withheld all possible information respecting said application or the remitting by PWA, or the receipt by said City of any proceeds of any such grant. In a collateral proceeding in which said City was a party, pending in the District Court of the State of Iowa in and for Johnson County, counsel for said City on the 18th day of November, 1935, produced in open Court, and for the first time made available to Plaintiff, the offer of PWA, a copy of which is annexed hereto as Exhibit "C", and produced a check or remittance in the amount of $28,140 dated on or about the 28th day of October, 1935, representing the first advance grant payment by PWA in connection with said project.

Paragraph XVIII.

The business of furnishing and providing electric current in and to the City of Iowa City, and in and to the surrounding communities and territory within Johnson County, Iowa, in which Plaintiff is wholly engaged and in which it is threatened and intended by Defendants that said City of Iowa City may be enabled to engage, through the unlawful disbursement of public funds of the United
34 States, is and will be wholly carried on and transacted within the confines of the State of Iowa, and does not in any respect constitute commerce with foreign nations or among the states within the provisions of Arti-

cle I, Section 8, Clause 3, of the Constitution of the United States.

Paragraph XIX.

The proposed project is not for a national or other public purpose for the following reasons:

(a) There is no need for the construction of an electric generating plant or electric distribution system in the City of Iowa City since any and all possible need for electric energy and service in said locality is now and for a long time past has been and will continue to be fully and adequately provided and supplied by private capital and enterprise and by means of capital invested in and represented by Plaintiff's existing plant and equipment which it operates as a public utility subject to the laws of the State of Iowa.

(b) The proposed project is solely a local project confined to the immediate locality of the City of Iowa City, and for the alleged benefit solely of certain consumers of electricity in said locality, and is not, and cannot be, for the purpose of serving or providing any benefit for the general public of the United States, and will not, and cannot, affect the general welfare of the United States.

(c) The expenditure of Federal funds for such project can inure only, if at all, to the private benefit of the consumers of electricity in and about the City of Iowa City, and to the said City in its private and commercial capacity, and said expenditure is solely for a private purpose.

(d) The only possible further benefit which could be served or promoted by the expenditure of Federal funds for the proposed project is the private individual benefit to manufacturers and producers of materials, equipment and electric appliances to be purchased, acquired and constructed thereby, and to the builders, contractors and providers of labor to be expended in the assembly and construction thereof, and if any secondary or ultimate or incidental benefit should result from the stimulation of industry and increase of profits in the manufacture, sale, assembly, transportation and installation of materials entering into the construction of said project, the same will be merely secondary, remote and contingent benefit and the

expenditure of public funds for such purpose will constitute a disbursement and expenditure for the private gain and profit of such manufacturers, producers, sellers, builders and contractors.

Paragraph XX.

The funds employed in making such grants for the construction of municipal utilities, and particularly the funds to be employed for the grant to the City of Iowa City, are largely if not wholly funds borrowed by the United States.

Paragraph XXI.

36 The contemplated and threatened grant of public funds of the United States to the City of Iowa City is sought to be made and justified solely by virtue of the provisions of Title II of the National Industrial Recovery Act (June 16, 1933, ch. 90, 38 Stat. 195) and/or the Emergency Relief Appropriation Act of 1935 (April 8, 1935, ch. 48, 49 Stat. 115), and executive orders and regulations of the President of the United States claimed to be promulgated pursuant thereto, and by actions of the defendants claiming to act under or by authority of one or more of said statutes, executive orders and/or regulations.

Paragraph XXII.

The threatened grant and disbursement of public funds of the United States and delivery thereof to said City for the purposes and uses herein set out are illegal and unauthorized and contrary to the scope and the authority of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, because

(a) Section 202 of the National Industrial Recovery Act provides that the Public Works Administrator shall prepare a comprehensive program of public works. Section 203 of said Act provides that said Administrator
37 may construct and finance or aid in the construction and financing of any public works project "included in the program prepared pursuant to Section 202." No such comprehensive program has ever been prepared and, as publicly announced by PWA, the only program ever prepared is the sum of the particular projects which PWA has at any given time approved. This does not constitute the

preparation of a comprehensive program as required by said Section 202 but is a mere catalogue of action taken. The proposed project, therefore, forms no part of such a comprehensive program. Said project is so situated and located that it can form no part of any national project or program of national public works, and therefore the inclusion or attempted inclusion thereof in any such contemplated or projected program would be unreasonable, capricious, arbitrary and in excess and outside the scope of the purposes, powers and authority provided in Sections 202 and 203 of the National Recovery Act.

38 (b) The proposed project is not reasonably designed or capable of increasing employment quickly, or relieving unemployment, but on the contrary will tend to increase and cause greater unemployment among employed persons, and is not a reasonably appropriate means of accomplishing any increase of employment or relief of unemployed persons. Plaintiff is informed, believes, and so alleges, that of such unemployment as exists in the City of Iowa City, or its vicinity, there is virtually none among persons who can be employed on projects of this sort. The project will require almost altogether skilled workmen, and has no reasonable relation to the unemployment situation in Iowa City, Iowa. Moreover, the project will inevitably cause permanent unemployment of many, and eventually all, of those now in Plaintiff's employ and engaged in its electrical department.

(c) Section 202 of the National Industrial Recovery Act by particularly enumerating in the list of public
39 works for which public money may be loaned and granted "development of water power" and "transmission of electrical energy" has excluded projects such as the proposed steam operated generating plant and electric distribution system. No other provision of said Act authorized a municipal generating plant or electric distribution system of such a type or character. Furthermore, even if authority to make such a loan and grant were conferred by said Act, such authority expired on June 16, 1935 by virtue of Section 201 (d) of said Act, which authority is not extended by the aforesaid Emergency Relief Appropriation Act of 1935.

(d) Said project is wholly useless and wasteful in that it duplicates and, to the extent of such duplication, destroys Plaintiff's existing adequate, reasonable and satisfactory system. The result of the construction of the proposed project will be to interfere with instead of to "promote the fullest possible utilization of the present productive
40 capacity of industries" as required by Section I of the National Industrial Recovery Act. Should Plaintiff be deprived of its business within the City of Iowa City and be compelled to remove its poles, lines and other equipment therein, Plaintiff would be incapacitated from rendering service to the consumers in the adjacent localities at rates which such consumers could possibly afford to pay. The result would, therefore, be the loss of service to these consumers, and the rendering idle, useless and valueless of additional property of Plaintiff.

(e) Neither the National Industrial Recovery Act nor the Emergency Relief Appropriation Act of 1935 authorizes the making of loans and grants to finance competitive projects destructive to lawful private industry already established and adequately serving the public. The making of loans and grants for such a project as herein contemplated tends to increase unfair competitive practices
41 instead of to "eliminate unfair competitive practices" as required by Section 1 of the National Industrial Recovery Act. Competitive projects are likewise contrary to the rule prescribed by the President of the United States under the National Industrial Recovery Act as set forth in Circular No. 1 which provides that "projects for the transmission of electric energy into territory not now served" will be preferred for grants.

(f) Said project is not authorized by the Emergency Relief Appropriation Act of 1935 in that in accordance with Subsection (g) of Section 1 loans and grants are only authorized where in the determination of the President of the United States not less than 25% of the aggregate loan and grant is to be expended for work, and Plaintiff is informed, and believes, and therefore alleges, that this test has not been applied, in that the President has not determined, with respect to the proposed project, or made any findings that not less than 25% of the aggregate of
42 any loan and grant is to be expended for work. The

amount of local labor to be employed is insignificant. In the application of the City of Iowa City for a loan and grant (Plaintiff's Exhibit "A" Page 12) it is stated:

"It is estimated that this project will employ approximately the equivalent labor of sixty men for twelve months."

(g) The acceptance of the proposed grant by the City of Iowa City is contrary to the statutes and laws of the State of Iowa for the reasons set forth in Paragraph XVI, and particularly Subsections (f), (i), (j), and (k) thereof.

Paragraph XXIII.

If said project should be held to be within the scope of the National Industrial Recovery Act or of the Emergency Relief Appropriation Act of 1935, then such Acts, and the proposed grant attempted to be made in reliance thereon, are unlawful, unconstitutional and void for the following reasons:

(a) Neither of said Acts nor the grant attempted to be made in reliance thereon are authorized by any power delegated to the Federal Government by the Constitution;

(b) The National Industrial Recovery Act and the
43 Emergency Relief Appropriation Act of 1935 severally attempt to extend the Federal power over matters of intrastate commerce and state police power and regulation of public utilities in contravention of the Tenth Amendment to the Federal Constitution and constitute the taking of Plaintiff's property in violation of the Fifth Amendment to the Federal Constitution;

(c) Such Acts are unlawful, unconstitutional and void as failing to indicate or establish any adequate legislative standard to guide the administrative officers charged with the administration of said Acts, but on the contrary attempt unlawfully to delegate legislative power to the President of the United States, and such administrative officers, including the Defendants herein; and to authorize the President and said officers to promulgate such rules and regulations having the force of law as will in his or their judgment best provide for the general welfare, in violation of Article I, Section 1, Article I, Section 8, Clauses 1, 2 and 18, and Article II, Section 1 of the Constitution of the United States. The attempted extension of the Federal

Emergency Administration of Public Works by Sec-
44 tion 12 of the Emergency Relief Appropriation Act of 1935 is likewise an unlawful attempt to delegate legislative authority in that it provides that said Administration "is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President", and further that all money appropriated by said Act is "to be used in the discretion and under the direction of the President," and no standard or guide of any kind is laid down in said Act for the exercise of such discretion.

(d) Said Acts are severally unconstitutional and void in that they fail to provide for any hearing for persons whose rights will be injured and whose property will be taken by the action of the defendants, and thereby deny due procees of law as a matter of procedure in violation of the Fifth Amendment to the Federal Constitution.

(e) The funds of the United States available and
45 to be used for the Project herein described are borrowed funds. Article I, Section 8, Clause 2, of the Constitution, which grants to Congress power to borrow money, confers no authority to expend such borrowed funds, nor is such authority conferred by any other section of the Constitution, for the purpose or in the manner herein alleged. Nor does Article I, Section 8, Clause 1, of the Constitution which grants to Congress power to collect taxes, confer authority to expend funds so raised for the purpose or in the manner herein alleged. Furthermore, said projects will not promote the general welfare of the United States, but are exclusively for the local and private welfare of the consumers of electricity in said Cities. Said
46 projects will, if anything, be to the general detriment of the United States by reason of creating an unnecessary and wasteful duplication of electricity distributing facilities, and causing unemployment and loss of invested capital. Such secondary and incidental benefit, if any, as might result from the manufacture, sale, assembly and installation of wires, cables, transformers, etc., would be incidental, remote and contingent, depending upon the intermediate conduct of manufacturers and sellers of such articles and of those who contract for their installation, and the expenditure of funds for such purpose would be

merely for the private gain and profit of such manufacturers, sellers and contractors.

47 Paragraph XXIV.

The proposed action by Defendants in carrying out said arrangement with the City of Iowa City will aid and abet said City in violating the laws and Constitution of the State of Iowa as herein more particularly alleged in Paragraph XVI, and will, therefore, be unlawful and void. The proposed grant is, and will be, invalid and unlawful as an illegal expenditure of Federal funds by the Defendants, and, therefore, the City will be obligated immediately to refund to the Federal Government the amount of the grant so illegally made and accepted by it. The City will thereupon become indebted to the Federal Government without warrant of law and in violation of the constitutional and statutory provisions of the State of Iowa and in violation of the authorization under which the City is proposing to establish a municipal electric light plant and distribution system.

Paragraph XXV.

Plaintiff is informed and believes and therefore alleges that the Defendants and said City are, in accordance with the aforesaid unlawful arrangement or understanding be-
tween PWA and said City combining and conspiring
48 together to consummate their joint design of constructing and operating said project and to injure Plaintiff as hereinabove alleged, and will, unless restrained by this Court, immediately proceed to do so. Said City will immediately present to said Defendants, or one or more of them or their agents, additional requisitions of money to be furnished pursuant to said arrangement, and said Defendants, or one or more of them, will, unless restrained by this Court, make such funds available for the construction of said project by withdrawing the same from the Treasury of the United States, and will immediately direct that they proceed with such construction in pursuance of said unlawful plan and arrangement.

Paragraph XXVI.

If Defendants, or any of them, shall carry out the provisions of said unlawful arrangement or understanding

with the City of Iowa City or do any or all of the Acts threatened by them as hereinbefore alleged, the property right of Plaintiff to enjoy its franchises and properties free from destructive competition brought about by unlawful means and to conduct its business free from unlawful interference will be immediately invaded and destroyed.

49 The value of the franchises and business of the Plaintiff and of the tangible and intangible property acquired and used therein and of the private funds invested and risked therein represented by the capital stock and obligations of Plaintiff will immediately be greatly damaged and impaired and will finally be rendered utterly worthless. Plaintiff, as a taxpayer, will be specially injured as hereinbefore alleged and will have been and in the future will be subject to the deprivation of its property by taxation for a purpose without warrant in law or in the Constitution of the United States and in violation thereof. Plaintiff's right as a taxpayer in said City of Iowa City that said City shall not be forced to violate the laws of the State of Iowa and shall not be forced to enter into relationships with others, specifically the Defendants herein named, who are without authority to enter into such relationships, will be violated. By reason of the foregoing Plaintiff would suffer the loss of its property without due process of law contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

Paragraph XXVII.

50 Plaintiff alleges that all of the acts and proceedings of the Defendants hereinabove referred to, both consummated and threatened, are illegal and void, and that if Defendants are permitted to carry into effect their plan and scheme for the erection of a municipally owned and operated electric light and power plant and distribution system in the City of Iowa City it will constitute an illegal and unlawful invasion of the rights of this Plaintiff and will result in illegal and unlawful competition and in the confiscation and destruction of Plaintiff's property located within and adjacent to said City and now used and useful in the performance of the public service of furnishing electrical energy to the inhabitants of said City and the territory now served by the Plaintiff, and Plaintiff will suffer

immediate and irreparable injury, loss and damage not susceptible of definite appraisal or ascertainment for which it has and can have no plain, speedy and adequate remedy at law.

Paragraph XXVIII.

The City of Iowa City and the members of its governing body are not made parties defendant hereto because they are without the jurisdiction of this Court and service of process cannot be had upon them in the District of
51 Columbia, and they are not necessary parties to this action.

Paragraph XXIX.

Plaintiff alleges that it is futile to ask said City to rescind its unlawful arrangement and understanding with PWA and the Defendants, inasmuch as Plaintiff has protested to said City against such arrangement and understanding but it persists in its determination to consummate the same.

Paragraph XXX.

The said City of Iowa City has, as hereinbefore alleged, announced its intention to join with Defendants in the immediate consummation of the said project. Plaintiff is informed and believes and therefore alleges that unless defendants are immediately restrained from doing so, they will at once perform the acts hereinbefore alleged. Plaintiff is further informed and believes and therefore alleges that the giving of notice of application for a restraining order would precipitate such unlawful acts and there would immediately result all the mischief complained of by Plaintiff herein and would cause Plaintiff immediate and
52 irreparable injury, loss and damage, whereas restraint of the doing thereof until disposition of Plaintiff's application for temporary injunction has been made would result in no detriment or injury to the defendants.

WHEREFORE, the premises considered, the Plaintiff prays:

(1) That process issue against the Defendants requiring them to answer this bill (but not under oath or affirmation, the benefit whereof is hereby expressly waived by the Plaintiff).

(2) That this Court grant Plaintiff a temporary restraining order against Defendants, and each of them, en-

joining them and each of them, their officers, agents and all persons acting in the aid of said Defendants and their successors in office, from doing any further act or thing to carry out any of the provisions of said unlawful arrangement with said City of Iowa City, and from in any manner aiding in the construction or from financing the construction of such electric generating system in the City of Iowa City, and more specifically from entering into any arrangement or agreement with said City for the purpose of constructing or financing the construction of said project in said City, and from honoring any requisition and
53 from transferring, lending, giving or disbursing to said City any funds whatsoever for said purpose, and from taking any step whatever designed to aid or facilitate the financing or construction of said project, such restraining order to be effective only until the matter of Plaintiff's application for a preliminary injunction shall be disposed of.

(3) That after notice and hearing, the Court enter a preliminary injunction to the same effect.

(4) That upon final hearing the Court enter a final order and decree to the same effect.

(5) And for such other and further relief as to the Court may seem meet.

IOWA CITY LIGHT AND POWER COMPANY
By R. B. MACDONALD
Its President

54 CHARLES D. WATERMAN
WAYNE G. COOK
Davenport, Iowa
CHARLES M. DUTCHER
Iowa City, Iowa
THOMAS K. HUMPHREY
Chicago, Illinois
JOHN S. BROOKES, JR.
WALTER B. GUY
917-15th St. N.W.
Edmonds Building,
Washington, D. C.
Solicitors for Plaintiff

55 STATE OF IOWA,
Scott County, ss:

R. B. MacDonald being duly sworn deposes and says that he is President of Iowa City Light and Power Company, a corporation organized under the laws of the State of Delaware, the Plaintiff named in the above entitled cause; that he has authority to make this affidavit in behalf of said corporation; that he has read the foregoing original Bill of Complaint by him subscribed and knows the contents thereof, and that the statements therein made are true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he verily believes the statements to be true.

R. B. MACDONALD

Subscribed and sworn to before me this 7th day of December, 1935.

JAMES J. LAMB
(Seal) *Notary Public in and for Scott County, Iowa.*

My commission expires July 4, 1936.

56 *Application to Federal Emergency Administration of Public Works* by *City of Iowa City, Iowa*

A Loan to Finance A Municipal Light and Power System
Amount $917,000.00

January 8, 1934

Exhibit "A"

57 *Contents*

	Page
Letter of Transmittal	1
I. General	2
II. Summarized General Information	2
III. Loan Requested	3-4
IV. The Project	
(a) General Description	5-7
(b) Estimate of Cost	8-10
(c) - (k) inclusive	11-12

V. Revenue and Expenses
(a) & (b) Past and Future operating costs 13-23
(c) Disposition of surplus..... 24-25
(d) & (e) inclusive..... 26-30
VI. Financial Data
(a) to (m) inclusive..... 31-37
VII. Legal Data
(a) to (bb) inclusive..... 38-41
VIII. Exhibits—Table of..... 42

58 Officers: E. B. Raymond, Treasurer; Wm. J. White, Assessor; Thos. E. Martin, Solicitor; J. F. Sproatt, Engineer and Street Commissioner; Harold W. Vestermark, Police Judge; W. M. Bender, Chief of Police; Herman Amish, Fire Chief; Dr. Isom A. Rankin, Health Officer; Edith Dautremont, City Nurse; C. G. Sample, Diary Inspector; C. A. Kutcher, City Inspector; M. H. Maher, Plumbing Inspector.

Aldermen-at-Large: James E. Stronks, J. Van der Zee. First Ward, M. J. McGuan; Second Ward, S. M. Woodward; Third Ward, Edw. W. Sybil; Fourth Ward, John P. Memler; Fifth Ward, Roscoe B. Ayers.

City of Iowa City

Harry D. Breene, Mayor

Geo. J. Dohrer, Auditor and Clerk

Iowa City, Iowa

January 8th, 1934

F. F. Hopkins, Engineer
State Advisory Board
Federal Emergency Administration of Public Works
Federal Building
Des Moines, Iowa

Gentlemen:

The City Council of Iowa City, Iowa, by a unanimous resolution passed at the regular meeting January 5th, 1934, have authorized and directed the Mayor and City Clerk to file an application with the Federal Emergency Administration of Public Works for a loan and grant for the purpose of constructing a municipal light and power system

and for acquiring or constructing a distribution system for electricity for Iowa City, Iowa.

Therefore in accordance with the said resolution we are herewith presenting such application and filing the same for your consideration.

Respectfully submitted,

H. D. BREENE,
Mayor, Iowa City, Iowa

GEO. J. DOHRER,
City Clerk.

59 January 8, 1934

Application of Iowa City, Iowa for Loan of $917,000.00 to Establish a Municipal Light and Power System

I. General

Circular #2 of the Federal Emergency Administration of Public Works has been followed in preparing this application and the data presented in accordance therewith. The correspondent will furnish additional data promptly upon request. Exhibit #1—"Report on Municipal Light and Power System for City of Iowa City, Iowa", contains additional information.

II. Summarized General Information

a. Applicant: City of Iowa City, Iowa, organized April 6th, 1853, under provisions of Chapter 42, Code of Iowa, 1851.

b. Correspondent: Harry D. Breene, Mayor, Iowa City, Iowa.

c. Attorney: Thos. E. Martin, Iowa City, Iowa.

d. Consulting Engineer: Walter E. Schwob, Iowa City, Iowa.

e. Population:

1910	10,091
1920	11,267
1930	15,340

60 *III. The Loan Requested*

61 *III. The Loan Requested*

(a) *Amount*

The amount of the estimated cost of this project is $917,000.00 and a loan and grant are requested of this amount.

(b) *Security*

The securities to be offered will be pledge warrants or pledge orders as provided for under the laws of the State of Iowa.

(c) *Period of Loan*

Fifteen years

Schedule of Retirement—Steam Plant Investment

Date	Investment	Retirement Fund	4% Interest	Retirement and Interest
1935	$917,000.00			
1936	872,000.00	$ 45,000.00	$36,680.00	$81,680.00
1937	825,000.00	47,000.00	34,880.00	81,880.00
1938	776,000.00	49,000.00	33,000.00	82,000.00
1939	725,000.00	51,000.00	31,040.00	82,040.00
1940	672,000.00	53,000.00	29,000.00	82,000.00
1941	616,500.00	55,500.00	26,880.00	82,380.00
1942	558,500.00	58,000.00	24,660.00	82,660.00
1943	498,000.00	60,500.00	22,340.00	82,840.00
1944	435,000.00	63,000.00	19,920.00	82,920.00
1945	369,000.00	66,000.00	17,400.00	83,400.00
1946	300,000.00	69,000.00	14,760.00	83,760.00
1947	228,000.00	72,000.00	12,000.00	84,000.00
1948	153,000.00	75,000.00	9,120.00	84,120.00
1949	78,000.00	75,000.00	6,120.00	81,120.00
1950		78,000.00	3,120.00	81,120.00
		$917,000.00		

62 (c) *Period of Loan—Continued*

The above schedule proposes to retire the original indebtedness over a period of fifteen years. It is assumed that the construction period will require about two years, including the completion of final plans and specifications, letting of bids and actual construction. For this reason it is assumed the actual operation of the system, under municipal administration, would begin about January 1, 1936 and the first maturity of bonds would take place December 31, 1936.

(d) *Application of Grant*

If the grant of 30 per cent of the estimated cost is made, the preferred method of applying the same would be to

reduce the amount of securities issued to the cost of the project less the grant, as set forth in Circular No. 1, Section 6, Case 5.

(e) *Schedule When Funds Needed*

This is indefinite for this project as the final plans and specifications must be completed.

63 *IV. The Project*

64 *IV. The Project*

(a)—General Description

Iowa City is now served with electricity by the Iowa City Light and Power Company, a United Light and Power Company subsidiary. The company terminates its 25-year franchise on January 13, 1934. The company's generating station is located in the town of Coralville, a village approximately two miles west of Iowa City. Here, company maintains a steam plant and a Hydro-electric plant combined and in addition interchanges power through an interconnection with the Iowa Electric Light and Power Company.

The energy is generated at 2,300 volts two phase, sixty cycle and is stepped up through a substation to 13,200 volts for transmission to Iowa City where it is again stepped down to 2,300 volts two phase for use on the City distribution system.

The service given by the Iowa City Light and Power Company has been excellent. The quality of service being due to adequate equipment, high standards of construction and competent operation. To produce the same quality of service with a municipally owned plant can be accomplished only by the adoption of similar standards. This report proposes that the City of Iowa City will operate its light and power department as efficiently as though operated by a private corporation. It is further proposed that the use of electricity will be promoted as vigorously with municipal as well as with private ownership and that the same high standards of construction and operation will be maintained as now exist on the property of the Iowa City Light and Power Company.

There are many and diverse avenues leading to the solution of the municipal electric light and power problem for the City of Iowa City, Iowa; each avenue has its
65 own peculiar advantages and proponents; each its

individual problems. Below are presented some logical approaches to the problem.

1. Construct a complete steam plant and distribution system and generate all energy used.

2. Construct a complete Diesel plant and distribution system and generate all energy used.

3. Purchase electricity over the hours of the lighter load and generate with a steam plant over the hours of the heavy load.

4. Same as No. 3, except generate with Diesel engines over heavy load period.

5. Purchase all electricity used from some reliable and adequate source of power.

6. Purchase all electricity used and maintain an adequate Diesel standby plant which can be expanded into a complete plant in a reasonable short time.

7. Purchase the complete property of the Iowa City Light and Power Company.

This report deals with the construction of a complete power station located in the City of Iowa City and the distribution of electricity either, by the construction of a new distribution system complete, or by using the present system through purchase from the Power Company. It is recommended that the matter of purchasing the present distribution system of the Iowa City Light and Power Company be thoroughly considered because of the additional expense of building a conflicting system where it is necessary to maintain continuous service.

66

The operation of the plant is considered in this report as being a wholly isolated plant without interconnection for exchange of power but maintaining the same emergency connection with the power station of the University of Iowa.

The City and its Growth

Iowa City is one of the older cities of the state and the 1930 census gave the population of the city as 15340. It is the home of the University of Iowa which makes the city the educational center of the state and has very little industrial development. The city has enjoyed a steady though not rapid growth as shown in the following table. The probable future growth is estimated as follows:

Population Growth of Iowa City

Date	Population
1890	7,016
1895	7,526
1900	7,987
1905	8,497
1910	10,091
1915	12,033
1920	11,267
1925	15,289
1930	15,340
1935	16,350
1940	16,800
1945	17,400
1950	18,550
1955	19,900
1960	20,700

67 *IV. The Project*

(b) Estimate of Cost—Preliminary

(1) Preliminary expenses	$3000.00
(2) Cost of land	5000.00
(3) Construction Costs	

Building and Structures

Power Plant Building
(Brick building with steel)
(Frame concrete foundation)

	Labor	*Material*
Boiler Room 157,100 cu. ft.	$13,200.00	$19,800.00
Turbine Room 148,000 cu. ft.	16,650.00	20,350.00
Total Power Plant building	$29,850.00	$40,150.00
Cooling water intake and discharge	$ 1,800.00	$ 4,200.00
Crane	450.00	4,550.00
Trackage	300.00	1,200.00
Concrete smokestack	4,000.00	6,000.00
	$36,400.00	$56,100.00

Boilers and Equipment		
3—300 HP boilers, 400# pressure, 750 degrees temperature	$ 5,500.00	$ 33,000.00
3—Superheater	600.00	3,900.00
3—Soot blower	300.00	1,200.00
3—Underfeed stokers & water wells	2,000.00	13,000.00
Piping and covering	7,000.00	14,000.00
Boiler feed pumps, heaters and softener	500.00	4,200.00
Coal and ash handling	2,000.00	12,000.00
Draft fans	500.00	4,500.00
Brick settings for boilers	3,000.00	6,000.00
Breechings	300.00	1,500.00
Flow meters and miscellaneous instruments	300.00	3,000.00
Coal storage bunkers	3,000.00	11,000.00
Miscellaneous material and equipment	1,400.00	6,300.00
Total	$26,400.00	$113,600.00

68 *Generating Equipment*	*Labor*	*Material*
2—300 KW turbines	$10,000.00	$135,000.00
2—Condensers and auxiliaries	4,000.00	31,000.00
Circulating water piping	2,000.00	4,000.00
2—Foundations	4,000.00	4,000.00
Piping	5,000.00	10,000.00
Generator Connections	700.00	2,000.00
Miscellaneous equipment		3,600.00
	$25,700.00	$189,600.00

Control Equipment		
Switchboard—12 panel and equipment	$ 4,000.00	$16,000.00
Station Light and Power equipment	700.00	1,800.00
Tools		1,500.00

Overhead Distribution System

The distribution system of the Iowa City Light and Power Company is adequate to provide service to all electric consumers of the City. The system has been maintained in

good condition and very little deferred maintenance is in evidence. It is operated at 2300 volts, two phase, 60 cycle.

The present street lighting system in the residential sections of the city is owned by the company and under contract with the city have been furnishing all maintenance and renewal of lamps.

The distribution system in the city served 5195 metered consumers in 1932 and approximately 5160 in 1933. The low percentage of unaccounted for loss in energy can be traced directly to the fact that the system carries ample copper conductors for the connected load.

The estimated cost of a new overhead distribution system would be as follows:

69 *Overhead Distribution System*	*Labor*	*Material*
Poles and Fixtures	$15,000.00	$ 65,200.00
Conductors	20,700.00	66,180.00
Services	12,000.00	12,000.00
Transformers	5,000.00	45,200.00
Meters	10,000.00	54,120.00
Street lighting fixtures	2,000.00	12,600.00
Total Overhead System	$64,700.00	$255,300.00
Office Equipment		10,000.00
Transportation Equipment		8,000.00
Miscellaneous Equipment		4,000.00
(4) Engineering		$ 27,450.00
(5) Legal, administration and supervision.		36,850.00
(6) Interest during construction 3%		24,500.00
(7) Miscellaneous costs		6,400.00
Total Cost		$917,000.00

For Sketch Plans—See Exhibits #6 and #7

For Additional Information—See Exhibit #1 Engineer's Report.

(c) *Economic and Social Value*

70 The Economic value of the project is to furnish consumers of electricity with the lowest possible rates and to benefit from any surplus that may accrue from the earnings of the project.

(d) *Program of Development*

This project, while not a part of a larger plan or long range program of development at the present time, can be associated with the development of a central steam heating system for which any of the tentative plant locations are well adopted. The development of a central steam heating district would eliminate much of the present smoke and soot evil in the business section of the City.

(e) *Regional Planning Board*

This project has not been submitted to this Board.

(f) *Metropolitan District*

This project is not a part of a Metropolitan District, but is an Independent project.

(g) *Endorsements*

Johnson County Taxpayers League. See Exhibit 11.
Iowa City League of Women Voters. See Exhibit 12.
Petitions of approximately 700 citizens—See Exhibit 15.

(h) *Objections*

No objections on file.

(i) *Competition*

This project will not compete with any similar business as the franchise of the Iowa City Light and Power Company expires January 13, 1934.

(j) *Plans & Specifications*

71 Plans and specifications are only in a preliminary stage and would require several months time to complete. Construction can be commenced in approximately six (6) months. The project can be completed in a year and one-half after contracts have been let.

(k) *Number of Men Employed*

It is estimated that this project will employ approximately the equivalent labor of sixty (60) men for twelve (12) months.

72 *V. Revenue and Expenses*

73 (a & b) *V. Revenue and Expenses*

Electric Output in Kilowatt-hours

The following data are taken from the report of the Iowa City Light and Power Company submitted to the City Council under date of June 2, 1933. The figures shown do not correspond with the company's report for the reason that the kilowatt-hour output sold to "Other Electric Cor-

porations" has been deducted. The deduction has been made since this report deals primarily with the business in Iowa City and immediate vicinity. Such interconnection may or may not be made should the City elect to construct a power station of adequate capacity to serve its consumers. Any additional output would tend to produce more favorable operation of the power station.

Electric Output (KWH)

Deducting Sales to "Other Electric Corporation")

	KWH 1929	KWH 1930	KWH 1931	KWH 1932
Delivered to Switchboard	6,935,185	7,710,117	8,259,808	8,562,036
Sold	5,692,723	6,316,459	6,877,905	7,152,626
	1,242,462	1,223,680	1,381,903	1,409,410
Used by Company	164,025	169,978	321,455	303,602
Unaccounted for	1,078,437	1,223,680	1,060,448	1,105,808
Per cent of Output Unaccounted for	15.55%	15.99%	12.84%	12.91%

Electric Sales in Kilowatt-hours

The sales of electricity for the period 1929-32, inclusive, has been taken from the report of the Power Company of June 2, 1933. The metered sales are classified in accordance with the particular rate schedule under which the sales were made. The kilowatt hours sold are shown in the following table.

74

Electric Sales in KWH	1929	1930	1931	1932
Metered Sales Residential	1,837,613	2,021,986	2,023,002	2,210,983
" " Commercial	595,510	886,726	736,118	893,171
" " Power (SUI)	23,800	6,200	16,900	7,100
Readiness to Serve—Power	1,423,546	1,522,906	1,613,013	1,518,202
" " " —Light	1,425,213	1,380,047	1,971,247	1,996,386
Post Lighting	164,622	189,538	195,518	192,410
Municipal Street Lighting	222,419	309,056	322,107	334,374
KWH Sold for Revenue—Company	5,692,723	6,316,459	6,877,905	7,152,626
Deduct Total Post and Street Lighting	387,041	498,594	517,625	526,784
KWH sold for Revenue—City	5,305,682	5,817,865	6,360,280	6,625,842

Number of Customers				
Average Number Residential meters read*	4,006	4,205	4,312	4,364
Average Number Commercial meters read	456	476	468	449
Average Number Ind. Power meters read (SUI)	1	1	1	1
Average Number Readiness to Serve—Power meters read	207	215	228	230
Average Number Readiness to Serve—Light meters read	138	139	261	277
Meters all classes not read	181	156	107	144
Average Number Electric meters in use**	4,787	4,969	5,121	5,195
Customers outside C. L.	202	223	256	270
Total meters in use	4,989	5,192	5,377	5,465

*Includes customers outside C. L.
**Does not include customers outside C. L.

75 *Probable Increase in Consumption of Electricity*

Under normal conditions the use of electricity is constantly increasing. The increase at the present time is due not so much to the connection of new consumers as to the development of new uses of electricity. The following data dealing with the number of population per consumer over the period 1930-33 shows that relative to this factor saturation has practically been reached.

Date	*Population*	*Population per Consumer*
1930	15340	2.95
1931	15800	2.94
1932	16000	2.93
1933	16100	2.96

The probable increase in consumers for future years is based on 2.95 population per consumer as shown in Table 5 following. The probable increase in KWH sold is also shown in this table.

TABLE NO. 5.

Probable Increase in Consumption of Electricity

Date	Population	Population Per Consumer	Number of Consumers	KWH sold Per Consumer	Total KWH Sold
1930	15,340	2.96	5,192	1,216	6,316,459
1931	15,800	2.94	5,377	1,279	6,877,905
1932	16,000	2.93	5,465	1,309	7,152,626
1933	16,100	2.96	5,433	1,190	6,465,258
1934	16,200	2.95	5,492	1,250	6,865,000
1936	16,400	2.95	5,559	1,370	7,615,830
1938	16,600	2.95	5,627	1,490	8,384,230
1940	16,750	2.95	5,678	1,610	9,141,580
1942	17,000	2.95	5,763	1,730	9,96[illegible]

76

TABLE NO. 5 (Continued)

Probable increase in Consumption of Electricity

Date	Population	Population Per Consumer	Number of Consumers	KWH sold Per Consumer	Total KWH Sold
1944	17,250	2.95	5,848	1,850	10,818,800
1946	17,600	2.95	5,966	1,970	11,753,020
1948	18,000	2.95	6,102	2,090	12,753,180
1950	18,550	2.95	6,288	2,210	13,896,480
1952	19,200	2.95	6,509	2,330	15,165,970
1954	19,700	2.95	6,678	2,450	16,361,100

77

V. Revenue and Expenses

(a & b)—continued

Revenue

The company, in the report made June 2, 1933, included a statement of revenue, operating expense and earnings for the period 1929 to 1932, inclusive. The statement is revised in this report to reflect the possible revenue of a municipally owned electric system at the same rates as the Power Company received.

The statement of revenue has been revised by deducting the amount paid to the company for post and street lighting. In adddition the item of revenue "Other Electric Corporations" has been deducted as well as the "Net Merchandise and Jobbing Revenue". The opinion expressed

in this report being that the City electric department should stand aside from the merchandising field in order to give the electric appliance dealers in the city a chance to prove that they can satisfactorily carry on an agressive load building program. If and when the dealers, with the cooperation of the municipal department, fail in their efforts to produce a reasonable amount of new business under normal conditions then it will be necessary for the City electric department to take some action relative to the retail merchandising question.

The revised statement of revenue is shown in Table No. 6.

TABLE NO. 6.

Revised Statement of Revenue

applying to

A Municipal Electric System

	1929	1930	1931	1932
Metered Sales Residential	$150,294.74	$164,538.82	$147,209.63	$158,863.18
Metered Sales Commercial	40,345.22	54,480.82	42,096.15	41,425.76
Metered Sales—Power SUI	654.50	170.50	457.88	195.25
Readiness to Serve—Power	49,016.73	53,289.56	50,999.14	48,610.30
Readiness to Serve—Light	65,731.20	61,709.48	75,517.50	77,238.90
Minimum Charges	2,670.15	2,546.53	2,672.97	2,510.20
Forfeited Discounts	2,558.30	3,017.90	3,827.99	5,077.69
Total	$311,270.84	$339,752.61	$322,771.46	$333,921.28
Less Refunds and Corrections	696.36	964.27	1,376.70	1,771.67
Total Electric Operating Revenue	$310,574.48	$338,788.34	$321,394.76	$332,149.61
Revenue per KWH Sold—City	$ 0.05854	0.05823	0.05222	.05013

78 *Estimated Total Revenue for 1933*

The total Revenue for 1932 as taken from the company's report of June 2, 1933, and applying to the operation of a municipally-owned plant is shown as $332,149.61, derived from the sale of 7,152,626 kilowatt-hours. The revenue per kilowatt-hour is then $0.04644.

The company's records show that for the first ten months of 1933 the total electric sales had decreased 9.61%, the per-

centage being based on the year 1932. The total sales of electricity by meter during 1932 are shown as 7,152,626 KWH. Assuming that the same rate of decrease would apply over the remaining two months of 1933, the estimated total sales for the year would be 6,465,260 kilowatt-hours. Further assuming that the distribution loss is 16%, which is an average loss, rather than the lower figure shown in the company's report, the kilowatt-hours delivered at the switchboard during 1933 would be approximately 7,700,000 plus 200,000 KWH used by the Company or 7,900,000 KWH.

Taking the revenue per kilowatt-hour sold as shown above for 1932, $0.04644, and applying the same to the estimated kilowatt-hours sold for 1933, 6,465,260 KWH, produces a total revenue for the year of $300,245.00. This figure will probably be somewhat less than the actual revenue for the reason that with the smaller consumption for 1933, the revenue per kilowatt-hour would be somewhat greater than the corresponding figure for 1932.

Result of Recent Rate Reduction

The result of the rate reduction recently offered to the City effective January 1, 1934, will be to further reduce the total revenue from electric sales. The company has presented certain figures showing that the annual reduction in revenue with the new schedule of rates will be approximately $49,000.00 as based on the revenue for 1932.

This revenue is shown as $332,149.61 which after
79 deducting $49,000.00 becomes $283,149.61 as the total revenue that would have been received under the 1932 sales of electricity had the new rates been in effect. The revenue per kilowatt-hour sold for 1932 would then have been $.03938 which applied to the total KWH sold in 1933 would have resulted in the total revenue for the year of $254,639.00. This represents the total revenue available provided the proposed municipally owned system would have the same schedule of rates.

Decreased Consumption of Electricity.

The decline in the use of electricity for 1933 is the result of the present period of economic readjustment and to the shortening of hours by commercial establishments. It is believed to be temporary and the actual period of such

decline should not be of long duration especially with the reduction in rates after January 1st, 1934 which will tend to stimulate the sale of electricity once more.

80 *Probable Future Revenue*

Date	Total Revenue
1933	$254,639.00
1934	271,854.00
1935	285,798.00
1936	299,759.00
1937	313,897.00
1938	327,991.00
1939	341,180.00
1940	355,425.00
1941	369,733.00
1942	385,240.00
1943	399,846.00
1944	415,442.00
1945	431,231.00
1946	447,894.00
1947	465,953.00
1948	483,601.00
1949	497,554.00
1950	523,619.00

The future revenues shown in the above table are calculated on the basis of the increase in use of electricity after the year 1933 and from the fact that the revenue per kilowatt-hour declines with increased use of electricity provided the rates remain the same.

The above revenues do not take into consideration the effect of any probable rate changes and are based on the same rates for the entire period shown. These rates are the new schedule of rates to be placed in effect January 1, 1934.

81 *Expense of Operation*

82 V. Revenue and Expenses (a & b)—continued

Yearly Expense of Operation—Steam Plant

(Based on 1933 output of 7,900,000 KWH at switchboard)

Production Expense			
Fuel		$51,360.00	
Plant maintenance	$10,000.00		
Insurance	2,000.00		
Water & miscellaneous expense	2,000.00		
Salaries and wages	15,000.00		
		29,000.00	
Total Production Expense			$80,360.00
Distribution Expense			
Maintenance		$7,000.00	
Salaries and wages		10,100.00	
Miscellaneous expense		800.00	
Meter expense:			
Salaries and wages		2,400.00	
Miscellaneous expense		500.00	
Office expense:			
Salaries and wages		7,430.00	
Miscellaneous expense		1,200.00	
Miscellaneous general expense		600.00	
Uncollectible bills		900.00	
New business expense		3,000.00	
Total Distribution Expense			$33,930.00
Total Expense of Operation			$114,290.00

83 *Summary of Operating Expense*

1933 Output - 7,900,000 KWH
1933 KWH Used - 6,465,260 KWH

	Steam	Per KWH Output (cents)	Per KWH Uses (cents)
Production Expense	$80,360.00	1.017	1.243
Distribution Expense	$33,930.00	0.4295	0.5248
Total Expense	$114,290.00	1.447	1.768

The expense of operation set forth above deals only with the production and distribution of electricity without considering the matter of excise tax, interest on indebtedness and any special expenses that may be incurred or donations made. These items will be considered later in this report.

84 *Future Yearly Operating Expense—Steam Plant*

Date	KWH Generated	Total Operating Expense	Expense of Operation per KWH
1933	7,900,000	$114,290.00	1.447 cents
1934	8,238,000	116,658.00	1.416 "
1935	8,686,872	117,658.00	1.355 "
1936	9,138,996	119,590.00	1.312 "
1937	9,599,304	121,486.00	1.265 "
1938	10,061,076	123,298.00	1.225 "
1939	10,497,480	124,866.00	1.189 "
1940	10,969,896	126,554.00	1.154 "
1941	11,446,848	128,178.00	1.120 "
1942	11,963,988	129,930.00	1.081 "
1943	12,456,252	131,438.00	1.055 "
1944	12,982,560	133,034.00	1.025 "
1945	13,518,216	134,578.00	0.9955 "
1946	14,084,712	136,170.00	0.9668 "
1947	14,698,824	137,894.00	0.9381 "
1948	15,303,816	139,450.00	0.9112 "
1949	15,975,360	141,210.00	0.8839 "
1950	16,675,776	142,974.00	0.8574 "

Two factors have been considered in determining the future operating expense. These are the fixed and variable expenses. The variable expense in the case of a steam generating plant is taken as the cost of coal; the variable expense with a Diesel generating plant, the cost of fuel oil and lubricating oil. All other expenses of operation are considered as fixed costs.

The expense of operation per kilowatt-hour shown above is taken as the expense per kilowatt-hour generated.

85 V. *Revenue and Expenses*

(c) *Disposition of Surplus*

Future Income Statement—1936—Steam Plant

The following income statement for the year, 1936, assumes that the City of Iowa City, Iowa, began its electric light and power department on January 1, 1936 so that a full years operation is reflected below. The basis of financing being 15 year 4% pledge warrants without grant of 30% from the Government.

Total Revenue—1936		$299,759.00
Expense—1936		
Total operating expense	$119,590.00	
Excise tax	9,000.00	
General expense	4,000.00	
Street lighting maintenance	4,000.00	
		136,590.00
Total Income		$163,169.00
Distribution extensions and renewals		15,000.00
		$148,169.00
4% interest on $917,000.00		36,680.00
		$111,489.00
Pledge warrant maturity		45,000.00
Net income for reserve and surplus		$66,489.00

86 FUTURE INCOME STATEMENT—STEAM PLANT

Basis—4% Pledge Warrants—15 year life
Rate Reductions of 10% in 1937
1941, 1945, 1949

Date	Total Revenue	Total Expense*	Total Expense per KWH used	5% Reserve Fund	Yearly Surplus
1936	$299,759.00	$233,270.00	3.063 cents	$14,988.00	$51,501.00
1937	282,220.00	234,831.00	2.936 "	14,111.00	33,278.00
1938	294,790.00	237,143.00	2.828 "	14,740.00	42,907.00
1939	306,537.00	239,101.00	2.733 "	15,327.00	52,109.00
1940	319,224.00	241,129.00	2.638 "	15,961.00	62,134.00
1941	299,793.00	242,553.00	2.543 "	14,990.00	42,250.00
1942	312,140.00	244,955.00	2.457 "	15,607.00	51,378.00
1943	323,738.00	246,988.00	2.379 "	16,187.00	60,563.00
1944	336,118.00	249,039.00	2.302 "	16,806.00	70,273.00
1945	314,974.00	250,428.00	2.223 "	15,749.00	48,797.00
1946	326,765.00	252,735.00	2.153 "	16,338.00	57,692.00
1947	339,543.00	255,079.00	2.082 "	16,977.00	67,487.00
1948	351,988.00	257,130.00	2.016 "	17,599.00	77,259.00
1949	330,690.00	255,250.00	1.917 "	16,535.00	58,905.00
1950	343,521.00	257,399.00	1.852 "	17,176.00	68,946.00
				$239,091.00	$845,679.00

Yearly surplus will be used to finance additional equipment and extensions to property as needed.

The expense per kilowatt-hour used, as shown above, is calculated on the basis of the kilowatt-hours sold by the company. This under municipal operation would compare with the kilowatt-hours sold plus all the energy used for street lighting.

In event the 30% grant is allowed the City of Iowa City will be able to lower its electric rates still further than shown in the above income statement.

V. *Revenue and Expenses*—cont.

87 (d) Unusual conditions.

No unusual conditions exist at the present time that may effect the present or future operating income and expenses. However, the establishment of an electric cook-

*Total Expense, as shown above, includes Retirement and Interest, Total Operating Expense and Excise Tax plus the following amounts:

General Expense	$4,000.00
Steel Lighting Maintenance	4,000.00
Distribution Extensions and Renewals	15,000.00
	$23,000.00

ing rate conducive to this use of electricity may be a favorable factor for future business. This use of electricity has not been encouraged for the reason that the electric company also furnishes gas to Iowa City.

V. *Revenue and Expenses*—continued

88 (e) Schedule of Rates

Rates of the Iowa City Light & Power Company Electric Rates in Effect December 1, 1933

Residential Lighting

	Gross	Net
30 KWH— @	9¢	8¢
30 KWH— @	8¢	7¢
40 KWH— @	7¢	6¢
Over 100 KWH— @	4¢	3¢
Minimum bill		$1.00

The net rate is charged if the account is paid on or before the discount day is shown on the face of the bill, otherwise the gross rate is charged.

Commercial Lighting

	Gross	Net
30 KWH— @	9¢	8¢
30 KWH— @	8¢	7¢
440 KWH— @	7¢	6¢
2000 KWH— @	5¢	4¢
Over 2500 KWH— @	4¢	3¢
Minimum bill		$1.00

The net rate is charged if the account is paid on or before the discount day as shown on the face of the bill, otherwise the gross rate is charged.

Optional Lighting Rate

Monthly demand charge per customer based on 15 minute demand $2.50 per KW.

Does not apply to customers with a demand less than 2 KW unless, using the minimum demand of $5.00 plus the energy rate; the total bill for the month figures less than the bill using the commercial block rate.

	Gross	Net
Energy charge for all electricity consumed—	3½¢	2½¢

The net rate is charged if the account is paid on or before the discount day as shown on the face of the bill, otherwise the gross rate is charged.

Note: The optional lighting rate is available to any customer within the city whose demand and energy consumption is such that the resultant rate secured is less than that from other lighting rates. Minimum demand under this rate is $5.00.

89 *Electric Cooking Rate*

	Gross	Net
First 50 KWH	5½¢	4½¢
Next 50 KWH	5¼¢	4¼¢
Over 100 KWH	5¢	4¢

The net rate is charged if the account is paid on or before the discount date as shown on the face of the bill, otherwise the gross rate is charged.

Note: Available to any customer desiring to cook with electricity.

Power Rate

Monthly, demand charge per customer, $1.00 per KW connected.

Energy Charge:

	Gross	Net
First 30 hrs use per KW of demand	6¢	5¢
Next 30 hrs use per KW of demand	4¢	3¢
For all current consumed in excess of first 60 hrs use of demand	3¢	2¢
Minimum demand charge for any customer	$1.00	

The net rate is charged if the account is paid on or before the discount day as shown on the face of the bill, otherwise the gross rate is charged.

Note: Available to all customers who have installed one or more motors larger than one horse power.

90 V. *Revenue and Expenses*
(e) Schedule of Rates—continued

Rates of the Iowa City Light & Power Company Proposed Electric Rates Effective January 1, 1934

Residential Lighting

	Gross	Net
30 KWH— @	7½¢	7¢
30 KWH— @	5½¢	5¢
Over 60 KWH— @	3½¢	3¢
Minimum bill	$1.00	

The net rate is charged if the account is paid on or before the discount day as shown on the face of the bill, otherwise the gross rate is charged.

Commercial Lighting

	Gross	Net
60 KWH— @	7½¢	7¢
90 KWH— @	6½¢	6¢
150 KWH— @	5½¢	5¢
1200 KWH— @	4½¢	4¢
2500 KWH— @	3½¢	3¢
Over 4000 KWH— @	3¢	2½¢
Minimum Bill	$1.00	

The net rate is charged if the account is paid on or before the discount day as shown on the face of the bill, otherwise the gross rate is charged.

Optional Residence Lighting

	Gross	Net
100 KWH— @	5¢	4½¢
Over 100 KWH— @	3¢	2½¢
Minimum Bill	$4.50	

The net rate is charged if the account is paid on or before the discount day as shown on the face of the bill, otherwise the gross rate is charged.

Optional Lighting Rate

Monthly demand charge per customer, based on 15 minute demand, $2.50 per KW.

Does not apply to customers with a demand less than 2 KW unless, using the minimum demand of $5.00 plus the energy rate, the total bill for the month figures less than the bill using the commercial block rate.

	Gross	Net
Energy charge for all electricity consumed..	2¼¢	2¼¢

The net rate is charged if the account is paid on or before the discount day as shown on the face of the bill, otherwise the gross rate is charged.

Note: The optional lighting rate is available to any customer within the city whose demand and energy consumption is such that the resultant rate secured is less than that from other lighting rates. Minimum demand under this rate is $5.00.

91

Electric Cooking Rate

	Gross	Net
50 KWH— @	5½¢	4½¢
Next 50 KWH— @	5¼¢	4¼¢
All over 100 KWH— @	5¢	4¢

The net rate is charged if the account is paid on or before the discount date as shown on the face of the bill, otherwise the gross rate is charged.

Note: Available to any customer desiring to cook with electricity.

Power Rate

Monthly demand charge per customer, $1.00 per KW connected load.

Energy Charge:

	Gross	Net
First 30 hours use per KW of demand....	4½¢	— 4¢
Next 30 hours use per KW of demand....	3½¢	— 3¢
For all current consumed in excess of first 60 hours use of demand	2½¢	— 2¢

The net rate is charged if the account is paid on or before the discount day as shown on the face of the bill, otherwise the gross rate is charged.

Note: Available to all customers who have installed one or more motors larger than one horse power.

92 VI. *Financial Data*

93 VI. *Financial Data:*

a. *Assessed Valuations:* Statement of assessed valuation of taxable property (real and personal) for last three fiscal years and ratio of assessed value to actual value.

	Real	Personal	Ratio assessed to actual
1930	12,018,988.00	4,156,346.00	50%
1931	12,388,484.00	2,581,648.00	50%
1932	12,662,268.00	2,515,041.00	50%

b. *Funded Debt:*

Issued to refund Improvement Bonds Outstanding.
General Obligation Bonds.
Amount Outstanding. $24,500.00
Interest Rate 4¼% payable semi-annually.

$7,500 maturing June 1, 1934.
8,000 " June 1, 1935.
9,000 " June 1, 1936.

Issued to pay the City's share of the cost of Street Improvements.
General Obligation Bonds.
Amount Outstanding $30,000.00
Interest rate 5% payable semi-annually.

$8,000 maturing May 1, 1937.
7,000 " May 1, 1938.
7,000 " May 1, 1939.
8,000 " May 1, 1940.

Issued to liquidate a judgment rendered on refused warrants.
General Obligation Bonds.
Amount Outstanding. $9,500.00
Interest Rate 4¼% payable semi-annually.

$3,000 maturing July 1, 1934.
3,000 " July 1, 1935.
3,500 " July 1, 1936.

Issued to fund a judgment rendered on refused warrants.
General Obligation Bonds.

Amount Outstanding $35,400.00
Interest Rate 5½% payable semi-annually.

94 $4,400 maturing May 1, 1937.
11,000 " May 1, 1938.
10,000 " May 1, 1939.
10,000 " May 1, 1940.

Issued to fund a judgment rendered on refused warrants.
General Obligation Bonds.
Amount Outstanding: $24,759.21
Interest Rate 5% payable semi-annually.

$6,000 maturing May 1, 1936.
6,000 " May 1, 1937.
12,759.21 " May 1, 1941.

Issued to fund a judgment rendered on refused warrants.
General Obligation Bonds.
Amount Outstanding $18,690.76
Interest rate 5% payable semi-annually.

$18,690.76 maturing Nov. 1, 1934.

Issued to construct a viaduct over railway tracks on College Street.
General Obligation Bonds.
Amount Outstanding $15,000.00
Interest rate 4¾% payable semi-annually.

$15,000.00 maturing Nov. 1, 1942

Issued for purchase of fire equipment.
General Obligation Bonds.
Amount Outstanding $3,500.00
Interest rate 6% payable semi-annually.

$2,000 maturing Nov. 1, 1933.
1,500 " Nov. 1, 1934.

Issued for purchase of fire equipment.
General Obligation Bonds.
Amount Outstanding $1,000.00
Interest rate 5½% payable semi-annually.

$1,000.00 maturing Oct. 1, 1932.

Issued to refund outstanding warrants.
General Obligation Bonds.
Amount Outstanding $1,000.00
95 Interest rate 5% payable semi-annually

$1,000.00 maturing May 1, 1934.

Issued for the purpose of constructing the Iowa Avenue Bridge across the Iowa River.
Amount Outstanding $22,000.00
General Obligation Bonds
Interest rate 4½% payable semi-annually.

$5,000 maturing Nov. 1, 1933.
5,000 " Nov. 1, 1934.
12,000 " Nov. 1, 1935.

Issued to take up refused warrants on the Bridge Fund.
General Obligation Bonds.
Amount Outstanding: $25,000.00
Interest rate 5% payable semi-annually.

$3,000 maturing Nov. 1, 1933.
3,000 " Nov. 1, 1934.
9,000 " Nov. 1, 1936.
10,000 " Nov. 1, 1937.

Issued for the purchase of land and equipping Municipal Airports.
General Obligation Bonds.
Amount outstanding: $65,000.00
Interest rate 4¼ payable semi-annually.

1933	1934	1935	1936	1937	1938	1939	1940
2000	3000	3000	3000	3000	4000	3000	4000

1941	1942	1943	1944	1945	1946	1947	1948
4000	4000	5000	4000	6000	5000	6000	5000

1949
2000

Issued for the purpose of paying contractor for construction of sewers.

Special assessment bonds.
Amount outstanding: $52,775 78
Interest rate 5% payable annually.

96	$10,325.67	maturing	May 1, 1932.
	9,099.97	"	May 1, 1933.
	10,499.97	"	May 1, 1934.
	6,399.97	"	May 1, 1935.
	5,650.00	"	May 1, 1936.
	3,750.00	"	May 1, 1937.
	2,650.00	"	May 1, 1938.
	2,650.00	"	May 1, 1939.
	1,150.00	"	May 1, 1940.
	550.00	"	May 1, 1941.
	50.00	"	May 1, 1942.

Issued for the purpose of paying contractor for the construction of paving.
Special Assessment Bonds.
Amount Outstanding: $394,126.12
Interest rate 5% payable annually.

$40,626.12	maturing	May 1, 1932.
72,700.00	"	May 1, 1933.
78,700.00	"	May 1, 1934.
60,000.00	"	May 1, 1935.
47,200.00	"	May 1, 1936.
37,700.00	"	May 1, 1937.
32,000.00	"	May 1, 1938.
17,000.00	"	May 1, 1939.
11,000.00	"	May 1, 1940.
7,000.00	"	May 1, 1941.

Issued to pay the Contractor for constructing sidewalks.
Special Assessment Bonds.
Amount Outstanding: $7,006.00
Interest rate 5% payable semi-annually.

$600.00	maturing	May 1, 1932.
1,351.00	"	May 1, 1933.
1,451.00	"	May 1, 1934.
1,451.00	"	May 1, 1935.
851.00	"	May 1, 1936.
851.00	"	May 1, 1937.
351.00	"	May 1, 1938.
100.00	"	May 1, 1939.

Issued to fund a judgment rendered on refused warrants.
General Obligation Bonds.
Amount Outstanding: $75,000.00
Interest rate 5% payable semi-annually.

97	$5,000.00	maturing	Nov. 1, 1941.
	5,000.00	"	Nov. 1, 1942.
	5,000.00	"	Nov. 1, 1943.
	20,000.00	"	Nov. 1, 1944.
	20,000.00	"	Nov. 1, 1945.
	20,000.00	"	Nov. 1, 1946.

c. *Sinking Fund:* None
d. *Floating Debt:* None
e. *Overlapping Debt:* Statement of gross debt of all over lapping taxing or assessment districts (in school—county—city).

School Board in Iowa City	$104,000.00
County Board in Johnson County	$1,289,044.00

City list attached.

f. *Outstanding Financial Obligations:* City—County—School Board. See "E".
g. *Defaults:* Some Special Assessment Bonds not paid in 1932 and 1933 due to balance in closed banks and slow payment of special assessments.
h. *Tax Rate:* Present tax rate per $1,000.00 of assessed value for State, County, City & School.

	State	County	City	School	Total
Iowa City	$2.25	$5.72	$14.01	$17.12	$39.10

i. *Tax Collections:* Levy for municipal purposes only.

	1929 Levied 1930 Collected	1930 Levied 1931 Collected	1931 Levied 1932 Collected
Amount Levied	$207,537.86	$204,973.26	$203,020.05
Uncollected at date of delinquency	2,349.08	3,616.34	18,162.61
Uncollected as of September 15, 1933	1,149.08	2,306.66	10,162.61

j. *Tax Dates:* Statement of dates on which taxes are levied, become payable and become delinquent.

Taxes levied—2nd Monday in September
" payable—January 1st.
" delinquent—March 1st and September 1st.

k. *Penalties on Delinquent Taxes:* Penalty of ¾ of 1% per month.

l. *Receipts and Expenditures of the City:*

98	Estimated Current Revenues	$263,724.00
	Estimated Current Expenses	247,767.00

m. *Description of City:* Iowa City is the County Seat of Johnson County and is situated on the Iowa River about 60 miles west of Davenport and 125 miles east of the State Capitol at Des Moines. The first State Capitol was located at Iowa City, and later the first State Capitol building was made the central building of the State University. This educational institution has grown until the present student enrollment is approximately 9,000.

Iowa City is situated at the intersection of Federal Highways No. 6 and 161 both of which are paved across the state. The State roads entering Iowa City are as follows: No. 1 and 261—well surfaced all weather roads. The county road system of Johnson County is all well surfaced all weather roads.

The railroad facilities are very good. The main line of the Chicago, Rock Island & Pacific Railway—Chicago to Denver—and a branch of the Chicago, Rock Island & Pacific, Iowa City to Muscatine. Also, the electric line of the Cedar Rapids & Iowa City Railway Company.

Iowa City is located on the main route of the United Airways from New York to San Francisco. The municipal aviation field at Iowa City is the first air mail field to be located in Iowa.

Receipts for the year ending 3-31-30	$430,854.45	
Warrants outstanding 3-31-30	199.03	
Balance of cash on hand 4-1-29	76,440.67	
Expenditures for the year ending 3-31-30		$391,409.73
Warrants outstanding 4-1-29		349.15
Balance of cash on hand 3-31-30		115,736.27
	$507,494.15	$507,494.15

99 Receipts for the year ending 3-31-31	$344,062.31	
Warrants Outstanding 3-31-31	8,196.99	
Balance of cash on hand 4-1-30	115,736.27	
Expenditures for the year ending 3-31-31		$355,158.16
Warrants Outstanding 4-1-30		199.03
Balance of cash on hand 3-31-31		112,638.38
	$467,996.57	$467,996.57
Receipt for the year ending 3-31-32	$368,213.15	
Warrants Outstanding 3-31-32	46,996.20	
Balance of cash on hand 4/1/31	112,638.38	
Expenditures for the year ending 3-31-32		$313,661.34
Warrants Outstanding 4/1/31		8,196.99
Balance of cash on hand 3-31-32		205,989.40
	$527,847.73	$527,847.73

100 VII. *Legal Data*

101 VII. *Legal Data*

Opinion of Counsel

To the Administrator,
Federal Emergency Administration of Public Works,
P. F. Hopkins, Engineer for Board,
Des Moines, Iowa

Dear Sir:

I hereby certify that I have examined the application of the City of Iowa City, Johnson County, Iowa, for a loan of $917,000.00 to defray the cost of constructing a municipal light and power system, and am of the opinion that the same is in proper and satisfactory form, and in substantial compliance with the rules and regulations prescribed by the Administrator in Circular No. 2.

I do further certify that I have examined the Constitutional, Statutory and Charter provisions applicable to the power of the applicant to construct the project and issue obligations in payment therefore, and am of the opinion that the applicant possesses lawful power and authority to construct the project and to issue obligations therefor.

I do further certify, in keeping with Circular No. 2, that:

a. *Organization*
Applicant was incorporated April 6th, 1853, under the laws of Iowa, provisions of Chapter 42, Code of Iowa, 1851.

b. *Charter*
No special charter.

c. *Debt Limitation*
5% of taxable property on last tax list.
Article XI—Section 3—Constitution of Iowa.
1½%—Section 6238—Code of Iowa, 1931.

VII. *Legal Data*

102 Valuation—January 1st, 1933.

Real Estate	$12,635,100.00
Money & Credits	2,515,041.00

d. *Deduction From C. Above*
Gross indebtedness $275,349.97
No deductions.

e. *Powers of Applicant*
1. Chapter 312—Sections 6127—Code of Iowa—1931.
2. Section 6134—d1—Code of Iowa—1931.

f. *Authorization by Voters*
Yes. Sections 6131 and 6134—d3. Code of Iowa—1931.

g. *Authorization by Resolution or Ordinance not Sufficient.*
Authorization by voters is required. Therefore resolution or ordinance not sufficient. Sections 6131 and 6134—d3. Code of Iowa—1931.

h. *Publication of Resolution*
Not applicable.

i. *Franchise Requirements*
No.

j. *Sale of Obligations*
Private sale.
Sections 6134d1 and 6134d2—Code of Iowa, 1931.

k. *Maximum Interest*
Maximum rate of Interest—5%. Chapter 319—Code of Iowa, 1931.

l. *Minimum Price*
Par plus accrued interest. Section 1175—Code of Iowa, 1931

m. *Other Authority Required*
Yes. To State Securities Dept. Chapter 393cl. Code of Iowa, 1931

n. *Maturity of Obligations*
No provision as to first maturity.
20 years maximum period. Section 1179-b 1—Code of Iowa, 1931.
No limitation specified in Chapter 312. Code of Iowa, 1931.

VII. *Legal Data*

103 o. *Restrictions on Payment*
No.

p. *Negotiability*
Yes. Section 9461—Code of Iowa—1931.

q. *Character of Investment*
No.

r. *Registration*
Said obligations may be made registerable as to principal only.
Section 6256—Code of Iowa, 1931.

s. *Approval of Bonds*
Yes. By State Securities Dept. Chapter 393-c 1. Code of Iowa—1931.

t. *Prior Registration*
Proposed obligations required to be registered in the office of City Treasurer. See Section 6256—Code of Iowa—1931.

u. *Tax Exemption—State*
Yes. See Section 6944—Paragraph 5—Code of Iowa—1931.

v. *Tax Exemption—Federal*
Yes.

w. *Litigation*
No.

x. *Property Acquisition*
Yes. Sections 6135 and 6140. Code of Iowa—1931.

y. *Bond Counsel*
Chapman & Cutler, Chicago, Illinois.

z. *Authority for Securities*
1. No. See Const. Art. 11, Para. 3; and Sections 6127, 6131, 6238 to 6241, and 6134-d 1 to 6134-d6—Code of Iowa—1931.
Wyatt v. Town of Manning 250 N. W. 141 (Iowa 1933)

104 VII. *Legal Data*

z. *Authority for Securities*—continued
2. No.
3. From the net earnings of the plant.
Section 6134-d 1—Code of Iowa—1931.
4. Foreclosure of mortgage on plant.
5. No.

aa. *Authority for Special Assessment Bonds*
1. Not applicable.
2. Not applicable.
3. Not applicable.
4. Not applicable.
5. Not applicable.

bb. *Leasing Authority*
Sections 6134-d 1 and 6134-d 2.
Code of Iowa—1931.

Yours very truly,

THOS. E. MARTIN,
City Solicitor
Iowa City, Iowa.

P. W. 17681

105 LOAN AND GRANT AGREEMENT dated as of ....., 193..., between the CITY OF IOWA, JOHNSON COUNTY, STATE OF IOWA (herein called the "Borrower") and the UNITED STATES OF AMERICA (herein called the "Government").

Part One

1. *Purpose of Agreement.* Subject to the terms and conditions of this Loan and Grant Agreement (herein called the "Agreement") the Government will, by loan and grant not exceeding in the aggregate the sum of $917,000 (herein called the "Allotment") aid the Borrower in financing a project (herein called the "Project") consisting of the construction of an electric power plant with steam turbo-generator, boilers and necessary auxiliaries and control equipment, and a complete distribution system all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 7738, Title II of the National Industrial Recovery Act (herein called the "Act") and the Constitution and Statutes of the State of Iowa (herein called the "State").

2. *Amount and Method of Making Loan.* The Borrower will sell and the Government will buy, at the principal amount thereof plus accrued interest, $709,000 aggregate principal amount of the bonds described below (herein called the "Bonds") less such amount of the Bonds, if any, as the Borrower may sell to purchasers other than the Government.

(a) *Designation:* Electric Plant Revenue Bond.

(b) *Authorized Amount:* $709,000.

Docket No. 7738 Exhibit "B" P. W. 11088

106

(c) *Type:* Negotiable, coupon, serial, revenue bond.

(d) *Registration:* Registerable at option of the holder as to principal only or as to principal and interest.

(e) *Date:* August 1, 1934

(f) *Interest:* at the rate of 4 per cent per annum payable on February 1, 1935 and semiannually thereafter on February 1 and August 1 of each year.

(g) *Maturities:* Payable on August 1 in years and amounts as follows:

Year	Amount	Year	Amount
1936	$47,000	1944	$47,000
1937	47,000	1945	47,000
1938	47,000	1946	47,000
1939	47,000	1947	48,000
1940	47,000	1948	48,000
1941	47,000	1949	48,000
1942	47,000	1950	48,000
1943	47,000		

(h) *Security:* Special obligations of the Borrower payable as to both principal and interest from and secured by an exclusive first lien on the net revenues of the entire electric system (such net revenues being herein defined as the gross revenues after deduction of reasonable operations and maintenance expenses) and further secured by a first lien mortgage upon the real and personal property constituting the electric system; and additionally secured by a franchise to operate said electric system for a period of (20) twenty years after date of sale of the electric system upon foreclosure of the mortgage.

(i) *Place and Medium of Payment:* Payable, in any coin or currency which, on the respective dates of payment of the principal of and interest on the Bonds, is legal tender for the payment of public and private debts, at the office of the Treasurer of City of Iowa City, Johnson County, State of Iowa or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York.

(j) *Denomination:* $1,000.

Docket No. 7738 1-2

107 3. *Amount and Method of Making Grant.* The Government will make and the Borrower will accept, whether or not any or all of the Bonds are sold to purchasers other than the Government, a grant (herein called the "Grant") in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The determination by the Federal Emergency Administrator of Public Works (herein called the "Administrator") of the cost of the labor and materials employed upon the Project shall be conclusive. The Government will make part of the Grant by payment of money and the remainder of the Grant

by cancellation of Bonds or interest coupons or both. If all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money. In no event shall the Grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $250,000.

4. *Bond Proceedings.* When the Agreement has been executed the Borrower (unless it has already done so) shall promptly take all proceedings necessary for the authorization and issuance of the Bonds.

5. *Bond and Grant Requisition.* From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requistion together with such documents being herein collectively called a "Requisition").

6. *Bond Purchases.* If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at a Federal Reserve Bank to be designated by the Administrator or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, having all unmatured interest coupons attached thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the Project.

7. *Grant by Payment of Money.* If a Requisition requesting the Government to make a payment on account of
108 the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the borrower at such place or places as the Administrator may designate against delivery by the Borrower of its receipt there-

for, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) 25 per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) 30 per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined;

provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between the Allotment and the amount paid (not including the amount paid as accrued interest) for the Bonds taken up by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds or interest coupons or both rather than by payment of money if, in the judgment of the Administrator, the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

8. *Grant by Cancellation of Bonds.* If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

9. *Grant Advances.* At any time after the execution of this Agreement the Government may, upon request of the Borrower, if in the judgment of the Administrator the circumstances so warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of 30 per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

109 10. *Deposit of Bond Proceeds and Grant; Bond Fund; Construction Accounts.* The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 8, Part One, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 7, Part One, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Construction Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator.

11. *Disbursement of Monies in Construction Accounts and in Bond Fund.* The Borrower shall expend the monies in a Construction Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and approved by the Administrator. Any monies remaining unexpended in any Construction Account after the completion of the Project which are not required to meet obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on the principal of the Bonds.

12. *Other Financial Aid from the Government.* If the Borrower shall receive any funds (other than those received under this Agreement) directly or indirectly from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed

the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

110 13. *Conditions Precedent to the Government's Obligations.* The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.* If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.* If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $917,000, or that the Borrower will be able to obtain, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the Project;

(c) *Compliance.* If the Administrator shall not be satisfied that the Borrower has complied with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.* If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds the security therefor or the construction of the Project;

(e) *Representations.* If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect.

111 (f) *Bond Resolution.* If the Borrower shall not have adopted a resolution providing for the authorization, issuance and sale of the Bonds, which shall contain such provisions as are, in the judgment of the Administrator, necessary to insure that:

1. The Borrower will use excess revenues derived from the operation of the plant for the purpose of paying outstanding Bonds.

2. The Borrower will secure the Bonds by a pledge of the property purchased, constructed and/or erected with their proceeds.

3. Any revenue Bonds issued subsequent to Bonds issued hereunder, will be junior and subordinate to the Bonds issued hereunder.

(g) *Rate Ordinances.* If the Borrower shall not have passed an ordinance providing for the fixing and maintaining of rates and collection of charges for the services afforded by Borrower's entire electric system, Additions thereto and/or extensions thereof which shall, in the judgment of the Administrator, contain such provisions as are necessary.

1. To insure that the revenues to be derived from the entire electric system additions thereto and/or extensions thereof will be sufficient at all times to pay the cost of operation and maintenance of the plant and to provide for the payment of the principal of and the interest on the Bonds and maintain a reasonable reserve therefor.

2. To insure the payment of the reasonable cost of any service rendered by the entire electric system to the Borrower or to any of the Borrower's agencies or instrumentalities.

(h) *Court Decision.* If the Supreme Court of Iowa shall not have rendered a decision, which satisfied the Administrator, that the Borrower may legally authorize and sell the Bonds and make all the covenants and agreements contained in the Bonds, the proceedings authorizing their issuance and sale and in this agreement.

(i) *Competition.* If the Borrower shall not satisfy the Administrator that the Iowa City Light and Power Company will be without authority to sell electrical energy within the municipal limits or, if such evidence can not be produced, that the electric system of the Borrower will have a sufficient portion of the gross business so that the Project's estimated revenues will be adequate to pay the principal of and interest on the Bonds when the same are due and payable.

(j) *Land to be Acquired.* If the Borrower fails to acquire the land needed at a price and in a manner satisfactory to the Administrator.

In consideration of the Grant, the Borrower covenants that:

1. *Construction Work.* All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. The following rules and regulations as set out in Bulletin No. 2, Non-Federal Projects revised March 3, 1934, entitled "P.W.A. Requirements as to Bids, Contractors' Bonds, and Contract, Wage and Labor Provisions and General Instructions as to Applications and Loans and Grants", shall be incorporated verbatim in all construction contracts for work on the project (in such construction contracts all blank spaces shall be filled in as provided in said Bulletin):

"1. (a) *Convict labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project.

"(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government engineer, no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; Provided, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rates for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

Skilled labor .....
Unskilled labor .....

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings be-

tween organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such

P. W. 11088 (R 2) (Aug. 10, 1934)

113 agreed wage rates shall apply: Provided, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

"(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of.....to be paid by employees in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of....., should such deductions be made, shall be posted in a prominent and easily accessible place at the side of the work, and there shall be kept a true and accurate record of the hours worked

by and the wages, exclusive of all authorized deductions paid to each employee, and the engineer inspector shall be furnished with a sworn statement thereof on demand.

114 (g) The Board of Labor Review (herein called the "Board") shall hear all labor issues arising under the operation of this contract and such issues as may result from fundamental changes in exonomic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the Event that as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in Paragraph 2 (a), (b), and (c) hereof) all contracts for work on the project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to such decreased cost.

"(i) Engineers, architects, and other professional and subprofessional employees engaged in duties normally done at the site of the project shall receive at least the prevailing rates for the various types of service to be rendered, provided that in no case shall professional employees receive less than the following weekly compensation for 40 hours or less irrespective of the number of hours employed: $36.00 in the northern zone; $33.00 in the central zone; and $30.00 in the southern zone. Where the working week is longer than 40 hours, weekly compensation shall be increased proportionally. Compensation under this paragraph shall be subject to the approval of the Government Engineer.

"3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivision and/or county).....and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or district).....

Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

"(b) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employ-
115 ment Service: Provided, however, That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union worker by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of this paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

"(c) *Compliance with Title I of the Act.*—The following sections 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

"(4) *Human labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to

the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. *Compensation insurance.*—Every employer of labor shall provide, if permitted by the laws of....., adequate workmen's compensation insurance for all labor employed by him on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Govern-
116 ment engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided by which the employees may, by paying the entire amount of the premiums, derive a similar protection.

"6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. *Withholding payment.*—Under all construction contracts, ... may withhold from the contractor
(The borrower)
so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. *Accident prevention.*—Reasonable precautions shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction of the Associated General Contractors of America, unless and to the extent that such provisions are

incompatible with Federal, State, or municipal laws or regulations.

"9. *N. R. A. Compliance.*—The contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement), and..... ..... shall have the right, subject to the ap-
(The borrower)
proval of the Government engineer, to cancel this contract for failure to comply with this provision and make open market purchases or have the work called for by this contract otherwise performed at the expense of the
117 contractor. So far as articles, materials or supplies produced in the United States are concerned, no articles, materials or supplies shall be accepted or purchased for the performance of the work nor shall any subcontracts be entered into for any articles, materials or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

"10. (a) *Inspection of records,*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the engineer inspector such reasonable facilities as he may request. In case of dispute the Government engineer shall determine the reasonableness of the request.

"11. *Reports.*—Every employer of labor on the project shall report within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to ..... to the Govern-
(The borrower)
ment engineer and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary ser-
118 vices and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government engineer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90 percent of the cost thereof to the contractor, and the remaining 10 percent shall be paid 30 days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. *Signs.*—Signs bearing the legend Public Works Project No. .... shall be erected in appropriate places at the site of the project.

"14. All reasonable rules and regulations which the Public Works Administration may prescribe toward the effectuation of the matters covered by paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

"15. Subcontractors.—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to in-

sure the fulfillment of all provisions of this contract affecting such subcontractors, particularly paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised (March 1934).

"16. *Termination for breach.*—In the event that any of the provisions of paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, ... may, subject to the approval
(The borrower)
of the Government engineer, and upon request of the Administrator, shall terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within 10 days after the serving of such notice such violation shall cease, the contract shall, upon the expiration of said 10 days cease and terminate. In the event of any such termination ..... may
(The borrower)
take over the work and prosecute the same to completion or otherwise for the account and at the expense of the contractor and/or such subcontractor, and the contractor and his sureties shall be liable to ..... for any
(The borrower)
119 excess cost occasioned ..... in the event
(The borrower)
of any such termination, and ..... may take
(The borrower)
possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. *Definitions.*—The term "Act" as used herein refers to the National Industrial Recovery Act. The term "Government engineer" as used herein shall mean the State Engineer (P. W. A.) or his duly authorized representative or any person designated to perform his duties or functions under this agreement by the Administrator. The term "engineer inspector" as used herein refers to State engineer inspectors, resident and assistant resident

engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work."

2. *Restriction as to Contractors.* The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March, 1934.

3. *Bonds and Insurance.* Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, or materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Administrator.

4. *Force Account.* All construction work on the Project shall be done under contract, provided, however, that if prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement to the contrary notwithstanding, to apply to the Administrator for permission to do all or any part of the Project on a force account basis.

120 *Part Three*

1. *Construction of Project.* Not later than upon the receipt by it of the first Bond payment, the Borrower will commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, plans, drawings, specifications and construction contracts which shall be satisfactory to the Administrator, and under such engineering supervision and inspection as the Administrator may require. Except with the written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage, or any conditional sale or title retention agreement.

2. *Information.* During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower and the Project as the Administrator or any such purchaser may at any time reasonably require.

3. *Representations and Warranties.* The Borrower represents and warrants as follows:

(a) *Litigation.* No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the security therefor the construction and operation of the Project, or the financial condition of the Borrower;

(b) Financial Condition. The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application. and there have been no changes in the
121 character of its assets or in its financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(c) *Fees and Commission.* It has not and does not intend to pay any bonus, fee or commission in order to secure the loan or grant hereunder;

(d) *Affirmation.* Every statement contained in this Agreement, in the application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government is correct and complete, and no relevant fact materially affecting the Bonds, the security therefor, the Grant or the Project, or the obligations of the Borrower under this Agreement has been omitted therefrom.

4. *Sale of Bonds by the Government.* The Borrower will take all such steps as the Government may reasonably request to aid in the sale by the Government of any or all of the Bonds. Upon request, the Borrower will furnish to the Government or to any purchaser or purchasers from the

Government of 25 per centum of the Bonds, information for the preparation of a bond circular in customary form, signed by the proper official of the Borrower, containing such data as the Government or such purchaser or purchasers may reasonably request concerning the Borrower and the Project.

5. *Expenses.* The Government shall be under no obligation to pay any costs, charges or expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement including, without limiting the generality of the foregoing, the cost of preparing, executing and delivering the Bonds, and any legal, engineering and accounting costs, charges or expenses incurred by the Borrower.

6. *Waiver.* Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement.

7. *Interest of Member of Congress.* No Member
122 of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise thereupon.

8. *Validation.* The Borrower hereby covenants that it will institute, prosecute and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder a letter from the Governor of the State stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will

recommend and cooperate in the enactment of such legislation.

9. *Miscellaneous.* This Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement will be governed by and be construed in accordance with the laws of the State.

10. *Naming of Project.* The Project shall never be named except with the written consent of the Administrator.

11. *Undue Delay by the Borrower.* If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for any unreasonable time in carrying out any of the duties or obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

12. *Construction of Agreement.* If any provision
123 of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall effect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the rights or obligations of the parties hereto, provided, in the opinion of the Administrator, the Agreement does not then violate the terms of the Act.

IN WITNESS WHEREOF, the CITY OF IOWA CITY, JOHNSON COUNTY, STATE OF IOWA and the UNITED STATES OF AMERICA have respectively cause this Agreement, to be duly executed as of the day and year first above written.

CITY OF IOWA CITY
By .....
.....

124 P. W. 42231-23

Federal Emergency Administration of Public Works

Washington, D. C., Oct. 7, 1935
(Date)
PWA Docket No. 7738.

City of Iowa City,
Johnson County, Iowa.

1. The United States of America (herein called the "Government") hereby offers to aid in financing the construc-

tion and equipping of an electric plant and distribution system (herein called the "Project") by making a grant to the City of Iowa City (herein called the "Applicant") in the amount of 45 percent of the cost of the Project. In no event will the grant be in excess of $413,000.

2. The Government will be under no obligation to make any grant, unless the Applicant has complied with the provisions of PWA Circular D, dated September 20, 1935.

UNITED STATES OF AMERICA
Federal Emergency Administrator of Public Works

By HORATIO B. HACKETT
Assistant Administrator.

Exhibit "C"

125 PWA Form No. 199

September 20, 1935

Federal Emergency Administration of Public Works

Harold L. Ickes, Administrator

P.W.A. Circular D

Relating to Certain Grants Under the Emergency Relief Appropriation Act of 1935

Note.—If local laws prevent the applicant from complying with the provisions set forth herein, the applicant should notify the Federal Emergency Administrator of Public Works.

Exhibit "D"

126 I. General Provisions

1. *Prerequisites to Government's Obligation.*—The United States of America (hereinafter called the "Government") shall be under no obligation to the applicant to whom the offer is made (hereinafter called the "Applicant") to make any grant:

(a) *Representation.*—If any representation made by the Applicant in its application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Applicant shall be incorrect or incomplete in any material respect;

(b) *Cost of Project.*—If it appears that the Applicant will not be able to obtain any funds which, in addition to the sum allotted by the Government, shall be necessary to complete the project described in the Government's offer (hereinafter referred to as the "Project");

(c) *Compliance.*—If the Applicant shall not have complied with all the provisions contained or referred to in this Circular theretofore to be complied with by the Applicant.

2. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or in any benefit arising therefrom.

3. *Bonus or Commission.*—The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

4. *Information.*—The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work.

5. *Insurance.*—The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

6. *Name of Project.*—The Applicant shall not
127 name the Project for any living person.

II. Grant Payments

1. *Advance Grant.*—After the receipt by the Applicant of an offer from the Government to make a grant (hereinafter called the "Offer"), the Applicant may request an advance on account of the grant in an amount not exceeding 15 per cent of the previously estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings, and other preliminary investigations, costs of preparation of plans, specifications, and other forms of proposed contract documents, and costs of advertisements for

bids for contracts, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant must be accompanied by a signed certificate of purposes in which must appear in reasonable detail the purposes for which such advance grant will be used.

2. *Intermediate Grant Requisitions.*—At any time after the Applicant has deposited in the Construction Account its share of the cost of the Project (hereinafter called the "Applicant's Funds"), if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes in which appear in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 25 percent of said previously estimated cost of the Project. When the Project shall be approximately 70 percent completed, the Applicant may file its requisition for an additional grant in an amount equal to 10 percent of the previously estimated cost of the Project.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this Circular relating thereto.

3. *Final Grant Payment.*—At any time after com-
128 pleting the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an amount equal to 45 percent of the cost of the Project, but not to exceed, in any event, the amount of the grant set forth in the Government's Offer. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has progressed in accordance with the provisions of this Circular relating thereto.

4. *Construction Account.*—A separate account or accounts (hereinafter collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant,

the intermediate grants, the Applicant's Funds and the final grant, shall be deposited in the Construction Account, promptly upon receipt thereof.

5. *Disbursement of Moneys in Construction Account.*— Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in a certificate of purposes filed with and accepted by the Government.

III. Construction Policies.

To effectuate the purposes of the Emergency Relief Appropriation Act of 1935, the Federal Emergency Administration of Public Works has adopted the policy:

(a) That if the Project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment. Advertisements for bids should be made once a week for two consecutive weeks in such newspapers or other publications as will reasonably insure adequate publicity, and the bids should be opened within a reasonable time after 14 days from the date
129 of the first publication.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or article required, unless such name is followed by the term "or Equal" is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or Equal" is to be liberally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in determining the lowest bidder for the supplying of materials and equipment, the Applicant may, in the interest of standardization or ultimate economy, award the contract to other than the actual lowest bidder.

(d) That, in determining the responsibility of bidders, the following elements will be taken into consideration: Whether the bidder involved (1) maintains a permanent

place of business; (2) has adequate plant equipment to do the work properly and expeditiously; (3) has a suitable financial status to meet obligations incident to the work; and (4) has appropriate technical experience.

(e) That, in order to insure completion of the Project within the funds available for the construction of the Project, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the Project, except where it is required by local law that protection for labor and materialmen be provided by a bond separate from the performance bond. In the latter case, the Administration considers adequate a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price.

However, where the contract price exceeds
130 $1,000,000, and the obtaining of a bond written in such amount is difficult, a bond in an amount not less than 50% of the contract price is considered adequate.

(f) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(g) That minimum or other wage rates required to be predetermined by State law or local ordinance shall be predetermined in accordance therewith, and incorporated in the appropriate contract documents or that, in the absence of applicable law or ordinance, the Applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the Project, and incorporate them in the appropriate contract documents.

The Applicant is Advised That Since the Honoring of Grant Requisitions by the Government Will Depend Upon the Government's Being Assured That the Applicant Pro-

poses to Construct the Project in Accordance With the Established Policies and Regulations Contained in This Circular, it Would be to the Mutual Advantage of the Applicant and the Government for the Applicant to Submit, Prior to the Advertising for Bids, to the Office of the State Director, P.W.A., All Proposed Contract Documents For Construction, Material and Equipment Contracts, Including the Plans and Specifications, and to Submit to the Office of the State Director the Determination by the Applicant of the Lowest Responsible Bidder for Each Contract Prior to the Award Thereof. For the Same Reason, it is Advisable That Applicant Submit to the Office of the State Director, P.W.A., Proposed Contracts for Architectural and Engineering Services. Further, although Specific Extra or Change Orders May not Appear to Constitute Material Changes in the Project for the Construction of Which Funds are Being Made Available, Since it may Later be Found That Such Extra or Change Orders Have in Fact Affected the Engineering or Financial Soundness of the Project, it is Advisable That the Applicant Notify the Office of the State Director, P.W.A., of All Contemplated Extras and Changes.

(h) That work shall be commenced as quickly as
131 possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(i) That the Project will be constructed in accordance with the following rules and regulations which will be incorporated verbatim as a separate chapter in all contracts (except subcontracts) for work to be performed at the site of the Project:

Construction Regulations

1. *Employment Services and Labor Preferences.*—With respect to all persons employed on projects[1], except as otherwise[2], provided in Regulation No. 2:

(a) Such persons shall be referred for assignment to such work by the United States Employment Service, and

[1] The Term "projects" or "project" as here used means the portion of project covered by this contract.

[2] Exception relates only to employees of the owner. Regulation No. 2 is Executive Order No. 7060, approved by the President June 5, 1935.

(b) Preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least 90 percent of the persons employed on any project[1] shall have been taken from the public relief rolls:

Provided, however, that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project[1], as defined in the specifications[2], need not be so referred by the United States Employment Service.

2. *Qualifications for Employment.*—(a) No persons
132 currently serving sentence to a penal or correctional institution shall be employed on the project[1].

(b) No person under the age of sixteen (16) years, and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project[1]. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(c) Except as specifically provided aboye, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever. The contractor may dismiss any employee not qualified to perform the work for which he has been referred, subject to disapproval by the owner.

(d) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerned activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or

[1] The term "projects" or "project" as here used means the portion of the project covered by this contract.

[2] The term "specifications" as here used means any one of the contract documents.

to refrain from joining, organizing, or assisting a labor organization of his own choosing.

3. *Hours of Work.*—(a) Except in case of emergency:

(1) The maximum hours of work for manual labor shall be 8 hours per day and 130 hours per month. On projects located at points so remote and inaccessible that camps or floating plants are necessary, the maximum hours of
133 work for manual labor shall be 8 hours per day and 40 hours per week.

(2) The maximum hours of work for cooks, camp assistants, and clerical and other nonmanual employees such as watchmen, policemen, and messengers, shall be 8 hours per day and 40 hours per week.

(3) Administrative and supervisory employees, including executive employees, timekeepers, and storekeepers, who perform in a work-week not more than 15 hours of manual labor (or, in case the Project is being constructed on a 40-hours week basis, not more than 20 hours) shall not be subject to any limitation of hours of work.

(4) Wherever practicable, the contractor shall perform the work in at least double shifts of labor, unless otherwise provided in this contract. The contractor shall not knowingly employ under this contract any person engaged in any other gainful occupation whose weekly hours of labor on such occupation, together with his hours of labor on the Project, exceed the limitations of hours prescribed for employees of his classification under this contract.

(b) Nothing in these regulations is intended to authorize hours or days of work in excess of the limitations of any applicable law or regulation.

4. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade or occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

.....	.....
.....	.....

If after the award of this contract it becomes
134 necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classification of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full, at least once each week within 3 days after the close of the pay-roll period, in lawful money of the United States, unless otherwise recommended in writing by the State Director: Provided, however, that this paragraph shall not be construed to prohibit deductions required by law and collection of obligations by legal process.

(d) A clearly legible statement of the minimum wage rate to be paid each trade and occupation employed under this contract and of the authorized deductions therefrom, if any, shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

(e) The contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the day following the payment of the wages a certified legible copy of each pay roll, whether paid by the contractor or any subcontractor, shall be transmitted by the contractor to such office as may be designated by the Works Progress Administration. The contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the Project. Such pay rolls shall be sworn to in accordance with the "Regulations Issued Pursuant to So-called Kickback Statute", issued jointly by the Secretary of the Trea-

sury and the Secretary of the Interior on January 12,
135 1935, a copy of which is herein elsewhere set forth.

5. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

6. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the Project and, in case any work is sublet, the contractor shall require the sub-contractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection afforded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the Project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide, and shall cause each subcontractor to provide, ...
for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise

from operations under this contract, whether such
136 operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as as follows:

Public Liability Insurance in an amount not less than $ ..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $, on account of one accident, and Property Damage Insurance in an amount not less than $

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under subparagraph (b) hereof or by separate policies of insurance in amounts as follows:

....

....

7. *Materials.*—(a) *Domestic.* Unless contrary to law, in the peformance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less,
137 a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, but is less than $10,000, a differential of 25% will apply;

On purchases where the foreign bid is $10,000 or more, a differential of 15% will apply.

(b) *Convict Made.*—No materials manufactured or produced in a penal or correctional institution shall be used on or incorporated in the Project, unless required by law.

8. *Inspection.*—(a) The Administrator, through his authorized agents, and the Works Progress Administration, through its authorized agents, shall have the right to inspect all work and materials, shall have access to all pay rolls, records of personnel, invoices of material, and all other data and records relevant to the performance of this contract.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

9. *Construction Reports.*—The contractor shall submit to the Owner schedules of the cost of labor, costs and quantities of materials and other items, supported as to correctness by such evidence as, and in such form as, the Administrator through his authorized agents may require. Submission of this information shall be a condition precedent to any payment under this contract. In addition to any records herein required, the following records, on forms to be furnished by the Public Works Administration, are required:

(1) Detailed Estimate (Contract "breakdown").

(2) Construction Schedule (Chart of Contemplated Progress).

(3) Periodical Estimates for Partial Payment.

10. *Department of Labor Reports.*—The contractor and each subcontractor shall report to the United States Department of Labor monthly, within five days after the close of each calendar month upon forms to be prescribed, and in accordance with instructions to be furnished, by the
138 United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the Project, the aggregate amounts of such pay rolls and the man-hours worked, and an itemized statement of the total expenditures for materials. The contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

11. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the Project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within five days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

(c) Within the first 15 days of each calendar month the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector. Except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and the Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates will be paid in full unless otherwise pro-
139 vided in this contract.

(d) Compliance with the provisions of subparagraphs (a) and (b) of this paragraph is a condition precedent to partial payment under subparagraph (c) hereof.

12. *Wage Claims and Adjustments.*—In cases of underpayment of wages, the Owner will withhold from the contractor out of payments due an amount sufficient to pay persons employed on the work covered by this contract the

difference between the wages required to be paid under this contract and the wages actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the Owner, for and on account of the contractor, to the respective employees to whom they are due.

13. *Signs.*—The contractor shall furnish signs bearing the legend:

"Federal Works Project No. ——
Public Works Administration"

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—(a) The contractor shall perform, directly and without subcontracting, not less than 25 per cent of the construction, to be calculated on the basis of the total contract price. No part of this contract shall be sublet without the approval of the Owner.

(b) If the contractor shall sublet any part of this contract, the contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractor and of the persons either directly or indirectly employed by his subcontractor, as he is for the acts and omissions of persons directly employed by himself.

(c) Paragraphs 1 to 5 inclusive, 7 to 10 inclusive, 11 (a) and (b), 17, 18, 19, the Regulations Issued Pursuant to So-called "Kick Back Statute" and the penalty clauses set forth in Section 9 of the Act and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

140 15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory ar-

rangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Priority of Construction Regulations.*—Any provisions of this contract in conflict or inconsistent with the requirements of these Regulations, except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.

18. *Definitions.*—The following terms as used in this contract are respectively defined as follows:

"Act": The Emergency Relief Appropriation Act of 1935.

"P.W.A." or "Public Works Administration":

The Federal Emergency Administration of Public
141 Works.

"Administrator": The Federal Emergency Administrator of Public Works.

"State Director": State Director (P.W.A.), his duly authorized representative or any person designated by the Administrator to perform his duties or functions.

"Government Inspector": The representative of the Inspection Division (P.W.A.).

"Owner": The public body, agency or instrumentality which is a party hereto and for which this contract is to be performed.

"Emergency": A temporary unforeseen occurrence or combination of circumstances which endangers life or property and calls for immediate action or remedy.

"Material": Materials incorporated in the project, or used or consumed in the performance of the work.

"Subcontractor": A person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

"Work at Site of Project": Work to be performed, including work normally done, on the location of the project.

19. *Paragraphs 1, 2(a), (b) and (c), 3(a) (1) and (2), 4(e), 8(a) and 10 incorporate rules and regulations issued by the President under the authority of section 6 of the Act. Any willful violation of any such rule or regulation is punishable by fine of not to exceed $1,000.*

Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act, No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

142 To effectuate the purpose of certain statutes concerning rates to pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dimissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ...(Name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of) .....(name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (project), for the weekly pay roll period from the ..... day of ....., 193..., to the ..... day of ....., 193...; that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

143

Sworn to before me this .....day of ..... 193...

Section 3. Said affidavit shall be executed and sworn to by the officer of employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having

control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in
144 the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

The clause in the pay-roll affidavit which reads " • • • that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor • • •" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause " • • • that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not

apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kick-Back Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

145

Penalty

Section 9 of the Emergency Relief Appropriation Act of 1935 reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder; or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both".

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

Memorandum

JANUARY 16 - 1936.

Preliminary Injunction filed.

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146 *Answer to Bill of Complaint*

Filed March 12 1936

* * * * * *

Come now, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works; Horatio B. Hackett, Assistant Administrator thereof; J. J. Madigan, Acting Executive Officer thereof; John Herrick, Executive Assistant thereof; F. E. Schnepfe, Director of Projects Division thereof, Harry L. Hopkins, Administrator of the Works Progress Administration; Henry Morgenthau, Jr., Secretary of the Treasury of the United States; W. A. Julian, Treasurer of the United States, and Guy F. Allen, Chief Disbursing Officer, Division of Disbursement, Treasury Department of the United States, defendants in the above-entitled case, and each of them, and for answer to the Bill of Complaint, say:

I.

These defendants are informed that plaintiff is a corporation incorporated under the laws of the State of Delaware, but are without knowledge as to any of the other allegations contained in Paragraph I of the Bill of Complaint.

147 II.

The defendants Harold L. Ickes, Horatio B. Hackett, John Herrick, J. J. Madigan, and F. E. Schnepfe (hereinafter jointly referred to as "the P.W.A. defendants") admit that defendant Ickes was appointed Federal Administrator of Public Works by Executive Order of the President dated July 8, 1933; admit that defendant Hackett is Assistant Administrator, defendant Herrick is Executive Assistant, defendant Madigan is Executive Officer, and defendant Schnepfe is Director of the Projects Division of P.W.A.

The P.W.A. defendants, and each of them, say that they are without knowledge as to any of the allegations with respect to defendants Hopkins, Morgenthau, Julian, and Allen; said defendants deny each and every allegation of Paragraph II of the bill of complaint except as specifically admitted or qualified herein.

The defendant Harry L. Hopkins admits that he is the duly appointed, qualified and acting Administrator of the

Works Progress Administration, and that he was appointed by an Executive Order of the President of the United States (No. 7034), (but that said Order was dated May 18th, 1935, and not May 6th, 1935, as alleged in the Bill of Complaint). but specifically denies that he is exercising, or threatening to exercise, performing or threatening to continue to perform, any acts in his official capacity, or otherwise, under the National Industrial Recovery Act, or under the Emergency Relief Appopriation Act of 1935, complained of by this plaintiff. Further answering, defendant Hopkins avers that he is wholly without interest as to the outcome of this controversy; that his presence as a party defendant to the instant case is without materiality as to the jurisdiction of the Court or as to the execution of a decree
148 granting the relief prayed, should the same issue; that the issuance of a decree against him could have no effect neither in fact or in law in regard to the performance by the other defendants hereto of the alleged acts or alleged proposed acts complained of.

The defendants Morgenthau, Julian, and Allen (hereinafter referred to as the "Treasury defendants") admit the allegations contained in Paragraph II in so far as it concerns them, except that as to the allegations concerning the Treasurer of the United States, they deny that he is in control of the disbursement of public funds of the United States and aver that he is in control only of the payment of checks drawn upon him, and that with certain minor exceptions not applicable to the instant case, he has no control over the drawing of such checks, and except further that they specifically deny the allegations in the last subparagraphs of Paragraph II, and say that they are not exercising or threatening to exercise, or performing or threatening to perform, any unlawful or unconstitutional acts.

The Treasury defendants, and each of them, say that they are without knowledge as to any of the allegations with respect to the defendants Ickes, Hackett, Herrick, Madigan, Schnepfe and Hopkins; said defendants deny each and every allegation of Paragraph II, except as specifically admitted or qualified herein.

III.

These defendants are advised that the allegations contained in Paragraph III of the bill of complaint are conclu-

sions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

IV.

The P.W.A. defendants admit the allegations contained in Paragraph IV of the bill of complaint, but defendant Hopkins and the Treasury defendants say that they are without knowledge as to any of the said allegations.

149

V.

These defendants are advised that the allegations contained in Paragraph V of the bill of complaint are conclusions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

VI.

The P. W. A. defendants and defendant Hopkins say that they are without knowledge as to any of the allegations contained in Paragraph VI of the bill of complaint, and demand strict proof thereof.

The Treasury defendants admit that the plaintiff is a taxpayer of the United States, but say that information as to the kinds and amounts of taxes paid by plaintiff must be obtained from other offices, that the necessary steps to secure said information have been taken, but that as yet these defendants are without knowledge as to the kinds and amounts of taxes paid by plaintiff. The Treasury defendants further say that they are without knowledge as to any allegation contained in Paragraph VI of the bill of complaint concerning plaintiff's status as taxpayer of the State of Iowa and of the City of Iowa City, and demand strict proof thereof.

VII.

These defendants are without knowledge as to any of the allegations contained in Paragraph VII of the bill of complaint, and demand strict proof thereof.

VIII.

These defendants are without knowledge as to any of the allegations contained in Paragraph VIII of the bill of complaint, and demand strict proof thereof.

150 IX.

These defendants are without knowledge as to any of the allegations contained in Paragraph IX of the bill of complaint, and demand strict proof thereof.

X.

These defendants are without knowledge as to any of the allegations of fact contained in Paragraph X of the bill of complaint, and demand strict proof thereof.

XI.

These defendants are without knowledge as to any of the allegations contained in Paragraph XI of the bill of complaint, and demand strict proof thereof.

XII.

The P. W. A. defendants deny each and every allegation contained in Paragraph XII of the bill of complaint.

Further answering the allegations of such paragraph, said defendants say that they are engaged in administering the provisions of Title II of the National Industrial Recovery Act of 1933 and the Emergency Relief Appropriation Act of 1935; that by the terms of the Emergency Relief Appropriation Act of 1935, and Executive Orders of the President pursuant thereto, the Federal Emergency Administrator of Public Works, with the approval of the President, is authorized, for the purpose of providing work relief and to increase employment by providing for useful projects, to make loans or grants, or both, for projects of States, Territories, Possessions, including sub-divisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project.

That upon the adoption of said Act, applications
151 were received from states, municipalities, and other public bodies throughout the United States for aid in financing the construction of a large variety of useful public projects, including, among others, airports, tunnels,

bridges, hospitals, jails, swimming pools, streets and highways, waterworks, sewage and drainage systems, and electric generating, transmission and distribution systems; that all such applications have been carefully examined for the purpose of determining whether the application is authorized by law, and whether the project meets the requirements of the Act of Congress above referred to; that after such examination, the Federal Emergency Administrator of Public Works, and the President, have approved loans and grants to aid in financing the construction of many thousands of useful public projects, having first determined that each such loan or grant meets the requirements of the Emergency Relief Appropriation Act of 1935, and Executive Orders of the President pursuant thereto, and will effectuate the purposes of said Act.

Said defendants further say that the projects which have been approved have not been limited to a particular section of the country, the comprehensive program being national in scope; that the projects have not been limited to any particular type or class, but have been greatly diversified; that defendants have not solicited, urged, or induced the construction of any particular type of useful public project, but have acted only at the instance and request of the municipality concerned; that where application is made for a loan or grant, or both, to finance or aid in financing the construction of a project which will involve competition between a municipality and a privately owned utility company, the Administrator has taken the position that it was

the intention of Congress that the question of
152 whether such competition is desirable should be left

entirely to the municipality concerned; that where, as here, a grant only is made, the Administrator has not given any consideration to the question of rates to be charged by the municipality; that where a loan is made to be repaid out of the revenues of the project and not out of local taxes, the Administrator, in determining whether the loan was reasonably secured, has considered the prospective earnings of the project, and solely for that purpose, the rates which the municipality proposed to charge; that the grant to the City of Iowa City was made pursuant to the policy outlined herein; that the sole aim and desire of

these defendants is to carry out the mandate of Congress as set forth in the Acts herein referred to.

Said defendants further allege that their activities under and pursuant to said statutes and Executive Orders have resulted in a vast increase in employment, and an improvement in the national prosperity, including, among other things, a vast improvement in the credit of municipalities, an increase in the value of municipal bonds and a consequent increase in the assets of national banks and other financial institutions throughout the United States.

The Treasury defendants and defendant Hopkins deny each and every allegation contained in Paragraph XII of the bill of complaint, in so far as it pertains to them, and say that they are without knowledge as to any of the allegations contained in said paragraph in so far as it pertains to other defendants, and demand strict proof thereof.

XIIa.

The P. W. A. defendants admit that on or about January 8th, 1934, the city of Iowa City, Iowa, made application for a loan and grant in the amount of $917,000.00, to be used in financing the construction of a municipal electric
153 plant and distribution system; that in September, 1934, such application was approved by the Administrator and the President, and a loan and grant agreement forwarded to the City; that such application was later withdrawn by the City, and a new application made for a grant only, to aid in financing the construction of such municipal electric plant and distribution system. Defendants further admit that the new application for a grant only, in the sum of $413,000.00, was approved by the Administrator and the President, and that on October 7th, 1935, P. W. A. forwarded to the City an offer to aid in financing the construction of such plant and system, the terms of which are set forth in Exhibits "C" and "D" attached to plaintiff's complaint.

Said defendants further allege that by agreement of the parties, the offer of October 7, 1935, was superseded by an offer dated January 8, 1936, a true and correct copy of which is attached hereto, marked "Exhibit A", and by this reference made a part hereof.

The P. W. A. defendants deny each and every allegation contained in Paragraph XIIa of the bill of complaint, except as hereinabove specifically admitted or qualified.

The Treasury defendants and defendant Hopkins deny each and every allegation contained in Paragraph XIIa of the bill of complaint, in so far as it pertains to them, and say that they are without knowledge as to any of the allegations contained in said paragraph in so far as it pertains to other defendants, and demand strict proof thereof.

XIIb.

The P. W. A. defendants admit that the city of Iowa City would be without authority to establish a municipally owned and operated electric light and power plant and distribution system without obtaining authority there-
154 for from the voters of said City at an election; that an election was held in said City, on April 17th, 1934, on the proposition set forth in Paragraph XIIb of plaintiff's complaint, and that the vote on such proposition is correctly set forth in such paragraph.

The P. W. A. defendants deny each and every allegation contained in such paragraph, except as herein expressly admitted.

The Treasury defendants and defendant Hopkins say that they are without knowledge as to any of the allegations contained in Paragraph XIIb, and demand strict proof thereof.

XIII.

The P. W. A. defendants aver that P. W. A. has offered in writing to make a grant to the City of Iowa City, Iowa, to aid in financing the construction of a municipal electric plant and distribution system; that all of the conditions of said grant are contained in the Government's offer dated January 8, 1936 (Exhibit A), and that there are no conditions, express or implied, except as set forth therein.

The P. W. A. defendants deny each and every allegation contained in Paragraph XIII of the bill of complaint, except as expressly admitted or qualified herein.

The Treasury defendants and defendant Hopkins say that they are without knowledge as to any of the allegations contained in Paragraph XIII of the bill of complaint, and demand strict proof thereof.

XIV.

The P. W. A. defendants say that plaintiff has been afforded an opportunity to present its objections to the approval of the proposed grant, and to the construction of the proposed project, both in person and in writing, and that the objections filed by plaintiff have been given careful consideration.

Said defendants deny each and every allegation
155 contained in Paragraph XIV of the bill of complaint, except as hereinabove expressly admitted or qualified.

The Treasury defendants and defendant Hopkins deny each and every allegation contained in Paragraph XIV of the bill of complaint, in so far as it pertains to them and say that they are without knowledge as to any of the allegations contained in said paragraph in so far as it pertains to other defendants, and demand strict proof thereof.

XV.

The P. W. A. defendants deny each and every allegation contained in Paragraph XV of the bill of complaint.

The Treasury defendants and defendant Hopkins say that they are without knowledge as to any of the allegations of fact contained in Paragraph XV, and demand strict proof thereof.

XVI.

The P. W. A. defendants deny each and every allegation of fact contained in Paragraph XVI of the bill of complaint.

Defendant Hopkins and the Treasury defendants say that they are without knowledge as to any of the allegations contained in Paragraph XVI of the bill of complaint, and demand strict proof thereof.

XVII.

The P. W. A. defendants deny that they have withheld any information from the plaintiff, or that they have refused to comply with any reasonable requests for information.

Said defendants say that they are without knowledge as to any of the other allegations contained in Paragraph

XVII of the bill of complaint, and demand strict proof thereof.

The Treasury defendants deny the allegations of Paragraph XVII in so far as such allegations pertain to them, and say that they are without knowledge as to the remaining allegations contained in Paragraph XVII, and demand strict proof thereof.

156 XVIII.

These defendants are without knowledge as to any of the allegations contained in Paragraph XVIII of the bill of complaint.

XIX.

The P. W. A. defendants deny each and every allegation of fact contained in Paragraph XIX of the bill of complaint. Defendant Hopkins and the Treasury defendants say that they are without knowledge as to any of the allegations of fact contained in Paragraph XIX of the bill of complaint, and demand strict proof thereof.

XX.

These defendants are without knowledge as to any of the allegations contained in Paragraph XX, except that the Treasury defendants say that the funds of the United States are not so segregated that borrowed moneys can be distinguished from other moneys in the Treasury.

XXI.

The P. W. A. defendants admit the allegations contained in Paragraph XXI of the bill of complaint.

Defendant Hopkins says that he is without knowledge as to any of the allegations contained in Paragraph XXI of the bill of complaint, except that he denies that he has taken or intends to take any action whatsoever in regard to the subject matter of this suit, and says that he is without interest as to its outcome.

The Treasury defendants say that the allegations of Paragraph XXI constitute conclusions of law which they are not required to answer; but, if such allegations be construed to be allegations of fact, the Treasury defendants admit that they have been governed in the actions which they have already taken, and will be governed in actions

which they may be called upon to take in future in the instant situation, not only by the provisions of Title II of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195) and of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), and the Executive Orders and regulations of the President pursuant thereto, but also
157 by the provisions of all other applicable statutes and the Executive Orders and regulations promulgated pursuant thereto.

XXII.

The P. W. A. defendants deny each and every allegation of fact contained in Paragraph XXII of the bill of complaint.

Defendant Hopkins and the Treasury defendants deny each and every allegation of fact contained in Paragraph XXII of the bill of complaint in so far as it pertains to them, and say that they are without knowledge as to any of the allegations contained in said paragraph, in so far as it pertains to other defendants, and demand strict proof thereof.

XXIII.

These defendants are advised that the allegations contained in Paragraph XXIII of the bill of complaint are conclusions of law which they are not required to answer, but if construed to be averments of fact, they deny each and every allegation thereof.

The Treasury defendants, further answering subparagraph (e) aver that the funds of the United States are not so segregated that borrowed funds may be distinguished from other funds in the Treasury.

XXIV.

These defendants deny each and every allegation of fact contained in Paragraph XXIV of the bill of complaint.

XXV.

The P. W. A. defendants admit that, unless restrained, they will make the grant to the City of Iowa City in accordance with the terms of the Government's offer, but deny all other allegations contained in Paragraph XXV of the bill of complaint.

Defendant Hopkins denies each and every allegation contained in Paragraph XXV of the bill of complaint in so far as it pertains to him and says that he is without knowledge as to any of the allegations contained in said paragraph in so far as it pertains to other defendants.

The Treasury defendants admit that, unless re-
158 strained, they will honor vouchers duly and regularly drawn by the defendant Ickes or his duly constituted subordinates, on moneys appropriated by Congress, but deny each and every other allegation of fact, pertaining to them, contained in Paragraph XXV of the bill of complaint, and say that they are without knowledge as to any of the other allegations contained therein, and demand strict proof thereof.

XXVI.

The P. W. A. defendants deny each and every allegation of fact contained in Paragraph XXVI of the bill of complaint.

Defendant Hopkins and the Treasury defendants say that they are without knowledge as to any of the allegations of fact contained in Paragraph XXVI of the bill of complaint, and demand strict proof thereof.

XXVII.

The P. W. A. defendants and defendant Hopkins deny each and every allegation of fact contained in Paragraph XXVII of the bill of complaint.

The Treasury defendants are advised that the allegations contained in Paragraph XXVII of the bill of complaint constitute conclusions of law which they are not required to answer, but if construed to be averments of fact, they say that they are without knowledge thereof, and demand strict proof thereof.

XXVIII.

These defendants admit that the City of Iowa City and members of its governing board are without the jurisdiction of this Court, and that service of process cannot be had upon them in the District of Columbia, but are without knowledge as to the other allegations of Paragraph XXVIII of the bill of complaint.

XXIX

These defendants are without knowledge as to any allegations of Paragraph XXIX of the bill of complaint, and demand strict proof thereof.

XXX

The P. W. A. defendants admit that, unless restrained, they will comply with the terms of the offer (Exhibit "A"), but except as expressly admitted herein, deny each
159 and every allegation of fact contained in Paragraph XXX of the bill of complaint.

Defendant Hopkins denies each and every allegation contained in Paragraph XXX of the bill of complaint in so far as it pertains to him, and says that he is without knowledge as to any of said allegations in so far as they pertain to other defendants.

The Treasury defendants admit that, unless restrained, they will honor vouchers duly and regularly drawn by the defendant Ickes, or his duly constituted subordinates, on moneys appropriated by Congress, but deny each and every other allegation of fact pertaining to them, contained in Paragraph XXX of the bill of complaint.

WHEREFORE, the premises considered, these defendants jointly and severally pray that the bill of complaint be dismissed, with proper costs and charges.

JAMES W. MORRIS,
Assistant Attorney General,

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General,

JOHN W. SCOTT,
Special Assistant to the Attorney General,

JEROME N. FRANK,
Counsel for Federal Emergency Administration of Public Works.

Attorneys for Defendants.

160 P. W. 47980-12

Endorsed: Copy Conformed to Executed Original Legal Division, P. W. A. Checked Rice Date Jan 10 1936

Exhibit "A"

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

Washington, D. C.,
January 8, 1936.
PWA Docket No. 7738R.

City of Iowa City,
Johnson County, Iowa.

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction and equipping of an electric plant and distribution system (herein called the "Project") by making a grant to the City of Iowa City (herein called the "Applicant") in the amount of 45 percent of the cost of the Project. In no event will the grant be in excess of $413,000.

2. *Conditions Precedent.* The Government will be under no obligation to the Applicant to make any grant:

(a) *Cost of Project:* If it appears that the Applicant will not be able to obtain any funds which, in addition to the sum allotted by the Government, shall be necessary to complete the Project;

(b) *Plans and Specifications and Certificate of Purposes:* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to comply with the Emergency Relief Appropriation Act of 1935 in all respects.

3. *Interest of Member of Congress.* No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in any agreement arising from the performance of this offer or in the funds hereby made available for the construction of the Project, or to any benefit arising therefrom.

4. *Bonus or Commission.* The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

5. *Information.* The Applicant shall furnish the
161 Government with reasonable information and data concerning the construction, cost, and progress of the work.

6. *Insurance.* The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

7. *Name of Project.* The Applicant shall not name the Project for any living person.

8. *Grant Payments:*

(a) *Advance Grant:* Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amout not exceeding 15 percent of the estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings, and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used;

(b) *Intermediate Grant Requisitions:* At any time after the Applicant has deposited in the Construction Account its share of the cost of the Project (hereinafter called the "Applicant's Funds"), if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 25 percent of said previously estimated cost of the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on

account of the grant, is equal to 35 percent of the cost of the Project, but in no event in an amount exceeding the amount set forth in Paragraph 1 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto;

(c) *Final Grant Payment:* At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be an
162 amount not in excess of 45 percent of the actual cost of the Project upon completion, but not to exceed, in any event, the amount of the grant set forth in Paragraph 1 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto;

(d) *Construction Account:* A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the Applicant's Funds and the final grant shall be deposited in the Construction Account, promptly upon the receipt thereof;

(e) *Disbursement of Moneys in Construction Account:* Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government.

9. *Construction of Project.* The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935, and the making of the grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion shall adopt said policies and comply therewith in the construction of the Project:

(a) That if the project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every

opportunity be given for free, open and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment;

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory;

(c) That, in determining the lowest bidder for the supplying of materials and equipment, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder;

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk
163 and that supplying labor and furnishing materials for the construction of the project, except in those cases in which it is required by the law of Iowa that protection for labor and materialmen be provided by a bond separate from the performance bond. In such case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate;

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor;

(f) That minimum or other wage rates required to be predetermined by the law of Iowa or local ordinance shall be predetermined, by the public body constructing a project, in accordance therewith, and incorporated in the ap-

propriate contract documents. In the absence of applicable law or ordinance, such public body shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the Project, and incorporate them in the appropriate contract documents;

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner;

(h) That the project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof, may, if the public body constructing a project so desires, be inserted verbatim in such construction contract).

10. This offer is made with the express understanding that the grant herein described is not conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project, or to the financing or the construction thereof.

UNITED STATES OF AMERICA
Federal Emergency Administrator of Public Works

By (Sgd.) HORATIO B. HACKETT
Assistant Administrator.

164 P.W.-L-Form No. 48.

Exhibit "A"

1. *Employment Services and Labor Preferences.* With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2 (Executive Order No. 7060, approved by the President June 5, 1935):

(a) Such persons shall be referred for assignment to such work by the United States Employment Service, and

(b) Preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least 90 percent of the persons employed on any project shall have been taken from the public relief rolls:

Provided, however, that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

2. *Qualifications for Employment.* (a) No persons currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) No person under the age of sixteen (16) years, and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(c) Except as specifically provided above, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever. The contractor may dismiss any employee not qualified to perform the work for which he has been referred, subject to disapproval by the Owner.

(d) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

3. *Hours of Work.* (a) Except in case of emer-

165 gency:

(1) The maximum hours of work for manual labor shall be 8 hours per day and 130 hours per month. On projects located at points so remote and inaccessible that camps or floating plants are necessary, the maximum hours of work for manual labor shall be 8 hours per day and 40 hours per week.

(2) The maximum hours of work for cooks, camp assistants, and clerical and other nonmanual employees such as watchmen, policemen, and messengers, shall be 8 hours per day and 40 hours per week.

(3) Administrative and supervisory employees, including executive employees, timekeepers, and storekeepers, who perform in a work-week not more than 15 hours of manual labor (or, in case the project is being constructed on a 40-hour week basis, not more than 20 hours) shall not be subject to any limitation of hours of work.

(4) Wherever practicable, the contractor shall perform the work in at least double shifts of labor, unless otherwise provided in this contract. The contractor shall not knowingly employ under this contract any person engaged in any other gainful occupation whose weekly hours of labor on such occupation, together with his hours of labor on the project, exceed the limitations of hours prescribed for employees of his classification under this contract.

(b) Nothing in these regulations is intended to authorize hours or days of work in excess of the limitations of any applicable law or regulation.

4. *Wages and Pay Rolls.* (a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade or Occupation	Hourly Wage Rate
.....	.....
.....	.....
(Insert Wage Schedule Here)	
.....	.....
.....	.....

166 If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than

such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classification of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full, at least once each week within 3 days after the close of the pay roll period, in lawful money of the United States: Provided, however, that this paragraph shall not be construed to prohibit deductions required by law and collection of obligations by legal process.

(d) A clearly legible statement of the minimum wage rate to be paid each trade and occupation employed under this contract and of the authorized deductions therefrom, if any, shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

(e) The contractor and each subcontractor shall perpare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by t' Works Progress Administration. Not later than the day following the payment of the wages a certified legible copy of each pay roll, whether paid by the contractor or any subcontractor, shall be transmitted by the contractor to such office as may be designated by the Works Progress Administration. The contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project. Such pay rolls shall be sworn to in accordance with the "Regulations Issued Pursuant to So-called Kick-back Statute", issued jointly by the Secretary of the Treasury and the Secretary of the Interior on January 12, 1935, a copy of which is herein elsewhere set forth.

5. *Accident Prevention.* Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery and equipment

and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

6. *Insurance.* The contractor shall not commence
167 work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.* The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection afforded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide, and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.* The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $, on account of one

accident, and Property Damage Insurance in an amount not less than $

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under subparagraph (b) hereof or by separate policies of insurance in amounts as follows:

.....

.....

168 7. *Materials.* (a) *Domestic.* Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100 per cent will apply;

On purchases where the foreign bid exceeds $100, but is less than $10,000, a differential of 25 per cent will apply;

On purchases where the foreign bid is $10,000 or more, a differential of 15 per cent will apply.

(b) *Convict Made.* No materials manufactured or produced in a penal or correctional institution shall be used on or incorporated in the project, unless required by law.

8. *Inspection.* The owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect

all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

9. *Department of Labor Reports.* The contractor and each subcontractor shall report to the United States Department of Labor monthly, within five days after the close of each calendar month upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls and the man-hours worked, and an itemized statement of the total expenditures for materials. The contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

10. *Payments.* (a) The contractor shall provide
169 all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the Project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within five days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the

subcontractor, to the extent of the subcontractor's interest therein.

(c) Within the first 15 days of each calendar month the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector. Except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and the Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates will be paid in full unless otherwise provided in this contract.

(d) Compliance with the provisions of subparagraphs (a) and (b) of this paragraph is a condition precedent to partial payment under subparagraph (c) hereof.

11. *Wage Claims and Adjustments.* In cases of underpayment of wages, the Owner will withhold from the contractor out of payments due an amount sufficient to pay persons employed on the work covered by this contract the difference between the wages required to be paid under this contract and the wages actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the Owner, for and on account of the contractor, to the respective employees to whom they are due.

12. *Signs.* The contractor shall furnish signs bear-
170 ing the legend:

"Federal Works Project No. ....
Public Works Administration"

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

13. *Subcontracts.* (a) The contractor shall perform, directly and without subcontracting, not less than 25 per cent of the construction, to be calculated on the basis of the total contract price. No part of this contract shall be sublet without the approval of the Owner.

(b) If the contractor shall sublet any part of this contract, the contractor shall be as fully responsible to the Owner for the acts and omissions of his subcontractor and of the persons either directly or indirectly employed by his subcontractor, as he is for the acts and omissions of persons directly employed by himself.

(c) Paragraphs 1 to 5 inclusive, 7 to 10 inclusive, 11 (a) and (b), 17, 18, 19, the Regulations Issued Pursuant to So-called "Kick Back Statute" and the penalty clauses set forth in Section 9 of the Act and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

14. *Assigment of Contract.* The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.* In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may service written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in
171 such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Priority of Construction Regulations.* Any provisions of this contract in conflict or inconsistent with the requirements of Exhibit "A", except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.

17. *Definitions.* The following terms as used in this contract are respectively defined as follows:

"Act": The Emergency Relief Appropriation Act of 1935.

"P. W. A." or "Public Works Administration": The Federal Emergency Administration of Public Works.

"Administrator": The Federal Emergency Administrator of Public Works.

"State Director": State Director (P. W. A.), his duly authorized representative or any person designated by the Administrator to perform his duties or functions.

"Owner": The public body, agency or instrumentality which is a party hereto and for which this contract is to be performed.

"Emergency": A temporary unforeseen occurrence or combination of circumstances which endangers life or property and calls for immediate action or remedy.

"Material": Materials incorporated in the project, or used or consumed in the performance of the work.

"Subcontractor": A person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

"Work at Site of Project": Work to be performed, including work normally done, on the location of the project.

18. *Paragraphs 1, 2(a), (b) and (c), 3(a) (1) and (2), 4(e), 8(a) and 10 incorporate rules and regulations issued by the President under the authority of section 6 of the Act. Any willful violation of any such rule or regulation is punishable by fine of not to exceed $1,000.*

172 *Regulations Issued Pursuant to So-Called "Kick-Back Statute"*

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ... (name the party signing affidavit) ..... (Title), do hereby certify that I am (the employee of) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the
173 attached pay roll is a true and accurate report of the full weekly wages due and paid to each person em-

ployed by the said contractor (subcontractor) for the construction of ..... (project), for the weekly pay roll period from the ..... day of ....., 193 , to the ..... day of ....., 193 ; that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this .... day of ....., 193 .

Section 3. Said affidavit shall be executed and sworn to by the officer of employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed

by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall became effective on January 15, 1935. 174

The clause in the pay-roll affidavit which reads " * * * that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * * " is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause " * * * that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kickback Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

Penalty

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the

benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both".

Section 35 of the Criminal Code, as amended, pro-
175 vides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * * " relating to any matter within the jurisdiction of any governmental department or agency.

176 *Order Consolidating Causes*

Filed March 31 1936

In the Supreme Court of the District of Columbia
Holding an Equity Court

Equity No. 58810.

OKLAHOMA UTILITIES COMPANY

v.

HAROLD L. ICKES, ADMINISTRATOR ETC., ET AL.

Equity No. 58927.

TEXAS UTILITIES COMPANY

v.

HAROLD L. ICKES, ADMINISTRATOR ETC., ET AL.

Equity Nos. 59071 and 59671.

ALABAMA POWER COMPANY

v.

HAROLD L. ICKES, ADMINISTRATOR ETC., ET AL.

Equity No. 60245.

IOWA CITY LIGHT AND POWER COMPANY

v.

HAROLD L. ICKES, ADMINISTRATOR ETC., ET AL.

Upon consideration of the motion of the plaintiffs filed in the above entitled causes, it is by the Court this 31st day of March, 1936,

ADJUDGED, ORDERED AND DECREED, That said causes be and the same are hereby consolidated for trial.

PEYTON GORDON
Justice.

No objection.

ALEXANDER HOLTZOFF
Special Assistant to the Attorney General.

177 *Amendment and Supplement to Bill of Complaint.*

Filed April 23 1936

* * * * * * * *

Comes now the plaintiff, Iowa City Light and Power Company, a corporation, and by leave of Court first duly had and obtained, amends and supplements its bill of complaint herein by adding thereto the following:

1—Plaintiff is informed, believes and therefore avers and offers to prove that commencing in 1933 the President of the United States announced and undertook the execution of a permanent "National Power Policy" to make electricity "more broadly available at cheaper rates to industrial, to domestic and to agricultural consumers", to effectuate regulation of rates for the intrastate generation, distribution and sale of electricity, to establish Federal regulation and control of matters of policy and service in connection with intrastate electric utilities and to promote and bring about public ownership or co-operative ownership of facilities for the generation, transmission and distribution of electricity in intrastate commerce.

In furtherance of said "National Power Policy" the Federal Government has established great Federally owned

power projects as "yard sticks" by which to measure cost of electricity, and to regulate intrastate rates and charges for electricity and has established or utilized various
178 additional agencies such as PWA, TVA and the Rural Electrification Administration. Such agencies have been and are actually engaged in carrying out various phases of said "National Power Policy". The campaign described in plaintiff's original bill of complaint herein is in furtherance, and is part and parcel, of said "National Power Policy".

2—Plaintiff is reliably informed, believes and therefore avers and offers to prove at the trial hereof that since the filing of the original bill of complaint herein the defendant Ickes as Federal Emergency Administrator of Public Works, acting by and through his assistant, the defendant Horatio B. Hackett, in purported compliance with the terms of the Federal Emergency Relief Appropriation Act of 1935, made an offer to grant to the City of Iowa City the sum of $413,000.00, under a written offer, copy of which is annexed to the answer of defendants as Exhibit "A" thereto, and is by reference made a part hereof as though set out at length herein. The City Council of Iowa City attempted to accept said offer on the 6th day of March, 1936, purporting to act on behalf of said City pursuant to the election referred to in paragraph XIIb of the bill of complaint herein, and is now proceeding to qualify for the grant as set out in said Exhibit "A". Plaintiff avers that unless restrained said new arrangement will be carried out according to its terms.

3—Plaintiff avers that the offer and purported acceptance above set forth are in furtherance of, and a part of, the illegal plan of defendants as set out more particularly in the original bill of complaint and herein. Said attempts to further said plan are illegal and will result in irreparable damage and injury to the plaintiff in the same manner and for the same reasons as alleged in the original bill of complaint with respect to the agreements then existing between said defendants and said City; and the allegations made in the original bill of complaint with respect to the arrangements then existing apply equally to the offer and
179 acceptance set out herein. Plaintiff therefore prays that the allegations of the original bill of complaint

with respect to said matters be read and considered as part hereof as though expressly repeated herein with respect to said last mentioned offer and purported acceptance.

WHEREFORE, plaintiff further prays that it be granted the same relief with respect to the offer and purported acceptance set out herein as is prayed in its original bill of complaint with respect to the matters therein recited.

IOWA CITY LIGHT AND POWER COMPANY,

By C D WATERMAN
Attorney.

CHARLES D. WATERMAN

WAYNE G. COOK
Davenport, Iowa

CHARLES M. DUTCHER
Iowa City, Iowa

THOMAS K. HUMPHREY
Chicago, Illinois

JOHN S. BROOKES, JR.

WALTER B GUY
917-15th St., N. W.,
Edmonds Building,
Washington, D. C.
Attorneys for Plaintiff.

180 DISTRICT OF COLUMBIA, *ss:*—

C. D. Waterman being duly sworn deposes and says that he is Attorney for Iowa City Light and Power Company, a Corporation organized under the laws of the State of Delaware, the plaintiff named in the above entitled cause; that he has authority to make this affidavit in behalf of said Corporation; that he has read the foregoing supplement to original bill of complaint by him subscribed and knows the contents thereof, and that the statements therein made are true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he verily believes the statements to be true; and he makes this affidavit on behalf of

said Corporation because no officer thereof is in the District of Columbia.

C. D. WATERMAN

Subscribed and sworn to before me this 21st day of April A. D., 1936.

ELSIE O. OLIVER
Notary Public,
District of Columbia.

(Seal)

Leave to file granted

ALFRED A. WHEAT—
Chief Justice

181 *Memorandum.*

Filed June 5 1936

* * * * * * * *

The plaintiffs in these five suits are public utility corporations owning or operating electric plants in their respective communities, and at the present time they have the field exclusively to themselves. The defendant, Ickes, is the Administrator of the Federal Administration of Public Works, and the other defendants are officers of the United States.

The object of the suits is to enjoin the defendants from furnishing money to the respective communities for the purpose of enabling them to construct municipal electric plants which, if constructed, will come into direct competition with those of the plaintiffs. In some cases, the plaintiffs are operating under franchises which have some years to run. In some cases the franchises have expired and the companies are operating by consent or acquiescence of the local authorities. No serious claim is made that there is any
182 difference in the status of these companies so far as their right to sue is concerned. In no case does the plaintiff have an exclusive franchise. In each case it is subject to regulation by the appropriate local authority. In each case the plaintiff has a substantial investment in its plant and is furnishing satisfactory service and if subject to the competition which will result from a municipally-owned plant it will, beyond question, suffer serious damage and in some cases its business will be destroyed. It

was frankly conceded by counsel for the plaintiffs that the municipalities have the legal power and right, if they proceed lawfully, to build competing municipal plants and that prior to the enactment of the statutes involved they had a desire to build such plants.

While the cases involve some differences of detail, both sides seem to agree that but three questions are involved in each. These questions are:

First: Have the plaintiffs a right to sue?

Second: Are the statutes involved constitutional?

Third: If constitutional, are the acts contemplated by the defendants authorized by the statute?

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(1) Have the plaintiffs a right to sue?

It is urged that plaintiffs have no standing to bring these actions as no legal or equitable right of theirs will be infringed by the making of the loans; that the injuries which they will suffer will result, not from the making of the loans, but from the competition which will come when the municipal plants begin to operate, and inasmuch as the plaintiffs have no exclusive franchises, and as the
183 municipalities may lawfully build competing plants, the plaintiffs are in no position to complain because they are acquiring the funds wherewith to finance them in an unlawful manner. Such was the view taken by the United States Circuit Court of Appeals for the Fourth Circuit in *Greenwood County v. Duke Power Company,* 81 Fed. (2nd) 986, and there is much authority to support it. It seems to me, however, that such a position is rather too narrow; that the furnishing of the funds by the Government and the resulting competition are so closely connected that, if the statute under which the funds are supplied is unconstitutional, or if the officer furnishing the funds is not authorized to do so, then the plaintiffs may test those questions on the merits.

There is a difference sometimes overlooked between the right to be heard and the right after hearing to prevail. My conclusion is that the plaintiffs have a standing as litigants which requires the Court to hear their claims and

decide them on the merits. This seems to me to be consistent with what was held in *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515.

(2) Are the statutes involved constitutional?

There are two statutes to be considered: The National Industrial Recovery Act, of June 16, 1933 (Title II, 48 Stat. 200), and the Emergency Relief Appropriation Act of April 8, 1935 (H.J. Res. 117).

The National Industrial Recovery Act contains the following provisions:

Section 202 provides (48 Stat. 201):

"The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control * * *; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under sub-section (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; * * *."

184

Section 203 provides:

"(a) With a view to increasing employment quickly (while reasonably securing any loans made by the United

States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase * * *; Provided, that in deciding to extend any aid or grant hereunder to any state, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several states, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands."

The Emergency Relief Appropriation Act of 1935 provides:

"That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated"

to be available for the following classes of projects:

"(a) Highways, roads, streets, and grade-crossing
185 elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation, $500,000,000; (c) rural electrification, $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; (g) loans or grants, or both, for projects of States, Territories,

Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000; *Provided further*, That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or more of the foregoing limitations if he finds it necessary to do so in order to effectuate the purpose of this joint resolution:" (49 Stat. 115, 6 unbound).

The contracts involved in these cases were made in December, 1935, from funds allotted under the Act of 1933, which had then expired, except as it had been continued by the Act of 1935. Section 12 of the latter Act provided:

"SEC. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purpose of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution, for the making of further loans under said Act or under this joint resolution."

(49 Stat. 119, unbound).

One of counsel for the plaintiffs, in his closing argument, said:

"There are two ways of construing this later act. You can say that after NIRA expires, all action is taken under a later act; or you can say that action is taken on the earlier act as extended by the President. It does not make the slightest difference at all, because, in either case, it rested

entirely in the hands of the President as to what he should continue from NIRA, and what he should not continue." (Transcript of Proceedings, Vol. 14, pp. 1777, 1778).

While both Acts have been referred to in the ar-
186 guments, the provisions of the Act of 1933 seem to me to be the ones with which we are principally concerned, although I do not think the question is of much importance.

If the projects herein involved be deemed authorized by the Act of 1933, the authority must be found under Section 202 as part of the Public Works Program described in subdivision (a):

"(a) Construction * * * of publicly owned instrumentalities and facilities"

for which under Section 203

"With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered * * * (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; * * *."

Under the Act of 1935, we have an appropriation available for

"(g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self liquidating projects of public bodies thereof, where in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; * * *".

The constitutionality of the provisions of the Act of 1933 was sustained by the United States Circuit Court of Appeals for the Fourth Circuit in the case of *Greenwood County* v. *Duke Power Company*, decided February 22, 1936, supra, which was a suit brought by the Duke Power Company to enjoin the South Carolina County of Green-

wood from constructing an electric power plant on the Saluda River and from obtaining a loan and grant from the Federal Public Works Administration for the purpose of constructing it.

The Act was also sustained by the Circuit Court
187 of Appeals for the Tenth Circuit in *Kansas Gas & Electric Co.* v. *City of Independence* (79 Fed. (2nd) 32, 44). See also *Langer et al.* v. *United States,* (76 Fed. (2nd) 817).

The provisions of the Emergency Relief Appropriation Act of 1935, in so far as they provide for "housing" projects were held unconstitutional by our Court of Appeals in *The Township of Franklin* v. *Tugwell,* decided May 18, 1936, on the ground that they violated Section 1 of Article 1 of the Constitution as a delegation of legislative power to the President. If it could fairly be said that that case had gone so far as to hold all the provisions of the Act to be unconstitutional, I would, of course, feel bound by it, but the only class of projects considered was "housing", and counsel for the plaintiffs do not claim that it goes further. In his opinion, Mr. Justice Van Orsdel said:

"In what we have said we do not lose sight of our duty to construe the Act so as to avoid, if fairly possible, the conclusion that it is unconstitutional. In an effort to carry out this judicial obligation, we have endeavored to find in the Act language which would enable us to say that Congress had declared a legislative policy with relation to 'housing' with sufficient definiteness to avoid the charge of an unconstitutional delegation of legislative power. But, as we have pointed out, this is not to be found. We are not here confronted with an appropriation for internal improvements of a national character or importance, or for the erection of public buildings, or the grant of loans to a state or municipality to carry out public works projects. As th these we might find in the nature of the objective a well-beaten path by which to supply the omitted means to that end. But here we have neither path nor program."

We have in the present cases grants or loans to municipalities to carry out public works projects, as to which it is easy to find the "well-beaten path".

It has not been argued that the relief of unemployment is an unconstitutional use of funds of the United States.

The constitutionality of the statutes was attacked on two grounds:

First: That there was an invasion of the reserved
188 powers of the States in violation of the 10th Amendment, and

Second: That there was a delegation of legislative power to the President in violation of Section 1 of Article I of the Constitution.

Both these grounds were considered in *Greenwood County* v. *Duke Power Company,* supra, and held to be without merit. After pointing out that the statute contemplated not the construction of isolated projects but of a "vast program of public works" intended to relieve unemployment and that such expenditures are justifiable and for the general welfare, the Court said at p. 994:

"And we do not think that it can be said that Congress is invading the reserved powers of the states, or is making expenditures for matters essentially local in character, merely because the project for which expenditure is made is not connected with interstate commerce and, when considered alone, is local in character. It cannot be said to invade the reserved powers of a state to make loans or grants of money to municipal corporations which the state continues to control, and which are at liberty to reject the loans and grants if they see fit to do so. And a program of works for relieving nationwide unemployment does not lose its national character and become local merely because each of the public works projects is constructed in some particular locality."

That the program is nationwide appears from the testimony of Administrator Ickes, who said that it extended to every county of the United States, except 3, and that there were 260 electric power projects though but 85 of them were in places where there were privately-owned facilities. In the present cases, the Federal Government retains no regulatory power over the operation of the projects for which it makes loans. I am unable to see how any reserved power of a State is infringed.

On the question of an unconstitutional delegation of legislative power, the Court said, p. 994:

"Nor do we think that the pertinent portion of
189 the Act can be condemned as an unconstitutional del-

egation of legislative power within the rule laid down in *Panama Refining Co.* v. *Ryan* 293 U. S. 388; and *L. A. Schechter Poultry Corporation* v. *United States* 295 U. S. 495. It was out of the question for Congress to prescribe the details of an extended program of public works. It appropriated the money for the purpose, laid down the principles which were to guide the President and the Administrator of Public Works in its expenditure, and left to them the working out of the details. The making of loans and grants in carrying out the policy thus laid down by Congress is the exercise of administrative, not legislative, decision. As said in *Wilmington & Zanesville Railroad Co.* v. *Commissioner* 1 Ohio St. 77, 88 and quoted with approval by the Supreme Court in *Hampton & Co.* v. *United States,* 276 U. S. 394, 407: 'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' ''

The Court also points out that the question was fully considered by the Circuit Court of Appeals of the Tenth Circuit in *Kansas Gas & Electric Co.* v. *City of Independence,* supra, and expresses itself as in accord with what was said by Judge Phillips in that case.

I think the reasoning of the Court in these cases is sound. The statutory provisions are in my opinion valid.

(3) Are the acts contemplated by the defendants authorized by the statute?

The action contemplated by the defendants is attacked as being beyond the authority conferred by the statute on various grounds, which seem to me to be without merit. Some of them were considered at length in *Greenwood County* v. *Duke Power Co.,* supra.

One ground of attack is that the Administrator did not at the start prepare "a comprehensive program". It is undoubtedly true that in a literal sense no definite program was at first formulated. The program was worked out slowly and progressively and considerable time was occupied in effecting an organization and in the examination of many proposed projects. The defendant, Ickes, in re-

190 sponse to a question asking his administrative interpretation of the provisions of the statute relating to a comprehensive program of public works, answered:

"We had two duties to perform, as I saw it. One was to prepare a comprehensive program of public works. The other was to get men in as large numbers as possible to work as quickly as possible. In any conflict between the two, we felt that the latter took precedence.

"We soon realized that to prepare a comprehensive program of public works would require months—perhaps a year or two—and that if we literally set about the preparation of a comprehensive program of public works, the very purpose of the Act itself would be defeated. So, we satisfied ourselves by developing the program of desirable public works as we progressed. We did not treat it academically at all, but practically." (Transcript of Proceedings, Vol. 12, p. 1468).

This I think was a reasonable, practical and substantial compliance with the statute. It appears from the evidence that on March 20, 1934, pursuant to a Resolution (Sen. Res. 190, 73rd Cong.) calling upon the Administrator to furnish the Senate with information, including a general survey of the public works program and an account of the organization of the Public Works Administration and a statement of its policies, the Administrator submitted a report to Congress a document of some 300 pages in length, giving the information called for by the Resolution. Thereafter Congress passed the Emergency Relief Act of 1935, with full information in regard to what had been done and what was being done under the Act of 1933. It seems to me that this must be regarded as Congressional approval of the Administrator's program.

It has been argued that some of the projects are not useful or are not self-liquidating, or are not primarily for the relief of unemployment. I feel, however, that the determination of such matters is within the discretion of the President, or the Administrator acting under him. Beyond all question, the Act confers upon these Executive

191 Officers a very wide discretion, and I believe that their decisions upon such matters of detail are not subject to judicial review.

My conclusion upon the whole case is that the bills should be dismissed upon the merits.

ALFRED A. WHEAT—
Chief Justice

June 5, 1936.

192 *Defendants' Proposed Findings of Fact and Conclusions of Law*

Filed June 26 1936

* * * * * * * * * * *

In the above-entitled cause heard before the undersigned, the Chief Justice of this Court sitting in Equity Division No. 3, the Court, from the pleadings and exhibits filed and from the hearings had and the evidence taken before it, makes the following findings of fact and reaches the following conclusions of law:

193 *Findings of Fact*

DESCRIPTION OF PARTIES.

1.

The plaintiff Oklahoma Utilities Company is a corporation organized and existing under the laws of the State of Oklahoma, with one of its places of business in the City of Hominy, Osage County, Oklahoma. It is engaged in the business, among other things, of purchasing, transmitting, selling and distributing electricity in several communities in the State of Oklahoma and, in particular, has been and now is engaged in such business in the City of Hominy, State of Oklahoma. This plaintiff is the only agency existing in the City of Hominy for the distribution and sale therein of electricity.

2.

The plaintiff Texas Utilities Company is a corporation organized and existing under the laws of the State of Texas, and has its principal office in the City of Plainview, Hale County, Texas. This plaintiff is engaged in the business of generating and distributing electricity in the State of Texas. It is the only agency now existing for the sale and distribution of electrical energy in the said City.

3.

The plaintiff Alabama Power Company is a corporation organized and existing under the laws of the State of Alabama, and has its principal office in the City of Attalla, Alabama. The Alabama Power Company owns and operates a generating, transmission and distribution system in the State of Alabama, and distributes electrical
194 energy to numerous communities in that State, including the Cities of Florence, Decatur, Sheffield, Tuscambia, Hartzelle, Russellville, and Guntersville. This plaintiff is the only agency now engaged in supplying electric light and power to the said cities, except for the City of Sheffield, which is now engaged in the distribution and sale of electrical energy on a limited scale.

The Alabama Power Company owns and operates hydroelectric plants as follows: Lock 12 (known as Lay Dam) on the Coosa River in Alabama, the construction of which was permitted by an Act of Congress approved March 4, 1907 (34 Stat. 1888); Mitchell Dam and Jordan Dam, likewise on the Coosa River, Alabama; and Martin Dam on the Tallapoosa River, Alabama, which latter three dams were constructed under licenses granted by the Federal Power Commission.

4.

The plaintiff Iowa City Light & Power Company is a corporation organized and existing under the laws of the State of Delaware, is qualified to do business in the State of Iowa as a foreign corporation, and has its principal office in said State, in the City of Iowa City, Iowa. This plaintiff is engaged in the generation of gas and electrical energy and in the transmission, distribution and sale thereof in the City of Iowa City, and in the incorporated towns of Coralville and University Heights, Johnson County, Iowa. This plaintiff is the only agency now selling and distributing electrical energy in the said towns.

195 5.

The defendant Harold L. Ickes (hereinafter sometimes called the "Administrator") is the duly qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called "PWA") appointed by Executive Order of the President of the United

States of America, dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of "The National Industrial Recovery Act," approved June 16, 1933.

6.

The defendant Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of PWA.

7.

The defendant John J. Madigan is a duly appointed, qualified and acting Executive Officer of PWA.

8.

The defendant F. E. Schnepfe is the duly appointed, qualified and acting director of the Projects Division of PWA.

9.

The defendant Harry L. Hopkins is the duly appointed, qualified and acting Administrator of the Works Progress Administration, and was appointed such by an Executive Order of the President of the United States (No. 7034), dated May 18, 1935.

10.

The defendant Henry Morgenthau, Jr. is the duly appointed, qualified and acting Secretary of the Treasury of the United States and, as such, has general supervision and control over the disbursement of public funds of the United States.

196

11.

The defendant W. A. Julian is the duly appointed, qualified and acting Treasurer of the United States and, as such, is in control of the payment of checks drawn upon him by disbursing officers of the United States.

12.

The defendant Guy F. Allen is the duly appointed, qualified and acting Chief Disbursing Officer, Division of Disbursement, Treasury Department of the United States and, as such officer, is in control of drawing and issuing checks on behalf of the United States, and the disbursement of the public funds of the United States.

THE FRANCHISES OF THE PLAINTIFFS.

13.

The ultimate predecessor of the plaintiff Oklahoma Utilities Company was granted a non-exclusive franchise by the City of Hominy on March 12, 1914, to engage in the electrical business in the said City for twenty years. The franchise was assigned to this plaintiff's immediate predecessor on May 1, 1926. The franchise expired on March 12, 1934, and has not been renewed or extended. This immediate predecessor, a corporation, was reorganized on October 1, 1934, and the reorganized corporation is the plaintiff Oklahoma Utilities Company, which is now operating in the City of Hominy at sufferance.

197

14.

On or about the 15th day of April, 1909, the City Council of the City of Plainview, Texas, granted to the predecessor of the plaintiff Texas Utilities Company, a non-exclusive franchise to construct, operate and maintain an electric light and power plant and distribution system in the City of Plainview, Texas, for a period of fifty years. This franchise was assigned to the Texas Utilities Company on November 17, 1915.

15.

In the year 1902 the Cities of Florence, Sheffield and Tuscumbia, each granted to the predecessor in interest of the plaintiff Alabama Power Company a non-exclusive franchise to construct and operate an electric power plant. These franchises were assigned to the plaintiff Alabama Power Company in 1925. By their terms, the franchises so granted by the Cities of Sheffield and Tuscumbia expired in October, 1932, and the franchise granted by the City of Florence expired in March, 1933.

On October 16, 1919, the City of Decatur granted to the plaintiff a similar non-exclusive franchise which on January 27, 1920, became effective for a period of thirty years.

On August 10, 1915, the Town of Hartzelle granted to the plaintiff Alabama Power Company an intermediate non-exclusive franchise to construct, maintain and operate throughout said town an electric distribution system and business.

On July 5, 1915, the Town of Guntersville granted a similar non-exclusive franchise to the plaintiff Alabama Power Company.

On June 28, 1923, the Town of Russellville granted
198 a similar non-exclusive franchise to the plaintiff Alabama Power Company.

16.

In the year 1909 Iowa City, Iowa, granted to the predecessor in interest of the plaintiff Iowa City Light and Power Company a non-exclusive electric franchise for a period of twenty years. In the year 1912 this franchise was assigned to the Iowa City Light and Power Company. In the year 1932 this plaintiff made an application to the City for a renewal of its franchise. An election was held in Iowa City on October 11, 1932, at which time the question as to whether the franchise should be renewed was submitted to a popular vote. A majority of those voting voted against such renewal. The franchise thereafter expired in accordance with its terms on January 11, 1934 (Martin, 1226).

In the year 1934 the Town of Coralville, Iowa, granted to this plaintiff a non-exclusive franchise extending for the term of twenty-five years, and in the year 1935, the Town of University Heights, Iowa, granted to this plaintiff a non-exclusive franchise for a term of fifteen years.

PLAINTIFFS AS TAXPAYERS.

17.

Each of the plaintiffs annually pays substantial amounts of money in taxes to the United States, and to the States, and municipalities in which they operate.

The plaintiff Alabama Power Company paid annual license and privilege taxes on the operation of its business to the Cities of Florence, Sheffield and Tuscumbia, Alabama,
up to January 1, 1936. In January, 1936, the Cities
199 of Florence and Sheffield refused to accept any privilege and license tax for the year 1936 from the Alabama Power Company.

AUTHORITY OF CITIES TO BUILD PLANTS

19.

The Cities of Florence, Decatur, Sheffield, Tuscumbia, Hartselle, Russellville, Guntersville in the State of Ala-

bama, the City of Hominy, Oklahoma, the City of Plainview, Texas, are authorized by the laws of their respective States to construct and operate municipal electric plants and distribution systems. In the Cities of Plainview, Texas, and Decatur, Hartselle, Russellville and Guntersville, Alabama, the municipalities are authorized to engage in competition with the existing power company, and in the Cities of Hominy, Oklahoma, Iowa City, Iowa, and Florence, Sheffield and Tuscumbia, Alabama, where the franchises of the existing power company have expired, the Cities may either compete with or supplant the existing plants of the power company.

Each of the Cities involved in these suits is author-
200 ized to issue bonds for the purpose of financing the construction of their respective plants and to receive grants for that purpose.

EVENTS LEADING TO APPLICATIONS OF CITIES

20.

Florence.

In March, 1933, the City of Florence employed engineers to appraise the existing system belonging to the Alabama Power Company which was supplying it with electrical power (149). During 1933, an election was held to determine whether the City should engage in the municipal electric business. The proposition carried by a vote of 14½ to 1. On or about November 16, 1933, the City of Florence and the Alabama Power Company entered into negotiations for the purchase by the City of the plant of the company at Florence. These negotiations were terminated because of the wide divergence between the price offered by the City and the amount asked by the Power Company for its plant (151).

On December 20, 1933, the City of Florence filed an application with the Public Works Administration for a loan and grant, under Title II of the National Industrial Recovery Act, for the purpose of constructing a munici-
201 pal power plant, and sometime later an allotment for a loan and grant to the City was made by the Public Works Administration and approved by the President.

Subsequently to these proceedings, the Tennessee Valley Authority attempted to persuade the City of Florence to

enter into a plan whereby the Authority would exercise its option (later abandoned) to purchase distribution systems in Florence, Alabama, and several other communities, from the Alabama Power Company, rehabilitate them, and turn them over to the communities. This plan was inaugurated in an attempt by the Tennessee Valley Authority to prevent duplication of existing facilities of the power company and for the purposes of protecting the investment of the Alabama Power Company. The City of Florence rejected this proposal as disadvantageous to itself, and made a counter-proposal that it purchase the existing facilities of the Alabama Power Company at Florence, and use funds to be supplied by the Public Works Administration for rehabilitation and extensions. Later this plan was abandoned by the Tennessee Valley Authority. PWA refused to make a loan or grant to the City of Florence until this plan had been abandoned.

21.

On December 28, 1934, the Public Works Administration entered into a loan and grant agreement with the City of Florence, whereby the United States agreed to aid the City in financing the construction of a municipal electric distribution system. A copy of this agreement appears as Exhibit F-1; Part 2-a, of Stipulation Agreement No. 1 in the cases of Alabama Power Company v. Ickes, et al., Equity Nos. 59071 and 59671.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between the City of Florence and the Public Works Administration. A copy of this new agreement appears as Exhibit F-3 in the said Stipulation Agreement No. 1.

202 22.

Sheffield.

In June, 1933, the City of Sheffield, Alabama, held an election to determine whether the City should erect a municipal power plant (Creer-210). The result of this election was 630 in favor of the establishment of a municipal electric system, and 96 against such a system.

Thereafter, on December 20, 1933, the City of Sheffield, Alabama, filed an application with the Public Works Ad-

ministration for a loan and grant of funds for the erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and the Public Works Administration. A copy of this agreement appears as Exhibit S-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between the City of Sheffield, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit S-3 of the said Stipulation Agreement No. 1.

23.

Tuscumbia.

On August 30, 1933, the City of Tuscumbia, Alabama, held an election to determine whether the City should erect a municipal power plant (Farr-205). The result of this election was 336 in favor of the establishment of a municipal electric system, and 8 against such a system.

Thereafter, on December 20, 1933, the City of Tuscumbia, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the
203 erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and PWA. A copy of this agreement appears as Exhibit T-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between the City of Tuscumbia, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit T-3 of the said Stipulation Agreement No. 1.

24.

Decatur.

On October 1, 1933, the City of Decatur, Alabama, held an election to determine whether the City should erect a municipal power plant (Hendrix-215). The result of this election was 1415 in favor of the establishment of a municipal electric system, and 501 against such a system.

Thereafter, on December 20, 1933, the City of Decatur, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant. In December, 1934, a loan and grant agreement was entered into between this City and the Public Works Administration. A copy of this agreement appears as Exhibit D-1; Part 3-b, of the aforementioned Stipulation Agreement No. 1.

The said contract was terminated by mutual agreement, dated December 2, 1935, and a new loan and grant agreement, dated December 4, 1935, was entered into between the City of Decatur, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit D-3 of the said Stipulation Agreement No. 1.

204 25.

Hartselle.

Sometime in 1933, the City of Hartselle, Alabama, held an election to determine whether the City should erect a municipal power plant (Livingstone-176). The result of this election was 296 in favor of the establishment of a municipal electric system, and 18 against such a system.

Thereafter, on December 20, 1933, the City of Hartselle, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant, and a loan and grant agreement, dated December 4, 1935, was entered into between the City of Hartselle, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit H-1, Part 2-a, of the aforementioned Stipulation Agreement No. 1.

26.

Russellville.

In December, 1933, the City of Russellville, Alabama, held an election to determine whether the City should erect a municipal power plant (Porter-182). The result of this election was 405 in favor of the establishment of a municipal electric system, and 103 against such a system.

Thereafter, on December 20, 1933, the City of Russellville, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erec-

tion of a municipal power plant, and a loan and grant agreement, dated December 4, 1935, was entered into between the City of Russellville, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit R-1; Part 1-a, of the aforementioned Stipulation Agreement No. 1.

205 27.

Guntersville.

On September 4, 1933, the City of Guntersville, Alabama, held an election to determine whether the City should erect a municipal power plant (Scruggs-200). The result of this election was 240 in favor of the establishment of a municipal electric system, and 70 against such a system.

Thereafter, on December 20, 1933, the City of Guntersville, Alabama, filed an application with the Public Works Administration for a loan and grant of funds for the erection of a municipal power plant and a loan and grant agreement, dated December 4, 1935, was entered into between the City of Guntersville, Alabama, and the Public Works Administration. A copy of this agreement appears as Exhibit G-1; Part 2-a, of the aforementioned Stipulation Agreement No. 1.

28.

Hominy.

Sometime in the year 1930, the Mayor and City Council of the City of Hominy, Oklahoma, became interested in the construction of a municipal electric light plant (Hall-7), and on December 16, 1930, the City held an election to determine the question of the issuance of bonds to be used for the purpose of constructing a municipal plant and distribution system. The vote was 373 in favor of the issuance of the bonds and 42 against.

The validity of the proposed bond issue was contested in the courts of Oklahoma; a contract was let for the construction of the proposed municipal plant; the performance of this contract was enjoined by the Federal Court in a suit brought by the Oklahoma Utilities Company. The City then began negotiations for the sale of its bonds to the Reconstruction Finance Corporation.

On August 24, 1933, the City filed an application
206 with PWA for a loan and grant to erect the proposed municipal power plant, and a loan and grant agreement dated January 10, 1935, was entered into between the PWA and the City of Hominy. A copy of this agreement is attached to plaintiff's Exhibit 92 and marked Exhibit C.

During the month of September, 1935, this contract was terminated and thereafter a new agreement, dated December 14, 1935, was entered into between the parties. A copy of this agreement is attached to plaintiff's Exhibit 92 and marked Exhibit F.

At the present time work is actually being carried on in the construction of the municipal power plant in Hominy without the use of Federal funds (Hall-14).

29.

Plainview.

On July 20, 1931, the Council of the City of Plainview, Texas, adopted a resolution favoring the erection of a municipal light and power plant. (Dysart-23). On November 15, 1932, the Council adopted an ordinance to the same effect and on the same date authorized the Mayor and the City Secretary to enter into a contract with Montgomery & Ward, Engineers, of Wichita Falls, Texas, for the erection of a municipal light and power plant.

On April 4, 1933, a municipal election was held to determine whether the City Council should be authorized to issue revenue bonds for the purpose of erecting a municipal power plant (Dysart-25). The result of this election was 438 in favor of the issuance of such bonds, and 100 against such issuance.

On August 17, 1935, a loan and grant agreement was entered into between the City of Plainview and the Public Works Administration. A copy of this agreement is attached to plaintiff's Exhibit 24, marked Exhibit D. This
207 contract was terminated by mutual agreement, dated December 2, 1935, and on December 4, 1935, a new loan and grant agreement was entered into between the City of Plainview and the Public Works Administration. A copy of this new agreement is attached to plaintiff's Exhibit 24, marked Exhibit F-1.

30.

Iowa City.

On April 17, 1934 an election was held in Iowa City, Iowa, on the question of the construction of a municipal electric system, and the issuance of revenue bonds therefor. The result of this election was 2959 in favor of such construction and issuance and 2804 against such construction and issuance.

On Jan. 8, 1934, Iowa City made application to PWA for a loan and grant for the construction of a municipal electric project. The project was approved by the Administration and the President and a loan and grant agreement was forwarded to the City. On October 5, 1934, the City returned the loan and grant agreement unexecuted and withdrew its application. On April 5, 1935, after a change in the City administration, (the application was reinstated.) On June 17, 1935, the application was amended so as to apply for a grant only. On January 8, 1936, pursuant to said application, PWA made an offer in writing to aid the City by way of grant in financing the construction of a municipal power plant; a copy of this offer is set forth in plaintiff's Exhibit 52. This offer was accepted by resolution of the City Council on March 6, 1936.

208

31.

PROCEDURE FOR HANDLING APPLICATIONS

Organization of PWA.

At the head of the PWA is the Administrator, whose powers are plenary and subject only to the control of the President. He has complete supervision and direction of the Public Works Administration. The Public Works Administration is composed of a number of Divisions, among which are the Legal Division, the Engineering Division, the Financial Division, and the Projects Division. The first three of the foregoing are examining divisions, and their function is to examine and make recommendations to the Administrator with respect to applications for projects. The Projects Division coordinates the reports of the examining divisions, and records and routes applications.

In addition there existed at one time in the Public Works Administration a Technical Board of Review to consider

projects against which an adverse report or protest had been lodged, and an Electric Power Board of Review established May 9, 1934 which considered adverse reports or protests with respect to electric power projects. The Electric Power Board of Review was dissolved by order of the Administrator on March 16, 1935.

The PWA has a field office in every State in the country. The chief official in each of these offices was at one time known as the State Engineer for the Public Works Administration, who usually was the Chairman of a State Advisory Board. This official is now designated as the State Director, and the State Advisory Board has been abolished.

By Executive Order of June 16, 1933, the President of the United States appointed a Special Board for Public Works,
consisting of the Secretary of the Interior as Chair-
209 man, and certain other Government officials as members. One of the functions of this Board was to pass upon all recommendations for allotments of funds appropriated pursuant to Title II of the National Industrial Recovery Act, for loans and grants for public works projects.

Applications.

Applications for loans and grants for PWA projects are governed by two separate statutes,—Title II of the National Industrial Recovery Act, and the Emergency Relief Appropriation Act of 1935, and the procedure for handling applications is slightly different under each statute.

Applications for funds appropriated by Title II of the National Industrial Recovery Act, such as are involved in the projects in the Cities of Florence, Sheffield, Tuscumbia, Decatur, Hominy and Plainview were received in the first instance at the State PWA office. Such applications were examined in such offices. The State Engineer made a report to the Public Works Administrator, recommending approval or disapproval of the application. The application and State Engineer's report were received by the Projects Division of the general office in triplicate, a copy of which was transmitted to each of the examining divisions for study and recommendation.

The recommendations of the three examining divisions were then sent to the Special Board for Public Works, which passed a resolution, recommending approval or disapproval of an allotment. If the Administrator of Public Works

agreed with the recommendation for an allotment for the project he signed the resolution in approval thereof. An allotment of funds was not intended to create, and did not create, a legal obligation to make a loan or grant. The Administrator then presented a list of projects to the President with his recommendation. The President gave a final approval or disapproval to the application by making notations on and signing the list.

Applications for funds appropriated by Emer-
210 gency Relief Appropriation Act of 1935, such as are involved in projects for the Cities of Hartselle, Russellville, Guntersville and Iowa City are handled in a slightly different manner. The applications are received in the first instance by the State Director of PWA. At the State office, representatives of the Legal, Engineering and Financial Divisions examine the application and prep[illegible] reports. The applications and the reports are forwarded in triplicate to the central office in Washington, and are there reviewed by the three examining divisions, and approval or disapproval is recommended by the Director of each examining division. If the application is approved by the Administrator and by the President of the United States the allotment is complete.

Before approving any project and before executing or authorizing the execution of a loan and grant agreement under either statute the Administrator received advice from his subordinates with respect to the facts bearing upon whether the making of the loan and grant would comply with the pertinent provisions of the statutes and Executive Orders of the President. In some instances he also relied upon data received through oral conferences, the results of which were not always reduced to writing. The Administrator submitted the approved projects to the President for his consideration and approval; in some instances the President acted on the basis of oral discussions which were not reduced to writing.

32.

Loans and grants for the financing of municipal electric projects were dealt with in the same manner and judged by the same tests as other projects.

Each of the applications submitted by the Cities herein involved were handled in accordance with the procedure outlined in Finding 31.

211

33.

Functions of PWA Subordinates Advisory

The State Engineers or Directors, the State Advisory Boards, each of the examining divisions of the PWA, the Projects Division, the Special Board for Public Works, the Technical Board of Review, and the Electric Power Board of Review, have at all times had only advisory powers with respect to the approval of applications for loans and grants. None of these agencies had any power either by original authorization or subsequent ratification to make allotments or contracts or to make commitments with respect thereto, or to do anything whatsoever except to obtain information and to make advisory reports and recommendations to the Administrator. The power of approval or disapproval rested entirely with the Administrator and the President.

34.

Cities Propose to Build Plants

With the proceeds of the sale of its bonds, and of the grant by PWA, each of the cities herein involved proposes to construct a municipal electric light plant. The result will be competition with the plants of the plaintiffs which in all probability will thereby suffer substantial financial loss.

35.

Inducement.

The determination of whether municipal competition with privately-owned utilities, or the elimination of competition by privately-owned utilities where their franchises had expired, was desirable, was made by the cities involved and not by PWA.

Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the part of any of the defendants, their agents or subordinates. There was and is no conspiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to,

212 nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regu-

late their rates or electric rates generally, or to foster municipal ownership of utilities.

The expenditures under these statutes involve no purchase of, nor contract providing for, regulation by the United States. The failure of any city to apply for or receive loans or grants under those statutes will impose upon it no disadvantage or financial loss.

36.

Rates.

The defendants have not reserved any right or power to influence or control rates to be charged by the proposed municipal power plants. Provisions of earlier contracts in any way inconsistent with the facts found herein were eliminated before any action was taken pursuant thereto by any of the municipalities.

37.

Neither the United States nor any of the defendants has reserved any right or power under the existing contracts, or in any other way, to require any of the municipalities to eliminate competition or to designate the person or agency from whom the municipality must purchase its power. Provisions of earlier contracts in any way inconsistent with the facts found herein were eliminated before any action was taken pursuant thereto by any of the municipalities.

The rights of the United States with respect to the construction of the projects are fully set forth in the contracts. These contracts are subject to no terms or conditions except as specifically set forth therein.

38.

Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed.

213 39.

Comprehensive Program

Upon his determination to approve a project, include it in the comprehensive program of public works, and make a loan and grant therefor, the Administrator submitted it to the President for his approval. When the action of the Ad-

ministrator was approved by the President, funds were allocated for the specific project. On March 20, 1934, pursuant to a Resolution (Sen. Res. 190, 73rd Cong.) calling upon the Administrator to furnish the Senate with information including "a general survey of the public works program," an account of the organization of the Public Works Administration and a statement of its policies, the Administrator submitted a report to Congress, a document some three hundred pages in length, giving the information called for by the Resolution, including a detailed list containing the name, location, and type of each approved project and the amount of funds allocated therefor.

Thereafter, on June 19, 1934, Congress enacted the Emergency Appropriation Act, Fiscal Year of 1935 (Pub. No. 412, 73rd. Cong., 2d Sess.), which, among other things authorized not exceeding $500,000,000 for public works under Title II of the National Industrial Recovery Act. On April 8, 1935, Congress enacted the Emergency Relief Appropriation Act of 1935, which, among other things, authorized the continuance of the Public Works Administration and the performance of its functions, and made available additional sums for loans and grants to States, municipalities, and other public bodies.

214 40.

Public Works Administration Program National in Scope.

A total of 7,957 projects, of many different types and extending into every county in the United States except three, have been approved by the Public Works Administration and funds allocated therefor. Of this number, 260 are electric power projects, 85 being located in places where privately-owned electric facilities are now being operated. The amount allotted for all non-Federal PWA projects is $1,222,636,961. The total allotted for the 85 competing electric projects is $58,768,800, representing 1.1% of the total number of allotments and 4.8% of the total amount of allotments.

41.

General Welfare.

Each of the projects herein involved is a part of a program of national scope, is designed to relieve unemploy-

ment, and promotes the general welfare of the United States.

42.

Loans Reasonably Secured.

No attempt was made by the plaintiffs in any case except with respect to Plainview, Texas, to prove that the loans were not reasonably secured and that the projects were not self-liquidating. In the case of Plainview, Texas, there is substantial evidence to support the determination of the Administrator that the Plainview project is self-liquidating and that the loan is reasonably secured.

As to all other projects involved in this litigation, except that in Iowa City which involved a grant only, the Administrator has made a determination that the loans are reasonably secured.

43.

Projects Approved.

Each of the projects herein involved has been approved by the Administrator and by the President of the United States.

215

44.

Work on Projects

The President of the United States has determined that in the case of the projects to be constructed in the Cities of Iowa City, Iowa, and Hartselle, Russellville, and Guntersville, Alabama, with funds appropriated under the Emergency Relief Appropriation Act of 1935, 25% of the loan or grant, or the aggregate thereof, will be expended for work on each project.

45.

The Court judicially notices that the census of 1930 indicates that in the years 1923-1925 there were approximately forty-one million people over the age of ten years gainfully employed in the United States. This number included agricultural and industrial workers. Of this group eight million were employed in industry. These are subdivided into workers in the durable and non-durable industries. The durable goods industries include firms manufacturing such products as iron and steel, machinery, transportation equip-

ment, railroad repair shops, non-ferrous metals, lumber and allied products, stone, clay and glass products. In the non-durable goods groups are textiles and their products, such as clothing, leather and its products, such as boots and shoes, food and kindred products, tobacco manufacturers, paper, printing, chemicals, and rubber products.

During the period 1923-1925 the average number of persons employed in the durable goods group and the non-durable group was approximately equal, there being over four million persons in each group.

From data computed by the Bureau of Labor Statistics of the Department of Labor, it appears that if the
216 average monthly number of persons employed during the years 1923-1925 be taken as normal and indicated by the index number 100, then both the durable goods and the non-durable goods industries stood together in August of 1929 at the figure 107. From the year 1923 to the year 1929 there was very small variation in the movement of employment in the durable and non-durable goods groups. Beginning with the latter part of 1929 employment in both groups decreased, but in the durable goods industries it decreased more rapidly than in the consumers' or non-durable goods industries.

During the first six months of the year 1933, the index of employment in the durable group varied between approximately 45 and 50, while during the same period the index of employment in the non-durable group varied between approximately 75 and 85.

46.

Pursuant to the provisions of PWA contracts, contractors engaged in furnishing materials and labor on public works projects are required to furnish reports to the Bureau of Labor Statistics giving data in regard to the number of people on the payroll, the amount of the payroll, the man-hours of work at the site of the construction project and the expenditures for construction materials. Upon the basis of information so received, a study was undertaken by the Bureau of Labor Statistics of six power projects already completed with funds furnished by the Public Works Administration. The total expenditure for labor and materials amounted to $461,628. The study shows that of this amount the labor at the site accounted for 13.2% of

the total expenditure, and materials for 86.7%. There were 85,529 man-hours created by these projects and 380,000 man-hours of indirect labor in fabricating, transporting, and producing the materials. Four and four-tenths man-hours of indirect labor were created for each man-hour of labor at the site. The conclusions of the Bureau of Labor Statistics as to indirect labor are approximations based upon carefully worked-out averages, and do not purport to be precise.

From July, 1933, until March, 1936, a total of $1,-
217 177,000,000 was advanced by the Public Works Administration for the purchase of materials for public works projects.

47.

The fundamental purpose of PWA was and is to relieve existing widespread unemployment, and to increase purchasing power through the construction of useful public works.

48.

Public Works projects are particularly adapted to relieving unemployment in the durable goods industries, by providing both direct employment, which is work at the site of the project, and indirect employment, which is work in industries supplying materials for use at the site, mining industries, and transportation facilities.

49.

50.

'The discretionary powers authorized by Section 203(d) of Title II of the National Industrial Recovery Act have never been exercised.

218 *Conclusions of Law*

1.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935 and the contracts and the loans and grants involved in these suits are valid and constitutional.

2.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contracts and the loans and grants involved in these suits involve valid expenditures for the general welfare, and involve no improper delegation of legislative power and no exercise of any improperly delegated power, and do not violate the Tenth Amendment or any other provisions of the Constitution.

3.

4.

Title II of the National Industrial Recovery Act sets forth definite standards with respect to the purposes of the expenditures by the Administrator and the means by which such expenditures should be made. These standards,
219 as administratively interpreted, were reaffirmed by the Emergency Relief Act, Fiscal Year of 1935, approved June 19, 1934, and were also reaffirmed by and incorporated in Section 12 of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935.

5.

If the making of the loans and grants results in lower rates, such result is but the incidental effect of what the States and their municipalities voluntarily decide to do, and therefore cannot have the effect of making such loans and grants invalid.

6.

Under the contracts involved in these cases the United States will have no control of the rates charged by, or the operation and management of, the plants of the several cities, and no rights with respect thereto other than those which any other holder of the bonds of any such cities would have under the laws of the States in which the cities are situated. The rates charged by the several cities, and the operation and management of their plants will in all respects continue to be subject to regulation by the several States in which the several cities are situated. The United States is in no way attempting to and will in no way be able

to regulate commerce within any of the States, as a result of said contracts.

7.

The contracts and the proposed loans and grants involved in these suits are made and being made in full compliance with the applicable statutes.

8.

Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935 authorize the making of loans and grants by PWA to municipalities for the purpose of financing the construction of municipally-owned generating plants and distribution systems, regardless of whether or not they compete with plants or distribution systems owned by privately-owned public utility companies, or will supplant the same where the franchises of such companies have expired.

9.

The provision of the Emergency Relief Appropriation Act of 1935 requiring that the President determine that, in the case of loans or grants to cities, not less than twenty-five per cent thereof would be expended for work under each particular project should be construed as referring not only to work on the site of the particular project, but also to include indirect labor resulting from the expenditures for such project.

10.

The administrative interpretation of the provisions of Title II of the National Industrial Recovery Act with reference to the preparation of a comprehensive program of public works, as set forth in Finding of Fact No. 39, and the inclusion of projects therein was a reasonable, practical and proper interpretation. Moreover, that interpretation has been adopted, ratified and approved by the Congress by the subsequent statutes above referred to.

11.

The execution and performance by the defendants of the contracts with the Cities of Florence, Sheffield, Tuscumbia, Decatur and Plainview are authorized by Title II of the

National Industrial Recovery Act as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, and execution and performances by the defendants of the contracts with the Cities of Hartselle, Russellville, Guntersville and Iowa City are authorized by the Emergency Relief Appropriation Act of 1935.

221 12.

13.

The execution and performance of these contracts are in all respects lawful under the Constitution and laws of the United States, and as to the cities other than Iowa City, under the laws and constitutions of the States in which the respective cities are situated. As to Iowa City, all questions of state law set forth in the Bill of Complaint were by stipulation withdrawn from consideration in these suits.

14.

The acts of the President and the Administrator in these cases were not unreasonable and were within the range of sound discretion.

The acts of the President and the Administrator in approving and making the contracts and the loans and grants called for the exercise of administrative discretion not subject to judicial review unless arbitrary and unreasonable.

15.

Each of the cities involved herein except Iowa City has the right under the Constitution and statutes of its State to build its proposed plant, to issue the proposed bonds, and to receive the proposed grants for financing the construction of such plant.

16.

The plaintiffs have a standing as litigants in accordance with *Frost* v. *Corporation Commission*, 278 U. S. 315, which required the Court to hear their claims and decide them on the merits.

222 17.

The plaintiffs are not entitled to the injunctions prayed for in the bills of complaint, or any other equitable relief in these actions.

18.

The bills of complaint should be dismissed on the merits with costs, and a decree should be entered accordingly.

19.

Each city involved in these suits has a right to engage in competition with plaintiff utility company operating within that city, and to require that plaintiff to discontinue its operations in such city when its franchise has expired.

20.

The provisions of the contracts relating to wages and hours and conditions of labor in the construction of the projects are stipulated by the contracts, and cannot be changed by any of the defendants.

21.

The contracts contain no provisions constituting any delegation by any of the cities involved in these suits of their powers to the defendants or to the United States.

22.

ALFRED A WHEAT
Chief Justice

June 26, 1936

Note: This is filed in 58,810, the Texas Utilities case. Ink corrections show only changes made in original.

223 *Decree*

Filed June 26 1936

* * * * * * * * * * *

These causes came on to be heard at this term on the merits and after the taking of testimony on behalf of all parties, were argued by counsel; and upon consideration thereof, it is this 26th day of June, 1936,

Ordered, Adjudged and Decreed that the bill of complaint in each of the above causes be and it is hereby dismissed on the merits, with costs.

ALFRED A. WHEAT
Chief Justice.

From the foregoing decree the plaintiffs in each cause give notice of appeals in open court to the United States Court of Appeals for the District of Columbia, which appeals are hereby allowed, and undertaking for costs is fixed at $100, or $50 cash in each case.

ALFRED A. WHEAT
Chief Justice.

224 *Order Continuing Preliminary Injunction*

Filed June 26 1936

* * * * * * * * * * *

The above entitled cause having been consolidated with Equity No. 58927, 59081 and 59671, both for trial in this Court and on appeal, and it appearing to the Court that the United States Court of Appeals for the District of Columbia has directed that the preliminary injunctions theretofore entered in said three cases shall be continued, and appeals having been this day taken in open Court from the decree of this Court dismissing the bills of complaint in said causes, as well as in this cause, and counsel for the defendants having signified that there was no objection to the entry of this decree, it is, by the Court, this 26th day of June, 1936,

Adjudged, Ordered and Decreed, that the preliminary injunction heretofore entered in the above entitled cause on the 16th day of January, 1936, and the injunction undertaking heretofore filed herein on the same day, be and the same are hereby continued in full force and effect until the final determination of this suit.

ALFRED A. WHEAT
Chief Justice.

No objection:—

ALEXANDER HOLTZOFF
Attorney for defendants

225 *Memoranda*

June 26, 1936.

Order extending time to file Statement of Evidence to and including August 5, 1936.

July 14, 1936.

$50 deposited in lieu of bond on appeal.

August 5, 1936.

Statement of Evidence and notice filed.

August 15, 1936.

Statement of Evidence signed. This is the same Statement of Evidence transmitted to Court of Appeals, in causes Nos. 58927 and 59071, in Equity.

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226 *Assignments of Error.*

Filed August 15 1936

* * * * * * * * * * *

Now comes the plaintiff and assigns as errors the action of the Court in the following particulars:

1. The Court erred in dismissing the bill of complaint and in making its conclusions of law numbered 17 and 18.

2. The Court erred in making its conclusions of law numbered 1, 2, and 4, the error being that in so far as Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 were construed to authorize the acts of the defendants herein said statutes violate the Constitution of the United States in the following respects:

(a) Neither Article I, Section 8, Clause 1 or 2, nor any other Section or Clause thereof grants to Congress the power to authorize the acts of the defendants; among other things the general welfare of the United States is not subserved thereby, but the benefits, if any, of the proposed action are purely local and not national.

(b) The Tenth Amendment denies to Congress the power to authorize the acts of the defendants in that

(1) they regulate and affect matters of purely local concern in Iowa City, Iowa, wholly within the police
227 power of the State of Iowa, and not subject, directly or indirectly, to Federal control;

(2) their primary purpose and necessary effect is to regulate and lower intrastate electricity rates and to promote public ownership of electricity facilities;

(3) their purpose and effect is to effectuate control by the Federal Government over working conditions and other details of the construction and operation of electricity project in Iowa City, Iowa.

(c) Both Title II of the National Industrial Recovery Act and The Emergency Relief Appropriation Act of 1935 delegate power beyond the limitations of Article I, Section 1; Article I, Section 8, Clauses 1, 2, and 18; Article I, Section 9, Clause 7; Article II, Section 1; and the other provisions of the Constitution contemplating a division of power among independent branches of the Government of the United States.

(d) Neither the said statutes nor the acts of the defendants have provided the plaintiff with an adequate hearing, and they otherwise arbitrarily provide for and seek the taking of the plaintiff's property without the due process guaranteed by the Fifth Amendment.

(e) They set up no adequate standards to guide the President and his appointees in the exercise of their discretion in carrying out the powers attempted to be conferred upon them.

3. The Court erred in making its conclusion of law numbered 4 the error being, in addition to that set forth in Assignment 2, *supra*, that neither the Emergency Relief Act of 1935 nor Section 12 of The Emergency Relief Appropriation Act of 1935 reaffirmed any standards, as administratively interpreted or otherwise, set forth in Title II of the National Industrial Recovery Act.

4. The Court erred in making its conclusion of law numbered 5, the error being that the lowering of rates is not the incidental effect of what the States and municipalities decide to do, but is the paramount, desired and necessary effect of the defendants' actions.

228

5. The Court erred in making its conclusion of law numbered 6, the error being that the defendants, through control over allotted funds and otherwise, retain unlimited power with respect to the Iowa City project, and that the defendants are exercising and will in the future exercise this control, as well as their other powers, to effectuate

regulation of commerce, within the State of Iowa and other States, in derogation of the police power of the States.

6. The Court erred in making its conclusions of law numbered 7, 8, 9, 10, 11, and 14, the error being that the action of the defendants is not authorized by Title II of the National Industrial Recovery Act or The Emergency Relief Appropriation Act of 1935 for the following reasons:

(a) The comprehensive program required by Section 202 and 203 of the National Industrial Recovery Act has never been prepared.

(b) The Iowa City project is not reasonably designed to increase employment quickly as required by Section 203 of the National Industrial Recovery Act and Section 1 of The Emergency Relief Appropriation Act of 1935.

(c) The Iowa City project is not "useful", in the sense required by law, but is wasteful and useless.

(d) This project is designed to effectuate the reduction of and control over intrastate electricity rates at the defendants' direction and the furthering of public ownership of electricity facilities.

7. The Court erred in making the first clause of its conclusion of law numbered 13 for the reasons set forth in Assignments 2 and 6, *supra.*

8. The Court erred in making its conclusions of law numbered 13, 15, and 21 for the reasons set forth in Assignments 2 and 6, *supra.*

9. The Court erred in making its conclusion of law
229 numbered 20 for the reason that the defendants may impose such changes.

10. The Court erred in making its conclusion of law numbered 14 for the reason among others, in addition to those set forth in Assignment 6, *supra,* that thus to limit judicial review deprives the plaintiff of the privilege of the full and complete judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed it by the due process clause of the Fifth Amendment, by Article III, Sections 1 and 2 of the Constitution, and by Title 18, ch. 3, Sec. 41, 43, 44, and 47 of the Code of the District of Columbia.

11. The Court erred in making conclusion of law numbered 9, the error being that the term "work" as used in The Emergency Relief Appropriation Act of 1935 does not include indirect labor resulting from the expenditures for

such projects, but only includes direct labor at the site of the projects.

12. The Court erred in making its conclusion of law numbered 19, the error being that the City of Iowa City may not compete with or supplant plaintiff in an illegal manner and particularly by means of a grant from the United States on the terms and conditions involved in this case.

13. The Court erred in its Finding of Fact No. 19, the error being that there was no evidence that the City of Iowa City is authorized to issue bonds and receive grants for the purpose of financing the construction of a municipally owned electric light and power plant and distribution system and such issues were expressly withdrawn from this suit.

14. The Court erred in making its seventh paragraph of finding of fact numbered 31, the error being that the action of the Special Board for Public Works upon applications was taken subsequent to action by the Administrator.

15. The Court erred in making its finding of fact numbered 32, the error being that in the case of electricity projects, including that for Iowa City, preferential
230 treatment was given by PWA, and through the Electric Power Board of Review private utilities were given an opportunity to escape competition by lowering their rates to a point satisfactory to Federal officials who had no legal interest in the matter; and that in the case of electricity projects, including that of Iowa City, a peculiar test of social desirability was applied by PWA and the defendants, to-wit, the lowering of electricity rates and extension of public ownership.

16. The Court erred in findings Nos. 31 and 32, the error in addition to the foregoing being that the application of Iowa City for funds was not examined and reported on by representatives of the Legal, Engineering and Financial divisions of the State Office of PWA for Iowa.

17. The Court erred in making its finding of fact numbered 33, the error being that certain of the subordinate bodies of PWA and agents of defendants were authorized to solicit applications through publicity and otherwise and to enter into negotiations with private utilities relative to electricity rates.

18. The Court erred in making its finding of fact numbered 35, the error being that PWA and the defendants did

make the determination that competition with the plaintiff was desirable, the error further being that PWA and the defendants solicited applications for projects through widespread publicity and offers of free gifts and otherwise, that the defendants have sought injury to the plaintiff and the lowering of rates in Iowa City and in other intrastate localities throughout the nation, and that the arrangements with Iowa City do purchase control by defendants over matters of local concern.

19. The Court erred in making its findings of fact numbered 36, 37 and 38, the error being that they have no support in the evidence; and further that the offer made to Iowa City was based upon an application providing for a specified schedule of rates and a total elimination of plaintiff from competition with the proposed municipal plant.

20. The Court erred in making its findings of fact
231 numbered 41, the error being that the finding is in truth a conclusion of law and, further, is contrary to the evidence.

21. The Court erred in making its finding of fact numbered 44, the error being that the action of the President in stating that 25% of the loan or grant to the City of Iowa City or the aggregate thereof will be expended for work on the project was not a determination of such facts.

22. The Court erred in making its finding of fact numbered 47, the error being the same as that in the case of finding numbered 41, *supra*, and being further that the purpose and necessary effect of the defendants' acts was to regulate and lower intrastate electricity rates and to further public ownership of electricity facilities by encouraging municipalities to undertake such projects, by threatening private utilities with competition unless rates were reduced, and by other means; and being further that the relief of unemployment did not enter into the defendants' consideration, and projects were not financed for that purpose or with that effect.

23. The Court erred in making its finding of fact numbered 48, the error being that there is no evidence that electricity projects such as that in Iowa City is particularly adapted to the relief of unemployed persons, but the evidence shows that the direct labor furnished by such projects is negligible in amount, and such as is furnished is at greatly higher cost than in the case of any other type of

project financed by PWA, that the indirect labor involved is uncertain and speculative in amount, location, and character, that all labor involved will not necessarily or probably go to unemployed persons but will go to any persons whom private contractors may choose to employ, and chiefly to skilled workers in crafts wherein there is, and, at the time the bills herein were filed, there was little if any unemployment.

24. The Court erred in failing to find that the plaintiff adequately serves the electricity needs of Iowa City, Iowa, and its residents under the regulation of the City
232 Council of Iowa City a body created by the law of Iowa with general and exclusive power and jurisdiction to regulate and supervise electric utilities in Iowa City, and, that the defendants' project will not serve new users or promote any other useful purpose but will merely duplicate present service, destroy the existing facilities and completely eliminate the plaintiff from the City of Iowa City, thereby causing the unemployment of a number of employees of the plaintiff, and, further, adversely affect electricity service in Iowa City and contiguous territory which the plaintiff has for some time supplied at progressively reduced rates; and will increase the cost to consumers of gas now supplied to Iowa City by plaintiff.

25. The Court erred in failing to find that no comprehensive program of public works has ever been prepared, and that the defendants have merely financed individual projects from time to time without regard to any comprehensive program, unless it be a program to reduce electricity rates and further public ownership of electricity facilities.

26. The Court erred in failing to find that the defendants, through control over the funds wherewith projects are financed, through their power of rescission of agreements and allotments, through their inspectors, and otherwise, required the construction of projects according to plans and specifications, construction policies, standards of materials, etc., imposed and fixed by the defendants.

27. The Court erred in failing to find that neither the defendants, the President of the United States, nor anyone else, ever made any findings of facts with respect to whether public works projects, and specifically the Iowa City project, came within the statutory authorization of Congress.

28. The Court erred in failing to find that the action of the President referred to in its finding of fact numbered 44 was taken with no evidence or information before him supporting such a determination, and that there will not be spent for work on the project of the City of Iowa City
233 25% of the loan or grant or aggregate thereof.

29. The Court erred in failing to find that funds borrowed by the United States are to be a source for the funds to be used to finance the electricity project of Iowa City.

30. The Court erred in failing to find that neither the defendants, nor anyone else, ever afforded to the plaintiff any opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing upon its rights with respect to the proposed loans and grants to the City of Iowa City.

31. The Court erred in failing to find the facts set forth in Assignments 15, 17, 18, 22 and 23 herein.

32. The Court erred in failing to find that the City of Iowa City took no action looking to the establishment of a municipally owned electricity plant until September 1, 1933; subsequent to the passage of the National Industrial Recovery Act and the offers of financial assistance made by defendants.

33. The Court erred in refusing to require the defendants to produce a memorandum from Henry Hunt, Chairman PWA Electric Power Board of Review to Harold L. Ickes, Administrator, a letter from said Administrator to the President, and a memorandum from the President to the Administrator, all subpoenaed by the plaintiff and by which plaintiff offered to prove that the conduct of the Electric Power Board of Review was in accordance with instructions of the Administrator and the President.

34. The Court erred in excluding testimony of the witness Rau by which the plaintiff offered to prove that the Electric Power Board of Review was governed by instructions from the Administrator and the President; that when an application for a loan and grant for a municipal electric project came before it, the Board considered first whether the project would reduce the rates paid for electric energy; that if it would not, the Board would disapprove the application; that private utilities were notified that if they lowered their rates below the proposed city rates the

234 project would be disapproved; that the city applicant was then given a further chance to reduce the proposed rates; and that applications were in many instances disapproved by the Board if the City could not meet the private utility reduced rates.

35. The Court erred in excluding testimony of the witnesses Vennard, Cary, Board, Kennedy and Byerly and documentary evidence by which plaintiffs offered to prove in specific instances the practices mentioned in Assignment 34, the final action taken in such cases by PWA, and admissions relevant thereto binding upon the defendants.

36. The Court erred in excluding telegraphic correspondence between the defendant Ickes and one F. T. Post, Plaintiffs' Exhibits for Identification Nos. 231 and 232, by which plaintiff sought to show an admission by the defendant that the PWA Electric Power Board of Review engaged in such negotiations as are set forth in Assignment 34 with his knowledge and approval.

37. The Court erred in ruling that the defendants need not produce in response to a subpoena the findings, recommendations or reports of the Electric Power Board of Review, the examining divisions of PWA, or any agency whatever of PWA, except the Special Board of Public Works, upon the projects here involved.

38. The Court erred in ruling that the defendants need not produce in response to subpoena the resolutions and other proceedings of the Special Board for Public Works, determining the principles to govern the allotment and expenditure of funds under Title II of the National Industrial Recovery Act.

39. The Court erred in excluding from evidence a book and certain magazine articles written by the defendant Ickes and certain passages therefrom (Plaintiffs' Exhibits for Identification Nos. 123, 141, 143) and certain documents and letters issued and written by PWA (Plaintiffs' Exhibits for identification Nos. 140, 217-230, inclusive, and 254) offered as admissions by the defendants of the truth of the facts stated by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of was to regulate and control the intrastate business of the plaintiff in generating and selling electric energy and
235 the rate charged by it, to establish yardsticks to measure charges for such energy sold in intrastate

commerce, to promote public ownership of electric generating and distributing systems,— all in accord with the so-called National Power Policy of the Federal Administration—; and that the defendants solicited and promoted the cooperation of political subdivisions of States in undertaking such projects, that the plaintiff and other privately owned utilities were denied a hearing with respect to such projects, and, by the control of the funds expended, that the defendants controlled the execution of such projects.

40. The Court erred in excluding from evidence certain publications of the National Power Policy Committee, addresses of the President, publications of the Tennessee Valley Authority, (Plaintiffs' Exhibits for identification Nos. 165-170, inclusive, 175-179, inclusive, 181, 183, 184), setting forth the so-called National Power Policy of the Administration referred to by the defendant Ickes, by which plaintiff sought to show that the purpose and effect of the acts of the defendants here complained of were as set forth in Assignment 39.

41. The Court erred in refusing to receive the testimony of the witnesses Lawrence, Field and Byerly, and the depositions of the witnesses Hiss, Harvey, Hoffman, Dysart and Rowell and documentary evidence (Plaintiffs' Exhibits for identification 21, 22, 268, 269, 270) by which plaintiff sought to prove that the offer of PWA to make a grant of from 30 to 45 per centum of the cost of construction of municipal electric projects and to lend the remainder of the cost to be repaid only out of the earnings of the proposed project had the effect of inducing certain of the municipalities here involved and municipalities generally to undertake such projects and that in elections held to vote upon such projects the proponents thereof represented said offer as a gift imposing no liability upon the recipients.

42. The Court erred in permitting the witness Ickes to testify as to action he took concerning correspondence by Mr. Hunt relating to an application of Hiram, Ohio,
236 and in receiving in evidence Defendants' Exhibit No. 11.

43. The Court erred in permitting the witness Ickes upon his redirect examination to answer the following question: "Your purpose in making these contracts for these competitive projects always was to increase employment quickly

as the statute required, and these other considerations were only incidental and collateral?''

44. The Court erred in refusing to require the production by the defendants, in response to plaintiffs' subpoenas duces tecum, of each of the following documents and in depriving plaintiff of the right to offer such documents in evidence:

(a) The report of State Engineer P. F. Hopkins to PWA on the application of Iowa City for a loan and grant.

(b) The report of the Engineering, Legal and Financial Divisions of PWA at Washington on said application.

(c) The application for allotment of funds under Emergency Relief Appropriation Act of 1935, NEC Form 3, addressed to the National Emergency Council with respect to the application of the City of Iowa City.

(d) The report of R. V. L. Wright on the remonstrance of the plaintiff in connection with the application to reinstate the original application of the City of Iowa City.

(e) All other memoranda or reports by the Iowa Field Office of PWA which the witness Hopkins made to the Administrator or the Department in connection with the Iowa City Project.

45. The Court erred in excluding each of the following portions of evidence offered by plaintiffs as follows:

(a) In sustaining defendants' objection to the question put to the witness R. B. MacDonald with respect to the history of rates in Iowa City from 1920 to date and the trend thereof, and in rejecting plaintiff's offer to prove by said witness that since 1926 the average cost of electricity in Iowa City has decreased 52%.

(b) In excluding plaintiff's evidence that the electric rates in effect in Iowa City are lower than the rates
237 in any city in Iowa of comparable population.

(c) In excluding plaintiff's Exhibits for identification Nos. 45, 54, 55, 58, 59 and 60 and each of them.

WALTER B. GUY
LOUIS H MANN
C D WATERMAN
WAYNE G COOK
Davenport, Iowa.
Attorneys for Plaintiff.

Service of the foregoing, by copy, acknowledged this 15th day of August 1936.

ALEXANDER HOLTZOFF
Attorney for Defendants.

---

238 *Designation of Record.*

Filed July 28 1936

* * * * * * * * * * *

The Clerk will please prepare the record on appeal in the above entitled cause and include therein the following:

1. Bill of Complaint with Exhibts thereto.
2. Memorandum that a preliminary injunction was entered January 16, 1936.
3. Order consolidating causes.
4. Answer to bill of complaint and Exhibit.
5. Amendment and Supplement to bill of complaint.
6. Memorandum Opinion of Chief Justice Wheat filed June 5, 1936.
7. Finding of Fact and Conclusions of Law filed June 26, 1936.
8. Final decree entered June 26, 1936, and plaintiff's notation of appeal therefrom.
9. Order continuing preliminary injunction.
10. Notation of deposit of $50.00 cash by plaintiff in lieu of cost undertaking on appeal.
11. Memoranda as to filing, submission and signing of Statement of Evidence.
12. Statement of Evidence.
13. Assignment of errors.
14. This designation.

WALTER B GUY
LOUIS H. MANN
239 C D WATERMAN
WAYNE G COOK
Attorneys for Appellant.

Service of the foregoing designation of record by copy acknowledged this 28 day of July 1936.

ALEXANDER HOLTZOFF
Attorneys for Defendant.

240 District Court of the United States
for the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 239, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 60245 in Equity, wherein Iowa City Light and Power Company, a corporation, is Plaintiff and Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, et al, are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of October, 1936.

C. E. STEWART,
Clerk.

(Seal)

Endorsed on Cover: No. 6865. Iowa City Light and Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator &c. et al. United States Court of Appeals for the District of Columbia Filed Oct 20 1936 Moncure Burke, Clerk

CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

Pat. 166

Supreme Court of the United States

OCTOBER TERM, 1937

85,796
D.C. D.C.

No. 84

ALABAMA POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

No. 85

ALABAMA POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

No. 86

IOWA CITY LIGHT AND POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 26, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

STATEMENT OF EVIDENCE

United States Court of Appeals for the District of Columbia

APRIL TERM, 1936.

No. 6579

TEXAS UTILITIES, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT.

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; ET AL.

No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF, JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; ET AL.

No. 6583

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

FILED AUGUST 10, 1936.

PRINTED AUGUST 29, 1936

United States Court of Appeals for the District of Columbia

APRIL TERM, 1936.

No. 6579

TEXAS UTILITIES, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT.

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; ET AL.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Statement of evidence	1	1
Testimony of James M. Barry	39	23

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

	Original	Print
Plaintiffs' Exhibit No. 1—Letters	50	31
Plaintiffs' Exhibit No. 2—Letters	93	61
Plaintiffs' Exhibit No. 3—Letters	100	66
Plaintiffs' Exhibit No. 4—Letters	111	71
Plaintiffs' Exhibit No. 5—Letters	117	74
Plaintiffs' Exhibit No. 6—Map of Alabama Power Co.'s system	130	83
Plaintiffs' Exhibit No. 7—Certificate issued by Ala. Public Service Com. to Ala. Power Co. for construction and operation of Mitchell Dam	131	82
Plaintiffs' Exhibit No. 8—Certificate (Martin Dam)	132	85
Plaintiffs' Exhibit No. 9—Certificate 4 dams across Tallapoosa river	132	85
Plaintiffs' Exhibit No. 10—Certificate hydroelectric power development on Coosa River near Wetumpka, Ala.	133	86
Testimony of Edgar W. Robinson	133	86
Testimony of Fernand Carl Weiss	135	87
Testimony of James A. Emery	137	89
Plaintiffs' Exhibit No. 11—Application of City of Decatur, Ala. to FEA of Public Works for a loan and grant of $285,000	141	92
Plaintiffs' Exhibit No. 12—Application of Guntersville, Ala. for $100,000	149	98
Plaintiffs' Exhibit No. 13—Application of Florence, Ala. for $486,122.48	154	102
Plaintiffs' Exhibit No. 14—Application of Hartselle, Ala. for $95,000	162	109
Plaintiffs' Exhibit No. 15—Application of Tuscumbia, Ala. for $127,244	169	115
Plaintiffs' Exhibit No. 16—Application of Sheffield, Ala. for $228,317.12	173	118
Plaintiffs' Exhibit No. 17—Application of Sheffield, Ala. for $200,000	177	121
Plaintiffs' Exhibit No. 18—Application of Tuscumbia, Ala. for $110,000	179	123
Testimony of Lee Glenn	186	128
Plaintiffs' Exhibit No. 19—Power contract between TVA and Florence, Ala.	190	131
Testimony of John P. Hodges	210	147
Testimony of Leon Livingston	210	148
Testimony of William J. Porter	211	149
Plaintiffs' Exhibit No. 20—Resolution of the City Council of Russellville, Alabama	214	150
Testimony of L. D. Taylor	218	154
Testimony of Claude D. Scruggs	220	154
Testimony of W. L. Farr	223	157
Testimony of Hoyt Greer	224	158
Testimony of Clyde Hendrix	225	159
Plaintiffs' Exhibit No. 21—Newspaper advertisement	228	160
Plaintiffs' Exhibit No. 22—Newspaper advertisement	230	163
Testimony of Edgar W. Robinson (recalled)	233	166

	Original	Print
Plaintiffs' Exhibit No. 24—Stipulation	235	167
Exhibit A—Ordinance No. 23 Plainview, Texas	238	170
Exhibit C—Contract between Plainview and Texas Utilities Co.	240	171
Exhibit D—Agreement between FEA and City of Plainview	257	186
Exhibit E—Agreement between FEA and City of Plainview	267	196
Exhibit F—Offer by FEA to City of Plainview	268	197
Plaintiffs' Exhibit No. 25-A, Application of Plainview for loan, $296,346.04	281	216
Testimony of Hubert L. Allen	300	232
Plaintiffs' Exhibit No. 26—Map of Plains Division of Texas Utility Co.	302	233
Plaintiffs' Exhibit No. 27—Tabulation of towns served by Company	304	237
Plaintiffs' Exhibit No. 28—Tabulation of Plains and Central Divisions for years 1934 and 1935	307	240
Testimony of George H. Carter	309	242
Plaintiffs' Exhibit No. 29—Telegram	310	243
Plaintiffs' Exhibit No. 30—Telegram	312	244
Plaintiffs' Exhibit No. 31—Telegram	313	245
Testimony of Otto M. Rau	319	248
Plaintiffs' Exhibit No. 32—Order No. 73 FEA	322	251
Plaintiffs' Exhibit No. 33—PWA Press Release No. 989	325	253
Plaintiffs' Exhibit No. 34—Order No. 141 FEA	331	258
Testimony of N. T. Veatch, Jr.	334	260
Plaintiffs' Exhibit No. 61—Estimate of project proposed by Plainview	335	261
Plaintiffs' Exhibit No. 62—Estimate of Probable Revenue of City Plant	337	262
Plaintiffs' Exhibit No. 63—Estimated annual expenses	338	263
Plaintiffs' Exhibit No. 64—Schedule	339	265
Plaintiffs' Exhibit No. 65—Statement of Estimated Annual Expenses	343	267
Plaintiffs' Exhibit No. 66—Table based on terms of contract, Bond and Interest	344	269
Plaintiffs' Exhibit No. 67—Labor Classification and Minimum Wage Scale	349	274
Testimony of Donald A. Henry	350	274
Plaintiffs' Exhibit No. 68—Relation of residential rates	351	276
Plaintiffs' Exhibit No. 69—Relation of commercial rates	352	278
Plaintiffs' Exhibit No. 70—Estimate with proper depreciation	355	281
Plaintiffs' Exhibit No. 71—Estimate with replacements and renewals	356	282
Plaintiffs' Exhibit No. 72—Table based on depreciation charge	357	283
Plaintiffs' Exhibit No. 73—Table based on replacements and renewals	358	284
Plaintiffs' Exhibit No. 75—Letter	360	285
Plaintiffs' Exhibit No. 76—Letter	360	286
Plaintiffs' Exhibit No. 77—Letter	361	286
Plaintiffs' Exhibit No. 78—Letter	362	287

	Original	Print
Plaintiffs' Exhibit No. 79—Telegram	363	288
Plaintiffs' Exhibit No. 80—Letter	363	288
Plaintiffs' Exhibit No. 81—Letter	364	289
Plaintiffs' Exhibit No. 82—Letter	365	290
Plaintiffs' Exhibit No. 83—Letter	367	292
Plaintiffs' Exhibit No. 84—Telegram	368	293
Testimony of R. B. MacDonald	370	293
Plaintiffs' Exhibits Nos. 35 to 57 inc.	384	302
Testimony of P. F. Hopkins	393	310
Testimony of Dan H. Wheeler	399	314
Testimony of Benjamin W. Thoron	405	318
Testimony of T. O. Kennedy	408	321
Plaintiffs' Exhibit No. 125—Letter Nov. 26, 1934, Hunt to Kennedy	408	321
Plaintiffs' Exhibit No. 127—Letter Aug. 27, 1934, Hunt to Kennedy	411	324
Plaintiffs' Exhibit No. 128—Letter Sept. 18, 1934, Hunt to Kennedy	412	325
Plaintiffs' Exhibit No. 129—Letter Oct. 2, 1934, Hunt to Kennedy	415	328
Plaintiffs' Exhibit No. 130—Letter Dec. 5, 1934, Hunt to Wagner	416	328
Testimony of D. E. Byerley	417	329
Plaintiffs' Exhibit No. 131—Letter Aug. 22, 1934 Hunt to Byerley	418	330
Plaintiffs' Exhibit No. 231—Telegram Nov. 7, 1934 Post to Ickes	426	337
Plaintiffs' Exhibit No. 232—Telegram Nov. 12, 1934 Ickes to Post	427	338
Plaintiffs' Exhibit No. 233—"Non-Federal Public Works that are deemed desirable" List 23	428	339
Plaintiffs' Exhibit No. 234.—"Non-Federal Public Works that are deemed desirable" List 42	430	340
Plaintiffs' Exhibit No. 235—"Non-Federal Public Works that are deemed desirable" List 53	431	341
Plaintiffs' Exhibit No. 236—"Non-Federal Public Works that are deemed desirable" List 69	432	342
Plaintiffs' Exhibit No. 237—"Non-Federal Public Works that are deemed desirable" List 135	433	343
Plaintiffs' Exhibit No. 238—"Non-Federal Public Works that are deemed desirable" List 120	434	344
Plaintiffs' Exhibit No. 239,—Letter	436	345
Plaintiffs' Exhibit No. 240—List No. 255-A	444	351
Plaintiffs' Exhibit No. 241—List No. 142	445	353
Plaintiffs' Exhibit No. 242—List No. 264	446	353
Plaintiffs' Exhibit No. 243—Letter Sept. 25, 1935 President to Ickes	447	355
Plaintiffs' Exhibit No. 244—Letter Oct. 28, 1935 President to Morgenthau	451	358
Plaintiffs' Exhibit No. 245—List No. 1014	453	359
Testimony of Richard L. Harkness	456	361

	Original	Print
Plaintiffs' Exhibit No. 132—Press Release #44	486	384
Plaintiffs' Exhibit No. 133—Executive Order dated Aug. 19, 1933	488	386
Plaintiffs' Exhibit No. 134—Press Release #201	490	387
Plaintiffs' Exhibit No. 135—Press Release #701	492	389
Plaintiffs' Exhibit No. 136—Press Release #1396	493	389
Plaintiffs' Exhibit No. 137—Press Release #1733	493	390
Plaintiffs' Exhibit No. 138—P. W. 18366	494	390
Plaintiffs' Exhibit No. 139—Press Release #868	496	392
Plaintiffs' Exhibit No. 140—P. W. 1073	497	392
Plaintiffs' Exhibit No. 141—Article by Ickes in "Today"	501	395
Plaintiffs' Exhibit No. 142—Press Release #709	501	396
Plaintiffs' Exhibit No. 143—Press Release #468	503	396
Plaintiffs' Exhibit No. 144—P. W. 38777	504	397
Plaintiffs' Exhibit No. 146—P. W. 39837	505	398
Plaintiffs' Exhibit No. 147—Order #43 of FEA	506	399
Plaintiffs' Exhibit No. 148—Order #43 (supplement)	506	399
Plaintiffs' Exhibit No. 150—Letter of Instruction #32 of FEA	506	399
Plaintiffs' Exhibit No. 152—Administrative Order #109	507	400
Plaintiffs' Exhibits Nos. 153a, 153b and 153c—forewords to Govt. manuals	508	400
Plaintiffs' Exhibit No. 154—pages 449 and 450 U. S. Govt. Manual	508	401
Plaintiffs' Exhibits Nos. 155a, 155b and 155c—pages 365 to 370 U. S. Govt. Manual for 1936	509	401
Plaintiffs' Exhibit No. 156—Press Release #1522	510	402
Plaintiffs' Exhibit No. 157 and 158—Press Release #1177	510	402
Plaintiffs' Exhibit No. 159—page 173 U. S. Govt. Manual for 1936	511	403
Plaintiffs' Exhibit No. 161—Press Release #248	511	403
Plaintiffs' Exhibit No. 162—Press Release #587	512	404
Plaintiffs' Exhibit No. 164—Press Release #912	513	405
Plaintiffs' Exhibit No. 165—Senate Document 110, 73rd Congress, 2d Sess.	514	405
Plaintiffs' Exhibit No. 166—compilation gathered for National Power Policy Committee	514	406
Plaintiffs' Exhibit No. 167—Text of speech of Roosevelt, Boulder Dam	524	413
Plaintiffs' Exhibit No. 168—Governor Roosevelt address at Milwaukee	524	413
Plaintiffs' Exhibit No. 169—Governor Roosevelt address at Los Angeles	525	414
Plaintiffs' Exhibit No. 170—President Roosevelt address at Bonneville Dam	526	414
Plaintiffs' Exhibit No. 175—TVA press release	528	416
Plaintiffs' Exhibit No. 176—TVA press release	531	418
Plaintiffs' Exhibit Nos. 177, 178, 179, 183 and 184—TVA press releases	531	418
Plaintiffs' Exhibit No. 181—TVA press release	532	419
Plaintiffs' Exhibit No. 194—Press release No. 33 of FEA	533	420

	Original	Print
Plaintiffs' Exhibit No. 195—Address of Ickes in Chicago....	533	420
Plaintiffs' Exhibit No. 196—Press Release No. 49	535	421
Plaintiffs' Exhibit No. 198—Press Release No. 113	535	422
Plaintiffs' Exhibit No. 197—Press Release No. 74	535	422
Plaintiffs' Exhibit No. 199—Press Release No. 116	536	422
Plaintiffs' Exhibit No. 200—Press Release No. 118	536	422
Plaintiffs' Exhibit No. 201—Press Release No. 135	536	423
Plaintiffs' Exhibit No. 203—Press Release No. 144	536	423
Plaintiffs' Exhibit No. 204—Press Release No. 152	537	424
Plaintiffs' Exhibit No. 205—Press Release No. 153	538	424
Plaintiffs' Exhibit No. 206—Press Release No. 209	538	424
Plaintiffs' Exhibit No. 207—Press Release No. 309	540	426
Plaintiffs' Exhibit No. 208—Press Release No. 380.....	540	426
Plaintiffs' Exhibit No. 209—Press Release No. 1165	540	426
Plaintiffs' Exhibit No. 211—Press Release No. 1192	542	428
Plaintiffs' Exhibit No. 212—Press Release No. 1419	543	428
Plaintiffs' Exhibit No. 213—Press Release No. 1564	543	428
Plaintiffs' Exhibit No. 214—Memo. to all PWA state engineers	544	428
Plaintiffs' Exhibit No. 215—Letter of instructions No. 52..	545	429
Plaintiffs' Exhibit No. 216—Staff Order No. 1	545	429
Plaintiffs' Exhibit No. 217—Press Release No. 52	547	430
Plaintiffs' Exhibit No. 218—Press Release No. 299	547	430
Plaintiffs' Exhibit No. 219—Press Release No. 452	547	430
Plaintiffs' Exhibit No. 220—Press Release No. 460	547	430
Plaintiffs' Exhibit Nos. 221, 223, 225, 229, 230, 224 and 226—Press Releases Nos. 462, 478, 558, 1818, 1833, 533 and 721	548	430&431
Plaintiffs' Exhibit Nos. 227 and 228—Press Releases Nos. 1046 and 1647	549	431&432
Plaintiffs' Exhibit No. 246—Stipulation agreement	557	437
Plaintiffs' Exhibit No. 247—Stipulation	559	438
Plaintiffs' Exhibit No. 248—Executive Order 6174	560	438
Plaintiffs' Exhibit No. 253—Executive Order of Sept. 21, 1935	568	444
Plaintiffs' Exhibit No. 255—Press Release No. 1864.....	572	447
Plaintiffs' Exhibit No. 256—pages 71-78 Govt. Manual 1934 ed.	572	447
Plaintiffs' Exhibit No. 257—revision of p. 71 Govt. Manual 1934 ed.	574	449
Plaintiffs' Exhibit No. 258—pages 449-454, Govt. Manual 1935 ed.	574	449
Plaintiffs' Exhibit No. 259—revision of pp. 449-454 Govt. Manual 1935	575	449
Plaintiffs' Exhibit No. 260—Letter from President to Sec. of Treas.	576	451
Plaintiffs' Exhibit No. 261—Senate Document 184, 74th Congress, 2d Sess.	577	450
Testimony of John H. Carlock	580	453
Testimony of R. A. Thompson	581	455
Plaintiffs' Exhibit No. 5—Letter of Harold L. Ickes.....	584	457

	Original	Print
Testimony of Leo M. Ewing	585	458
Testimony of Robert L. Sawyer	586	459
Testimony of Albert C. Laun	587	460
Plaintiffs' Exhibits Nos. 263, 264 and 265—Letters	591-A	463
Plaintiffs' Exhibit No. 266—Letter	592	466
Plaintiffs' Exhibit No. 267—Letter	594	468
Plaintiffs' Exhibit No. 268—Handbill	595	469
Plaintiffs' Exhibit No. 269—Newspaper advertisement	597	471
Plaintiffs' Exhibit No. 270—Handbill, Russellville, Ala.	598	472
Testimony of Thomas A. Martin	602	473
Defendants' Exhibit No. 1—TVA letter	606	475
Defendants' Exhibit No. 2	610	477
Testimony of Julian B. Adler	616	482
Testimony of Winfield Holbrook	619	484
Testimony of Herbert Dysart	622	486
Defendants' Exhibit No. 3—Ordinance No. 369	622-A	487
Defendants' Exhibit No. 5—Contract	623	489
Testimony of George F. Harley	627	492
Defendants' Exhibit No. 7—Summary of Operating Results, proposed Municipal Plant	628	493
Defendants' Exhibit No. 8—Estimate of Operating Results	630	495
Testimony of Harold L. Ickes	647	507
Defendants' Exhibit No. 11—Memorandum Jan. 30, 1935, Ickes to Hunt	652	511
Testimony of Herman Bailey Byer	691	542
Defendants' Exhibit No. 13—Employment in the durable and non-durable goods groups	694	545
Defendants' Exhibit No. 14—Chart, Pay Rolls in durable and non-durable groups	696	547
Defendants' Exhibit No. 15—Statistical table, computation of total amount expended on PWA projects for the purchase of materials	698	551
Defendants' Exhibit No. 16—Table	699	553
Defendants' Exhibit No. 17—Chart, Distribution of Employment on 6 Completed PWA Power Projects	702	555
Defendants' Exhibit No. 18—Chart	704	557
Defendants' Exhibit Nos. 19 to 22—Executive Orders of the President	713	565
Testimony of D. L. McDonald	718	571
Plaintiffs' Exhibit No. 271—Estimate of cost of construction of well, Plainview	719	572
Plaintiffs' Exhibit No. 272—Agreement to aid in financing construction	723	574
Plaintiffs' Exhibit No. 273—Application for Loan and Grant	723	575
Testimony of Lee Schneitter	725	576
Testimony of N. T. Veatch, Jr. (recalled)	729	579
Plaintiffs' Exhibit No. 274—Chart	731	581
Testimony of Donald A. Henry	735	585
Testimony of N. T. Veatch, Jr. (recalled)	740	588
Plaintiffs' Exhibit No. 275—Table	740	589
Stipulation	743	591

United States Court of Appeals for the District of Columbia

Endorsed: United States Court of Appeals for the
1 District of Columbia. Filed Aug 18 1936. Moncure Burke, Clerk.

Equity No. 58927
TEXAS UTILITIES COMPANY
v.
HAROLD L. ICKES, ET ALS

Equity No. 59071
ALABAMA POWER COMPANY
v.
HAROLD L. ICKES, ET ALS

Equity No. 59671
ALABAMA POWER COMPANY
v.
HAROLD L. ICKES, ET AL

Equity No. 60245
IOWA CITY LIGHT & POWER COMPANY
v.
HAROLD L. ICKES, ET ALS

Statement of Evidence

Be it remembered that at the trial of these consolidated causes before Chief Justice Wheat on April 20, 21, 22, 23, 24, May 11, 12, 13, 14, 15, 18, 19, 20, 22, 26, 1936, proceedings were had, evidence was taken, exceptions noted on behalf of the plaintiffs, and rulings were made by the Court as follows:

2 The following appearances were entered:

On behalf of the plaintiffs, Texas Utility Company and Alabama Power Company:

Dean G. Acheson
Newton D. Baker
Raymond T. Jackson
Howard C. Westwood

On behalf of the Texas Utility Company:
Charles C. Crenshaw
On behalf of the Alabama Power Company
Perry W. Turner
On behalf of the Iowa City Light and Power Company:
Walter D. Guy
Louis H. Mann
C. D. Waterman
Wayne G. Cook
On behalf of all the defendants:
Alexander Holtzoff, Special Assistant to the Attorney General
John W. Scott, Special Assistant to the Attorney General
Jerome N. Frank, Legal Counsel, Federal Emergency Administration of Public Works
William J. Dempsey, Assistant Legal Counsel, Federal Emergency Administration of Public Works
Robert E. Sher, Assistant Legal Counsel, Federal Emergency Administration of Public Works
Thomas A. Cowan, Attorney, Department of Justice.

3 Plaintiffs introduced Stipulation Agreement No. 1. which was received in evidence. This Stipulation Agreement was signed by counsel for the defendants and by counsel for the plaintiffs.

This agreement provides that the facts set forth therein are true and that the documents attached thereto as exhibits are true copies of the originals. It further provides that the right of the defendants to object to the facts and documents included therein on the ground of their irrelevancy, immateriality or incompetency is in no way prejudiced.

PARAGRAPH I. (of the Stipulation Agreement)

Paragraph I of the Stipulation Agreement states that the plaintiff, Alabama Power Company, is a corporation organized and existing under the laws of the State of Alabama, that it is a resident and citizen of the State of Alabama with its principal office and corporate domicile in the City of Attalla, Alabama. There is incorporated in this Paragraph I, and attached, document marked "Exhibits A" and entitled "Charters and Amendments of Alabama Power

Company." Among the documents included in "Exhibit A" which show the history and development of Alabama Power Company, are the following:

1.—The original charter or certificate of incorporation of Alabama Power Company which was recorded December 4, 1906. Under this charter, Alabama Power Company was empowered to construct and operate an electric generating and distributing system in seventeen towns and cities within the State of Alabama. This charter authorized Five Thousand Dollars ($5,000) of capital stock.

2.—A certificate of change or alteration of the original charter of Alabama Power Company, recorded April
4 22, 1907, whereby an addition to the charter was made stating that the corporation was organized for the specific purpose, among others, of developing water power on the Coosa River in the State of Alabama.

3.—A certificate of change or alteration of the amended original charter of Alabama Power Company, recorded October 31, 1908, whereby an addition to the charter was made stating that the corporation was organized for the specific purpose of improving navigation on the Coosa River, and of developing in connection therewith, the full water power thereof.

4.—A certificate of change, alteration, and amendment of the original amended charter of Alabama Power Company, recorded April 23, 1913, by which the scope of operation of Alabama Power Company was enlarged to carry on the general electric utility business in 112 towns and cities within the State of Alabama.

5.—The certificate of incorporation of the Alabama Electric Company, recorded October 16, 1908, whereby the capital stock was authorized to be $8,500 and the company was empowered to do an electric utility business in 21 towns and cities within th State of Alabama. The charter of the Wetumpka Power Company, recorded March 21, 1907, whereby the capital stock was authorized to be $6,000 and the company was authorized to do an electric utility business in 17 towns and cities within the State of Alabama, and, whereby the company was specifically authorized to construct a water power dam across the Coosa River at Lock 15. A certificate of change or alteration of the original charter of the Wetumpka Power Company, recorded November 3, 1908,

5 whereby the company was stated to be organized for the specific purpose of improving the navigation upon the Coosa River in Alabama through the construction of water power dams and to distribute the power therefrom. Charter of Alabama Electric Company recorded November 14, 1908, whereby the company was authorized to have a capital stock of $5,000, to carry on an electric utility business in 17 towns and cities within the State of Alabama, and, specifically authorized to improve navigation on the Coosa River in Alabama and to develop and distribute in connection therewith the full water power of the river. Certificate of change or alteration of the original charter of Alabama Electric Company, dated July 14, 1910, which changed the name of the company to Alabama Power and Electric Company. Certificate of incorporation of Alabama Power Development Company, recorded March 29, 1907, whereby the company was authorized to have a capital stock of $300,000 and to carry on an electric utility business in three towns and cities within the State of Alabama.

6.—The joint agreement whereby the Alabama Electric Company, Wetumpka Power Company, Alabama Power and Electric Company, and Alabama Power Development Company merged into and with the Alabama Power Company, under the name of Alabama Power Cohpany. This agreement, recorded July 29, 1913, provided that the capital stock of the consolidated corporation should be $20,000,000.

7.—A certificate of incorporation of the Huntsville Railway Light & Power Company recorded July 29, 1899, whereby the company was authorized to conduct an electric street railway system in and around Huntsville, Alabama.

6 The authorized capital stock being $100,000. The certificate of incorporation of the Huntsville Electric Light Company recorded July 29, 1899, whereby the company was authorized to do an electric utility business in the City of Huntsville, Alabama, and its suburbs. The authorized capital stock being $50,000. The articles of agreement between the Huntsville Railway Light & Power Company and the Huntsville Electric Light Company whereby the two corporations were consolidated under the name of the Huntsville Railway Light & Power Company.

8.—The certificate of incorporation of the Decatur Light, Power & Fuel, Company, recorded April 16, 1903, whereby

the company was authorized to carry on an electric utility business in and around Decatur, Alabama. The authorized capital stock being $100,000.

9.—The certificate of incorporation of the Etowah Light & Power Company, recorded April 27, 1905, whereby the company was authorized to carry on an electric utility business in and around Etowah County, Alabama. The authorized capital stock being $24,000.

10.—The certificate of incorporation of the Pell City Light & Power Company, recorded May 28, 1914, whereby the company was authorized to carry on an electric utility business within St. Clair County, Alabama. The capital stock being $3,000.

11.—The joint agreement dated March 1, 1915, whereby Huntsville Railway Light & Power Company, the Decatur Light, Power & Fuel Company, Etowah Light & Power Company and Pell City Light & Power Company merged into and with Alabama Power Company under the name of Alabama Power Company. Under this agreement
7 the consolidated corporation was authorized to have a capital stock of $50,000,000.

12.—Certificate of incorporation of Little River Power Company, recorded November 5, 1906, whereby the company was authorized to develop a water power project on the Little River in Alabama and to carry on an electric utility business in three towns and cities within the State of Alabama. The authorized capital stock being $100,000.

13.—The joint agreement whereby the Little River Power Company was merged into and with the Alabama Power Company, which agreement was dated December 31, 1917.

13(a).—Certificate of alteration and amendment of the certificate of incorporation of Alabama Power Company whereby the 400,000 shares authorized common stock of the company of par value of $100 each was changed to 400,000 shares of common stock without nominal or par value, and, the par value of the 90,000 shares authorized but unissued preferred stock of the company of the par value $100 per share was changed to 90,000 shares of preferred stock without nominal or par value, and, further, the conversion at the option of the holders of any of the 10,000 shares of authorized and issued preferred stock of the par value of

$100 per share to the preferred stock without nominal or par value was authorized.

14.—The certificate of increase of the capital stock of Alabama Power Company effective April 3, 1924, whereby the capital stock of the corporation was increased by 300,000 shares of preferred stock without par value, so that the authorized capital stock of the corporation became 800,000 shares of which 400,000 shares were common stock without par value and 400,000 shares preferred stock, of which
8 preferred stock, 10,000 shares were of the par value of $100 per share and 390,000 were without par value.

15.—Act of the General Assembly of the State of Alabama incorporating the Cherokee Development and Manufacturing Company, approved December 8, 1900, whereby the company was authorized to conduct an electric utility business, the capital stock of the corporation being authorized to be $50,000. Minutes of the Directors Meeting of the Cherokee Development and Manufacturing Company held May 27, 1907, whereby the name of the corporation was changed to the Birmingham, Montgomery & Gulf Power Com-
9 pany. The certificate of incorporation of the Sheffield Company, dated December 7, 1904, whereby the corporation was authorized to carry on an electric utility business within the cities of Sheffield, Florence and Tuscumbia, Alabama, and their vicinities. The authorized capital stock being $1,000,000.

16.—Joint agreement whereby the Birmingham, Montgomery & Gulf Power Company and the Sheffield Company merged into and with the Alabama Power Company under the name of Alabama Power Company, which agreement was recorded July 21, 1925. Under this agreement the capital stock of Alabama Power Company was increased to one million shares, of which 600,000 shares were common stock without par value and the balance, 400,000 shares, was preferred stock as described above. Under this agreement, Alabama Power Company was authorized to carry on an electric utility business in some 255 towns and cities within the State of Alabama, in addition to those towns and cities in which it already was authorized to conduct an electric utility business.

17.—Certificate of creation and authorization of an additional 200,000 shares of preferred stock of Alabama Power

Company without par value, effective June 7, 1926. This certificate increased the authorized capital stock of the Alabama Power Company to 1,200,000 shares.

18.—Act of General Assembly of Alabama, incorporating the Mobile Gas Light and Coke Company, approved February 23, 1866, whereby the company was given the privilege for 30 years of engaging in a gas lighting and heating utility business in the City of Mobile, Alabama. Act of General Assembly of Alabama, approved December 5, 1894, whereby the life of the Mobile Gas Light and Coke Company was extended for an additional 30 years. Declaration of incorporation of the Electric Lighting Company of Mobile, Alabama, dated June 13, 1884, whereby the company was authorized to conduct an electric utility business in Mobile, Alabama, and was authorized to have a capital stock of $10,000. Act of General Assembly of Alabama, approved February 16, 1893, whereby the duration of the Electric Lighting Company of Mobile was extended for the term of 20 years. Agreement of consolidation between the Electric Lighting Company of Mobile and the Mobile Gas Light and Coke Company, dated May 16, 1903, whereby the companies were consolidated under the name of the Electric Lighting Company of Mobile and authorized to issue $300,000 capital stock and $300,000 in 5% gold bonds. The certificate of incorporation of the Mobile Electric Company, recorded May 30, 1906, whereby the corporation was authorized to carry on an electric utility business in and around Mobile, Alabama. The capital stock being authorized at $3,000,000. The consolidating agreement between the Electric Lighting Company of Mobile and the Mobile Electric Company, dated May 31, 1906, whereby the Electric Lighting Company of Mobile merged into the Mobile Electric Company. Certificate of amendment of consolidation agreement between the Electric Lighting Company of Mobile and the Mobile Electric Company, dated August 26, 1910, whereby the capital stock of the consolidated company was increased to $7,500,000. Certificate of incorporation of Consumers Power Company, dated August 11, 1924, whereby the corporation was authorized to carry on an electric utility business in some 33 towns and cities within the State of Alabama. The total authorized capital stock of the company being $2,000.00. Amendment to the

certificate of incorporation of Consumers Power Company changing name of the corporation to Gulf Electric Company, dated October 31, 1924. Certificate of amendment to charter and increase of capital stock of Gulf Electric Company, dated November 20, 1924, whereby the company was authorized to increase its capital stock to 125,000 shares without nominal or par value. Joint agreement whereby the Mobile Electric Company merged into and with the Gulf Electric Company, under the name of Gulf Electric Company. This agreement was dated October 16, 1925, and authorized the consolidated company to issue capital stock of 450,000 shares without par value, and, to carry on an electric utility business in some 131 towns and cities within the State of Alabama. Certificate of incorporation of the Houston Power Company, recorded May 29, 1920, whereby the corporation was authorized to carry on an electric utility business in some 44 towns an cities within the State of Alabama. The authorized capital stock of the corporation being fixed at $100,000. Certificate of increase of capital stock of the Houston Power Company, dated May 28, 1923, whereby the authorized capital stock was increased to 300,000 shares, 100,000 of which was to be preferred stock of $100 par value each and 200,000 shares to be common stock of $100 par value each.

19.—Joint agreement between Alabama Power Company, Gulf Electric Company and Houston Power Company, whereby these companies were consolidated under the name of Alabama Power Company, which agreement was dated October 3, 1927. Under this agreement a new corporation by the name of Alabama Power Company was formed, the existence of which was perpetual. The capital stock of the new consolidated corporation was authorized at 3,206,753 shares without nominal or par value. The new consolidated corporation possessed all the rights, privileges, powers, immnuities, contracts, easements and franchises of Alabama Power Company, Gulf Electric Company and Houston Power Company.

20.—Certificate of increase of capital stock of Alabama Power Company effective April 18, 1928, whereby the authorized capital stock of the corporation was increased by 400,000 shares of $5.00 preferred stock without nominal or par value.

21.—Certificate of increase of capital stock of Alabama Power Company effective May 24, 1929, whereby the authorized capital stock of the corporation was increased by one million shares of common stock without nominal or par value.

22.—Certificate of increase of capital stock of Alabama Power Company effective May 3, 1930, whereby the authorized capital stock of the company was increased by 643,247 shares of common stock without nominal or par value, so that the authorized capital stock of the corporation was increased to 5,250,000 shares without nominal or par value.

23.—Certificate of decrease of capital stock of Alabama Power Company effective April 18, 1934, whereby the capital stock of the corporation was decreased by retiring 16,116 shares of preferred stock owned by the company so that the total authorized capital stock of the company now consists of 5,233,884 shares without nominal or par value.

13

No provision or restriction in the charter of Alabama Power Company in any way prohibits the company from obtaining a franchise of perpetual duration from any municipality.

PARAGRAPH II (of the Stipulation Agreement)

Paragraph II of the Stipulation agreement describes the defendants as follows:

Harold L. Ickes, the duly appointed, qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called P.W.A.), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201(a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act"; Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of P.W.A.; John Herrick, the duly appointed, qualified and acting Executive Assistant of P.W.A.; John J. Madigan, the duly appointed and qualified Acting Executive Officer of P.W.A.; F. E. Schnepfe, the duly appointed, qualified and acting Director of Projects Division of P.W.A.

Henry Morgenthau, Jr., the duly appointed, qualified and acting Secretary of the Treasury of the United States

and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian, the duly appointed, qualified, and acting Treasurer of the United States and, as such, is, under the supervision of the Secretary of the Treasury, in control of the payment by means of the public funds of the United States, of checks drawn upon him.

Guy Allen, the duly appointed, qualified and act-
14 ing Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United States, and the actual disbursement of the public funds of the United States.

PARAGRAPH III (of the Stipulation Agreement)

Paragraph III of the Stipulation Agreement states that Alabama Power Company is a taxpayer of the State of Alabama and of each of the cities of Decatur, Florence, Sheffield and of Tuscumbia, and of the cities of Guntersville, Hartselle, and Russellville, Alabama, and of the counties in which such cities are located, and with respect to its hereinafter mentioned properties and operations has paid to each of these cities, counties and to the State of Alabama, substantial amounts of taxes in the past and has paid or incurred the liability to pay such substantial taxes for the twelve months ended December 31, 1935.

PARAGRAPH IV (of the Stipulation Agreement)

Paragraph IV of the Stipulation Agreement states that Alabama Power Company is a taxpayer of the United States and with respect to its electric properties and operations in the State of Alabama including the properties and operations in each of the aforesaid cities, has paid to the United States many thousands of dollars in taxes in the past; and under the provisions of an Act of Congress, approved June 16, 1933 (48 Stat. 254, 256), for the period ended January 1, 1935, has paid, or incurred the liability to pay to the United States, excise taxes in the sum of $270,000, and has incurred the liability to pay the United States similar taxes for the current year.

15 PARAGRAPH V (of the Stipulation Agreement)

Paragraph V of the Stipulation Agreement states that Alabama Power Company now owns and operates electric public utility properties serving the public throughout the State of Alabama. These properties consist of hydroelectric and steam generating plants, of high tension transmission lines, of distribution lines, and of equipment and facilities, for use in generating, transmitting, distributing, metering and delivering electric energy. Among other communities served by the Alabama Power Company are the cities of Decatur, in the County of Morgan, Florence, in the County of Lauderdale, Sheffield and Tuscumbia in the County of Colbert, and the cities of Guntersville in the county of Marshall, Hartselle in the County of Morgan and Russellville in the County of Franklin.

PARAGRAPH VI (of the Stipulation Agreement)

Paragraph VI of the Stipulation Agreement states that Alabama Power Company's properties, including the properties serving the aforesaid cities and the individuals therein, are furnished with electric energy almost entirely by the following hydroelectric plants of the company:

1.—Lock 12, known as Lay Dam, on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat, 1288).

2.—Mitchell Dam, which was constructed on the Coosa River in Alabama under authority of a license issued by the Federal Power Commission which was authorized by the Federal Water Power Act (41 Stat. 1063). This license (Exhibit B-1) is attached to this Stipulation Agreement and incorporated by reference into this paragraph thereof.

16 The license recites that the Federal Power Commission found that this project of Alabama Power Company's was best adapted to a comprehensive scheme of development and utilization of the Coosa River for the purposes of navigation, of water power development and of other beneficial public uses; and, that the project was desirable and justified in the public interest for the purpose of improving and developing the Coosa River for the use and benefit of interstate and foreign commerce. The license further states that it was issued to Alabama Power Company

for the purpose of constructing, operating and maintaining for a period of fifty years from the date thereof (June 27, 1921) the project works therein described, necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power. The following conditions to the license were contained therein:

(a)—The cost of inspection by the United States during the period of construction of the project was to be borne by the licensee.

(b)—The operation and construction of navigation facilities constructed in connection with the project should at all times be controlled by rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam, as should be made from time to time by the Secretary of War.

(c)—The licensee should construct and install such appliances as necessary for furnishing power for the operation of navigation facilities, including lights and signals and should furnish free of cost to the United States power
17 for the operation of such navigation facilities.

(d)—Licensee would be required to provide a navigation channel between Mitchell Dam and Dam No. 12 at least 200 feet wide, in event a project for navigation on this section of the river was adopted.

(e)—Licensee should convey to the United States free of cost such of its lands and its rights of way and such right of passage through its dams or other structures and permit such control of pools as may be required to complete navigation on this section of the river in event of the adoption of the project for navigation of this section of the river.

(f)—The licensee was required to pay annual charges to the United States, based upon power generating capacity of the project, for reimbursing the United States for the cost of the administration of the Federal Water Power Act.

3.—Jordan Dam, likewise on the Coosa River in Alabama, was likewise constructed under a license from the Federal Power Commission. This license (Exhibit B-2) stated that the project was necessary and convenient for the development and improvement of navigation and for the development, transmission and utilization of power. It further stated that the Commission found that this project was best

adapted to a comprehensive scheme of improvement and utilization of this waterway for the purpose of navigation, of water power development and of other beneficial uses; and, further, that the project was desirable and justified in the public interest, for the purpose of improving and developing the Coosa River for the benefit of interstate and foreign commerce. The license was granted subject
18 to the following terms and conditions:

(a)—The license was issued for a period of 50 years from the date thereof (November 7, 1925).

(b)—For navigation purposes the licensee was required to install and maintain a standard gauge in the reservoir and another in the tailwater immediately below the power house, and, was also required to install and maintain a standard gauging station in the Alabama River (the stream into which the Coosa drains). The licensee was required to reimburse the United States for costs incurred in the annual supervision of these gauges.

(c)—The operation of navigation facilities constructed in connection with the project was at all times to be controlled by rules and regulations in the interest of navigation including the control of the level of the pool caused by such project, as made from time to time by the Secretary of War. These rules and regulations included the maintenance and operation by the licensee at its own expense of such lights and signals as directed by the Secretary of War and such fishways as prescribed by the Secretary of Commerce.

(d)—The licensee was to construct and install such appliances as were necessary for furnishing power for the operation of navigation facilities, and was to furnish free of cost to the United States the power for the operation of these navigation facilities.

(e)—The operations of the licensee so far as they affected the use, storage and discharge from storage of the water of the Coosa River, was at all times to be controlled
19 by rules and regulations of the Secretary of War prescribed in the interest of Navigation, and, in accord with such rules and regulations of the Federal Power Commission prescribed in the interest of flood control.

(f)—The licensee should convey to the United States free of cost such of its lands and rights of way and such right of passage through its dam or other structures and permit such

control of pools as may be required to complete such navigation facilities whenever the United States desired to construct navigation facilities at this project.

(g)—The licensee should make provision in this project for the future construction of a lock by the United States, and should excavate the upper approach channel to an elevation 270 feet above mean sea level before impounding the water behind this dam.

(h)—The licensee should pay to the United States annual charges for the purpose of reimbursing the United States for the costs of the administration of the Act, such annual charges to be based on the power capacity of the project.

4.—Martin Dam, on the Tallapoosa River in Alabama, which dam was also constructed under a license from the Federal Power Commission. This license (Exhibit B-3) stated that this dam was necessary and convenient for the development and improvement of navigation, and, was best adapted to a comprehensive scheme of improvement and utilization of this river for the purpose of navigation, for water power development and of other beneficial public uses. The license was issued to Alabama Power Company subject to the following conditions:

(a)—The license was issued for a period of 50 years from the date thereof (June 9, 1923).

(b)—For navigation purposes the licensee was required to install and maintain certain gauges for determining the stage and flow of the stream, and to reimburse the United States for the annual expenses incurred in the supervision of these gauges.

(c)—The licensee should pay to the United States annual charges for the purpose of reimbursing the United States for the cost of the administration of the Federal Power Act, these charges to be based on the power capacity of the project.

Paragraph VI of the Stipulation Agreement further states that in compliance with these conditions contained in the Federal Power Commission licenses, and in compliance with the Act of Congress (35 Stat. 1288) under which Lock 12 known as Lay Dam was constructed, the Alabama Power Company expended large sums of money in preparing certain portions of the Coosa River bed for future navigation. Alabama Power Company in compliance with these condi-

tions built piers in the streams to form navigation guides to the locks, and, in addition, constructed such dams so that locks could be erected therein as and when the United States might determine to complete the navigation from one pool level to the next. The completion of such projects on the Coosa River created contiguous slack water pools, 57 miles in length, and when such pools shall be connected by locks placed in the aforementioned dams, such pools will afford a 9-foot depth of navigation on such river for a distance of 49 miles.

21 PARAGRAPH VII (of the Stipulation Agreement)

Paragraph VII of the Stipulation Agreement states that the Alabama Power Company has held franchises in each of the Cities of Florence, Sheffield and Tuscumbia, Alabama. These franchises may be summarized as follows:

The Florence franchise granted to the Alabama Power Company's predecessor, and its successors and assigns, the right to construct and operate an electric light plant with the necessary poles and wires over the streets of Florence for the purpose of furnishing electricity to the citizens of Florence for the period of 30 years. By the terms of the franchise the City of Florence agreed to pay $1500. yearly to the plaintiff's predecessor and assigns, in consideration for which the predecessor and its assigns undertook to erect and maintain in good order an electricity plant furnishing efficient light service, to place poles under the City's directions, to repair sidewalks disturbed by the placing of poles, to furnish to the City at a price fixed a sufficient number of incandescent and arc lamps for the lighting of streets and public buildings to take up the sum of $1500. and to keep such lamps burning every night, to extend the arc light system as required by the City, to charge for electricity service to consumers no more than rates specified in the franchise beginning at the rate of 16c per kilowatt hour, and to run wires from lines to the consumers' buildings at the expense of the grantee of the franchise. The franchise was dated March 13, 1903.

The Sheffield franchise is in substantially the same terms as the Florence franchise, giving the right to operate the electric light plant for a period of 30 years. It was granted in October, 1902.

The Tuscumbia franchise is in substantially the same terms, giving the right to operate the electric light plant for 30 years. It was granted in October, 1902.

21a The foregoing three franchises were validly assigned to the Alabama Power Company in 1925. By their terms the franchises or rights so granted by the Cities of Sheffield and Tuscumbia expired in October, 1932, and the franchises or rights granted by the City of Florence expired in March, 1933. Since the expiration of the periods defined therein, the Alabama Power Company has continued to operate an electricity system in each of the said Cities and to sell to such Cities electricity for lighting the streets and public buildings and other public places therein except that the City of Sheffield has for some time been lighting its own streets.

The City of Hartselle, Alabama, on August 10, 1915, granted to the Alabama Power Company, its successors and assigns, the right, without stated duration, and in consideration of the benefits that would accrue to the City, to construct, maintain and operate an electricity plant and system for all purposes whatsoever over the streets and public places of the City, together with all appurtenances necessary to the transmission of electricity to the inhabitants and corporations both within and beyond the limits of the City. The poles and other appliances shall be constructed so as not to interfere unreasonably with the proper use of the streets and public places of the City and shall be maintained in good condition. Whenever any opening or alteration is made in any of the streets or public places of the City in installing or operating the poles and other appliances, the work shall be completed within a reasonable time and the streets and public places shall be restored to good condition. The City shall be held harmless from all liability or damage resulting from negligence in the construction or operation of the poles and other appliances. If the supply of electricity shall be interrupted by some cause beyond the control of the Alabama Power Company or its assigns the electricity service shall be restored within a reasonable time.

Meters for measuring current shall be installed, and
21b shall be maintained by the company or its assigns free of charge. The company or its assigns has the right to make a prescribed minimum monthly charge of

$1.00 per meter, whether or not electricity is used. The company or its assigns shall have the right to make a prescribed charge for electricity of 12c per kilowatt hour. The company is not required to furnish electricity to anyone until satisfied of his financial responsibility and may require reasonable security. All bills for electricity in excess of the monthly minimum charge shall be subject to a prescribed discount if paid within 10 days.

The City of Guntersville, Alabama, on July 5, 1915, granted to the Alabama Power Company, its successors and assigns in consideration of the benefits accruing to the said city, the right, without stated duration, to construct and operate an electricity plant and system for all purposes whatsoever over the streets and public places of the City together with all poles and appurtenances desirable to the transmission and furnishing through said City of electricity to the said City, its inhabitants and corporations both within and beyond its limits for all purposes for which electricity may be used. The poles and appurtenances shall be constructed so as not to interfere unreasonably with the streets and public places of the City and shall be maintained in good condition. Whenever the company shall make any opening or alteration in any of the streets or public places of the City in installing or operating poles or appliances the work shall be completed within a reasonable time and such streets and public places shall be restored to good condition under the supervision of city officials. The City shall be held harmless from all liability or damage resulting from negligence in the construction or operation of poles or other appliances. In the event the supply of electricity shall be interrupted by some cause beyond the control of the Alabama Power Company or its assigns the service shall be restored within a reasonable time. Meters for measuring current shall
21c be installed and shall be furnished and maintained free of charge. The Company or its assigns has the right to make a prescribed minimum monthly charge of $1.00 per meter, whether or not electricity is used. The company and its assigns shall have the right to make a charge of 12c per kilowatt hour. The company is not required to furnish electricity to anyone until satisfied of his financial responsibility and may require reasonable security. All bills for electricity in excess of the monthly mini-

mum shall be subject to prescribed discount if paid within 10 days.

The City of Russellville, Alabama, on June 28, 1923, granted to the Alabama Power Company, its successors and assigns, in consideration of the benefits accruing to the City, the right, without stated duration, to construct and operate in the City an electricity plant and system. The grantee is given the right to construct and operate in the City a system of poles and other appurtenances desirable to the transmission of electricity for all purposes whatsoever over the streets and public places of the City, together with the right to construct and operate such poles and other appurtenances desirable to the transmission through said City and the furnishing to said City and to the inhabitants and corporations both within and beyond the City's limits of electricity for all purposes and likewise for the purpose of extending lines and furnishing current beyond the City's limits. The poles and other appurtenances shall be constructed so as not to interfere unreasonably with the streets and public places of the City and shall be maintained in good condition. Whenever the Company shall make any opening or alteration in any of the streets or public places of the City in installing or operating the poles or other appliances the work shall be completed within a reasonable time and the streets or other public places shall be restored to good condition. The City shall be held harmless from all liability or damage resulting from negligence in the construction or operation of
21d poles and other appliances. The grantee may from time to time make and enforce reasonable regulations for the use of electricity. In the event the supply of electricity shall be interrupted by some cause beyond the grantee's control the service shall be restored within a reasonable time. The grantee shall install and maintain free of charge meters for measuring current and shall have the right to make a minimum monthly charge of $1.00 per meter whether or not electricity is used. All charges for electricity shall be no more than a prescribed schedule, beginning with a rate of 10c per kilowatt hour for the first 30 kilowatt hours and a progressively lower rate for increased consumption. The company is not required to furnish electricity to anyone until satisfied of his financial responsibility and may require reasonable security. All bills shall be subject to a prescribed

discount if paid within 10 days, subject to the prescribed monthly minimum. The prescribed maximum rates shall be subject to alteration and revision by the Alabama Public Service Commission.

The City of Decatur on October 16, 1919, granted to the Alabama Power Company, its successors and assigns, the right, for a term of 30 years, to construct and operate in the said City an electricity plant and system. The grantee is further given the right for 30 years to construct and operate in the City a system of poles and other appurtenances desirable to the transmission of electricity for all purposes whatsoever over the streets and other public places of the City, together with the right to construct and operate such poles and other appurtenances desirable to the transmission through said City and furnishing to said City and to the inhabitants and corporations both within and beyond the City's limits electric energy for all purposes whatsoever, and for the purposes of extending lines and furnishing electricity beyond the City's limits. The poles and other appurtenances shall be constructed so as not to interfere un-
21e reasonably with the proper use of the streets and public places of the City and shall be maintained in good condition. Whenever the company makes any opening or alteration in any of the streets or public places of the City in installing or operating the poles or appliances the work shall be completed within a reasonable time and the streets and public places shall be restored to good condition. The City shall be held harmless from liability and damage resulting from the construction and operation of the poles and other appliances, and the City, in the event of a claim against it for such damage, will not pay such claim before suit brought nor will it consent to judgment. The grantee may from time to time make and enforce reasonable regulations for the use of electricity. In the event the supply of electricity shall be interrupted by some cause beyond the grantee's control, the service shall be restored within a reasonable time. The grantee shall install and maintain meters for measuring current free of charge. The grantee shall have the right to make a monthly charge of $1.00 per meter whether or not electricity is used. The grantee shall have the right to make charges for electricity at a prescribed schedule beginning with 10c per kilowatt hour for the first

30 kilowatt hours and a progressively lower rate for increased consumption. The grantee is not required to furnish electricity to anyone until satisfied of his financial responsibility and may require reasonable security. All bills for electricity shall be subject to a prescribed discount if paid within 10 days provided that they shall not be below the prescribed monthly minimum. The rates shall at all times be subject to regulation and revision by the Alabama Public Service Commission. The grantee must connect its hydro-electric system with its distribution system in the City. The grantee shall maintain a local business office at a convenient place in the City whereat the public may transact such business as it may desire at reasonable hours during the day.

The Alabama Power Company is the only person,
22 firm or corporation engaged in supplying electric light and power to the cities of Hartselle, [illegible]ntersville, and Russellville, and, the cities of Decatur, Florence, Sheffield, and Tuscumbia and their inhabitants, and is the only person, firm and corporation now having facilities to distribute electric light and power to such cities and their inhabitants; except that the city of Sheffield has for sometime been lighting its own streets and selling power to some retail customers.

Rates for sale of electric power and energy by Alabama Power Company in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission.

PARAGRAPH VIII (of the Stipulation Agreement).

Paragraph VIII of the Stipulation Agreement states that contracts between the Federal Emergency Administration of Public Works, for the United States of America, and the cities of Florence, Sheffield, and Tuscumbia, Alabama, were entered into on December 28, 1934. A contract between the Federal Emergency Administration of Public Works, for the United States, and the city of Decatur, Alabama, was entered into on December 6, 1934. These four contracts are attached to the Stipulation Agreement as Exhibits F-1; part 2-a (Florence), S-1; part 1-a (Sheffield), T-1; part 1-a (Tuscumbia), D-1; part 3-b (Decatur), and are incorpor-
23 ated in the Stipulation Agreement. These four con-

tracts were substantially the same in their terms, conditions, and provisions. Each provided among other things, for the following:

1.—Subject to the terms and conditions of the contract the United States Government agreed to aid the city in financing the construction of an electric distribution system, as described in the city's application, by loan and grant of federal funds not exceeding the following amounts:—

Florence	$436,000.
Sheffield	230,000
Tuscumbia	130,000
Decatur	350,000

30 per cent of the cost of labor and materials employed on these projects was to be a grant of federal funds by the Government to each city.

2.—The security taken by the Government for these loans was described as follows: "Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof." These obligations were 4 per cent serial bonds of each city.

3.—The following condition precedent to the Government's obligation under each contract was stated: "Tennessee Valley Authority Contract. If the Borrower shall not execute a valid contract, satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority
will supply electrical energy to the Borrower, and will
24 permit the borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds. *Rate and Bond Ordinances.* If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the ordinance providing for the authorization, issuance and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator."

Paragraph VIII of the Stipulation Agreement also stated that each of the above four contracts was amended by an agreement between the Federal Emergency Administration of Public Works, for the United States, and each of the four cities. These amendatory agreements, which are attached to the stipulation agreement as Exhibits F-1; part 3 (Florence), S-1; part 3-a (Sheffield), T-2 (Tuscumbia), D-2 (Decatur), were entered into on the following dates:

Florence	April 15, 1935
Sheffield	" 6, 1935
Tuscumbia	March 26, 1935
Decatur	May 27, 1935

and, the only change or amendment to the original contracts effected by these amendatory agreements was the deletion from the original contracts of the clause stated above providing that the Government would be under no obligation under the contract if the cities did not execute the above described contract with the Tennessee Valley Authority.

Paragraph VIII of the Stipulation Agreement further states that each of the above four contracts, as amended, was terminated by a written agreement between the Federal Emergency Administration of of Public Works and each of the cities of Florence, Sheffield, Tuscumbia, and Decatur. Each of these four terminating agreements which are attached to the Stipulation Agreement as Exhibits F-2 (Florence), S-2 (Sheffield), T-1; part 4-a (Tuscumbia), D-1; part 6 (Decatur), was dated December 2, 1935, and, each agreement stated as the reason for the termination that it was to the mutual advantage of the city and the Government to terminate the loan and grant agreement. On December 4, 1935, new loan and grant agreements were entered into between the Federal Emergency Administration of Public Works, for the United States, and each of the cities of Florence, Sheffield, Tuscumbia, and Decatur, Alabama. The agreements were each attached to the Stipulation Agreement and are as set out in Exhibits A, B, C and D of the defendants' answer to the third amended bill of complaint in No. 59071 which may be treated as adopted and made a part of this Statement.

Paragraph VIII of the Stipulation Agreement states that contracts beween the Federal Emergency Administration of

Public Works, for the United States of America, and the cities of Hartselle, Russellville and Guntersville, Alabama, were entered into on December 4, 1935. These three contracts are attached to the Stipulation Agreement as Exhibits H-1; part 2-a, and part 2-b (Hartselle), R-1; part 1-a and part 1-b (Russellville), and G-1; part 2-a and part 2-b (Guntersville) and are incorporated in the Stipulation Agreement. They likewise appear as Exhibits A, B and C of the defendants' answer to the second amended bill of complaint in No. 59671 which may be treated as adopted and made a part of this Statement.

There is attached to Paragraph VIII of the Stipulation Agreement as Exhibit X a document compiled, published and distributed by the Federal Emergency Administration of Public Works, entitled "Contract Record Memo-
39 randum." This document contains suggested forms and instructions to be followed by applicants in approving and executing loan and grant agreements with the Federal Emergency Administration of Public Works for the United States.

Whereupon

James M. Barry

was called as a witness on behalf of the plaintiffs, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

I am vice-president and general manager of the Alabama Power Company. I was trained as an engineer, being graduated from the University of California, class of 1910, in electrical engineering. I have had experience on the Pacific Coast with the Pacific Gas and Electric Company and other utility companies. I came to Alabama at the close of
40 1918 as one of the division managers of Alabama Power Company and was stationed at Anniston, Alabama. Since that time I have worked in various capacities for the company and in 1926, I was made vice-president of the company. In 1927 I was made vice-president in charge of operations, and in 1932, I was made vice-president and general manager. Alabama Power Company is engaged in the distribution and sale to the public of electricity in the State of Alabama. Alabama Power Company operates a

generating, transmitting and distributing system in the State. The lines of the company pass through 66 of the 67 counties in the State of Alabama and we operate in 65 of the 67 counties of the State of Alabama. The Alabama Power Company furnishes light as well as power and does a general business of industrial, commercial and residential service in the State of Alabama. The electric power business of Alabama Power Company includes all these classifications of power. The Alabama Power Company has 6 large hydroelectric plants, 3 of them are located on the Coosa River and 3 on the Tallapoosa River. The plants have a total installed capacity of 414,500 kilowatts. The plants on the Coosa River are what we term "run-of-river" plants, that is, they do not have appreciable storage in the upper reaches of the river. The plants on the Tallapoosa River make use of storage, the storage being at the uppermost plant of the three, Martin Dam, and the water is utilized through Martin Dam and through the two plants lying immediately below it. The hydro system makes for an ideal integrated operation in that in the summer time, when the flows on the Coosa River are low, we can utilize the storage on the Tallapoosa and thus make up deficiencies on the Coosa. The three plants on the Coosa River are known as Lay Dam, Mitchell Dam and Jordan Dam. The plants on the Tallapoosa River are known as Martin Dam, Upper Tallassee, and Thurlow. Mitchell Dam, Jordan Dam, and
41 Martin Dam, are operated under license from the Federal Power Commission, and, Lay Dam, which was completed in 1914, was constructed under special Act of Congress. Lay Dam is sometimes referred to as Lock 12. With respect to Mitchell Dam, the license was issued designating the place as Duncan's Riffle. With respect to Jordan Dam, the license was issued designating that as Lock 18. With respect to Martin Dam, the license designated it as Cherokee Bluffs.

We are an Alabama company and our business is done wholly within the State but we have interconnections with companies in adjoining States. We send electricity into Georgia and a small quantity into Tennessee and we send some into Mississippi and some into the Panhandle of West Florida. None of our lines go beyond the State boundaries

and deliveries are nominally at the State lines and our properties extend only up to State lines. In some cases the meters are located some distance on the Alabama side of the State line. Our territorial maximum kilo-watt hour demand, that is, our demand in the State of Alabama for 1935, was 294,000 kilowatts. Defining transmission lines as those with voltages of 154,000 volts, 110,000 volts, 44,000 volts, and 22,000 volts, and I might say that the amount of 22,000 volts is relatively small in the total, we have 3,575 miles of transmission lines in the State of Alabama. Distribution lines are defined as those below 22,000 volts and the voltages are 11,000; 6,600; 4,000 and 2,300. We have a total of 3,931 miles of such distribution lines. A distribution line, as it is commonly known in the electric business, is one that serves the domestic and commercial consumer. Among utility operating men there is a distinction, usually of about 22,000 volts, between transmission lines and distribution lines. Below 22,000 volts is usually considered distribution voltage, and, considering distribution systems in cities and towns, we usually find that 11,000 volts is the top voltage,
42 and, probably the most common voltage is 4,000. I am, of course, referring to the primary voltages. Those are not the voltages at which the customers use the electricity for there is another transformation below that to the usable voltages of 440, 220, or 110, whatever the local condition happens to require. The Alabama Power Company serves directly 515 communities within the State of Alabama, of which 212 are incorporated. Among the incorporated cities which Alabama Power Company serves are the cities of Florence, Sheffield, Tuscumbia, Decatur, Hartselle, Guntersville and Russellville.

The Alabama Power Company serves directly, as of the end of 1935, 114,760 customers, and, indirectly serves through resale to other utility corporations or municipalities, an estimated number of 80,000, making a total of about 195,000 customers served directly and indirectly. The number of employees of the Alabama Power Company as of December 31, 1935, was 2,186.

"By Mr. Turner:

"Q. Mr. Barry, it is admitted in the stipulation that the company pays taxes to the State, the county, the city, and the Federal Government. I will ask you to state the amount

of such taxes for each such governmental subdivision—only the counties in which the towns involved here were situated? A. Let me understand your question, Mr. Turner. Are you asking about the total taxes of the company now, or are you asking about the taxes applicable to these seven towns and the counties in which they are situated?

"Q. Let me get at it in this way: How much tax does the company pay to the State of Alabama? A. The company accrued from operating expenses last year for taxes $2,427,-188, and we paid out something over $2,500,000.

"Mr. Frank. If the Court pease, we are not ob-
43 jecting to this evidence being taken, but, by remaining silent, we do not want to be precluded from objecting on the ground that it is irrelevant, after the evidence is admitted, on the ground that it does not show any standing to sue, and is irrelevant. We have no objection to its being taken, but we want to reserve our right to move to strike it out. May we do that?

"The Court. I think it may be understood that you object to this line of testimony, and I overrule your objection, and you have an exception, your objection being based upon the ground of relevancy, is that it?

"Mr. Frank. On the ground that it is irrelevant and immaterial.

"The Court. I think we had better take the testimony.

"Mr. Frank. I would suggest that it would be better to take it.

"The Court. Then, at the end of the case, I can better determine it.

"Mr. Frank. But we do not want to waive the objection."

We paid to the State of Alabama in taxes for 1934, $918,-391.51, and in 1935, $973,728.11. The State, county and school district taxes paid within the counties in which these seven cities are located, for 1934 were $37,920.80, and for 1935, $36,982.29. The amount of city taxes paid to each of the seven cities involved in this suit, are as follows: For the city of Decatur in 1934, $6,082.46; for 1935, $9,058.72, these figures including ad valorem taxes and city licenses. For the city of Florence in 1934, $5,319.20; for 1935, $5,218.70. For the city of Sheffield for 1934, $5,350.60; for 1935, $5,091.08. For the city of Tuscumbia, $1,912.95 for 1934 and 1935, $1,943.63. For the city of Guntersville, for 1934, $1,468.22;

for 1935, $1,254.68. For the city of Hartselle for 1934,
$579.49; for 1935, $605.56. For the city of Russell-
44 ville for 1934, $1,350.24; for 1935, $1,240.03. The company has paid the 3 percent electric tax to the Federal Government since the adoption of that Act, and, the total amount paid from October 1, 1933, to January 31, 1936, was $335,414.87.

The total gross earnings of the company for the year 1934 were $15,407,516.00, and for 1935, $16,794,483.00. Of this sum, the gross electric revenue was $14,995,030.00, and for 1935,$16,364,857.00. The seven cities involved in this suit are a part of the integrated system of Alabama Power Company and they enjoy their service off the same transmission network that the other cities which we serve receive their service from. The largest portion of our electricity comes from our hydro electric plants, I should say 80 percent of it last year and the four plants under license from the Federal Power Commission are the largest of the six hydro-electric plants.

The total installed generating capacity of Alabama Power Company is 624,292 kilowatts. That of course is a different thing from the prime capacity of the system operating as an integrated system. Operating independently of any other companies with which it is connected, the Alabama Power Company has a prime capacity in the driest year on record, with the largest steam plant that it has on its system out of service, of 393,000 kilowatts. We have several large modern steam plants to supplement the hydro-plants whether in emergencies or during low water periods. The total capacity of the steam plants which we own is 156,000 kilowatts, and of that 130,000 kilowatts is located in the coal fields right near the load center of the system. These are very efficient and modern plants. In addition to the owned steam plants, we have leased steam plants with an available capacity
amounting to 53,800 kilowatts. All these figures are
45 for the close of 1935, and "KW" is an abbreviation for kilowatts. The maximum territorial demand in Alabama is 294,000 KW. The Alabama Power Company acquired the properties in Florence, Sheffield and Tuscumbia during the early part of 1925 from the local operating company there which secured its power from a local steam plant. Our records indicate that we started operating there

on January 2, 1925. Shortly after we purchased the local property, we shut down the local steam plant and connected the local system to our transmission network, did a great deal of rehabilitation work, and reduced rates. At Russellville we acquired the local system from the municipality which was operating it. We started operation there on November 1, 1923. It was a very badly rundown system and secured its power from a small local steam plant. My record indicates that we connected it to our system immediately and practically constructed a new distribution system in the city. In Decatur we acquired the property in 1915 from a predecessor company. Decatur secured its power supply from a local steam plant and we operated that steam plant until 1920 when a transmission line was completed to Decatur, at which time the Decatur distribution system was connected to our transmission system. At Hartselle, the property was acquired by us in August 1915, from a private individual. It was a very small system and was operated as a local system, receiving its power supply from a small steam plant that was run in connection with a planing mill. We operated the local plant until 1916 when we connected the Hartselle distribution system to the Decatur distribution system and thereafter operated both as a unit. At Guntersville, we built a system new in November 1915 and the first power we had there was a small steam plant. We added to it in 1917 and connected it to our transmission system in 1924. The total number of customers of the company in December, 1935, for each of these seven
46 cities was: Decatur, 3,500; Florence, 2,475; Sheffield, 1,376; Tuscumbia, 952; Guntersville, 591; Hartselle, 608; Russellville, 622, a total of 10,124. The revenues for the twelve months ending December 1935 from all customers in each of these seven cities, including revenues from residential, commercial, street lighting; industrial power, etc., was: For Decatur, $284,911.31; for Florence, $190,789.19; for Sheffield, $100,623.69; for Tuscumbia, $47,728.29; for Guntersville, $64,777.35; for Hartselle, $281,056.46; for Russellville, $70,135.82; a total of $787,022.11.

The rates and service of Alabama Power Company are regulated by the Alabama Public Service Commission. In all seven towns we have progressively reduced the rates

ever since our entry into the local situation, so that the rates now are very much lower than when we took over the properties. Those rates were put into effect by order of the Alabama Public Service Commission. We have made a study of the comparison of rates existing in the seven cities at the time of the acquisition of these properties by Alabama Power Company and the rates now in effect. We have made a particular study of the residential rates in somewhat the same form that the Federal Power Commission has used in its national survey, and I have here a tabulation giving the monthly bill for 25 KW hours, 100 KW hours, and 250 KW hours, before acquisition by the Alabama Power Company and then progressively through the years down to 1936.

"(By Mr. Turner)

"Q. What is the percentage of change, increase, or decrease in rates?

"Mr. Scott. To which we object, your Honor. It is wholly incompetent, irrelevant and immaterial to determine the issues here. We are not here on any matter involving the rate structure. * * *

* * * * * * * * *

"The Court. I will sustain the objection. I do not think that it is material.

"Mr. Turner. We will reserve an exception if your Honor please.

"The Court. Yes.

"Mr. Turner. And we offer to show by this witness that rates have been materially reduced over the years.

* * * * * * * * *

"(By Mr. Turner):

"Q. Mr. Barry, what is the policy of the Commission with reference to the uniformity of rates in Alabama throughout the territory it serves?

"Mr. Scott. To which we object. It is absolutely incompetent, irrelevant and immaterial.

"The Court. I sustain the objection to that.

"Mr. Turner. We reserve an exception, if your Honor please, and offer to prove that the Alabama Public Service Commission has estabished a policy of making the rates of

this company uniform throughout the State for domestic, commercial and industrial service. We reserve an exception.

"The Court. Very well."

Alabama Power Company has agreed to sell a portion of its transmission system to the Tennessee Valley Authority and the cities of Florence, Sheffield, Tuscumbia, Russellville, Decatur and Hartselle are served by that portion of its transmission system. The only city that is not served by that portion of the company's transmission system is the town of Guntersville. That portion of Alabama Power Company's transmission system is located in northwestern Alabama. Albama Power Company had negotiations with the cities of Florence, Sheffield, Tuscumbia, Russellville, Decatur and Hartselle for the sale to those cities of its distribution systems located therein. The negotiations with Sheffield began in June 1933. The negotiations with Tuscumbia began shortly thereafter. The negotiations
48 in Florence took place about November 1933, and the negotiations in Decatur, Russellville and Hartselle took place in February 1934.

"Q. Did the company make an offer to those towns to sell the properties to them?

"Mr. Scott. To which we object. It is wholly incompetent, irrelevant and immaterial to the issues.

"The Court. How is that relevant? If it is, I want to know it.

"Mr. Turner. If your Honor please, at the time these offers were made, the towns had application pending before the PWA to secure these loans in three of the towns, Florence, Sheffield and Tuscumbia, the franchise of the company had expired. They were there under an indeterminate franchise. We sought to minimize our damages by an agreement to sell these properties to these towns. We made that offer to them and we want to show by this witness that they rejected our offer solely because they admitted that the price at which we had offered the property was reasonable, but in view of the 30 percent grant by the Government, they could not buy; they would not buy."

(Then followed a lengthy colloquy between counsel)

"Mr. Frank. • • • • I would like to have the testimony go in subject to objection and argue the points at the proper time.

"The Court. I can determine the legal effect later. Sometimes in equity cases considerable time is necessarily devoted to exclude some evidence at the start and then I find, after the case is pretty nearly completed, that there is a relevancy that I could not see at the time. I will admit it now."

Whereupon it was agreed in open court on the record that the correspondence between Alabama Power Company and the six towns with reference to the purchase of the properties would be admitted in evidence subject to the
49 defendants' right of objection and subject to their right to supplement letters if any are omitted in the correspondence.

Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the Cities of Sheffield and Tuscumbia with reference to the negotiations between the cities and the company for the sale of the company's distribution systems in Tuscumbia and Sheffield to the cities. This folder of correspondence was offered as Plaintiffs' Exhibit No. 1 and was received in evidence. Plaintiffs' Exhibit No. 1 contains the following letters:

50

Commission
City of Sheffield
Alabama

June 9, 1933.

Alabama Power Company,
Power Building,
Birmingham, Alabama.

Gentlemen:— Re: City of Sheffield

I have been requested, by resolution adopted by the Commissioner of Sheffield on June 6th, 1933, to request of you the following information:

The City Commission would be pleased to have your price, based on the present replacement value, of the electric light and power system now owned by your Company

in the corporate limits of the City of Sheffield, exclusive of the following:

Street Car barn and appurtenances.
Transmission line to Florence.
Power Building in Sheffield.
Interest in pumping station in Sheffield.

If additional information is needed as to the exact information we desire, I will gladly forward the same to you. Thanking you, I am

Yours truly,

W. H. RICHESON
President City Commission
Sheffield, Alabama.

51 June 10, 1933.

Mr. W. H. Richeson,
President City Commission,
Sheffield, Alabama.

Dear Mr. Richeson:

I have your letter of June 9 asking for a price on our electric distribution system in the City of Sheffield.

We should like to discuss this matter with your Commission, but at the present time we are very busy preparing for a rate hearing before the Public Service Commission on June 20. If satisfactory to you, I should like to visit Sheffield shortly after the completion of the hearing and go into this matter with you.

Will you kindly let me know if this arrangement is satisfactory.

Yours very truly,

J. M. BARRY
Vice Prés. & Gen. Mgr.

JMB:h
b/c-Mr. J. T. Jackson

52

Commission
City of Sheffield
Alabama

June, 12, 1933.

Mr. J. M. Barry, Vice-President & Gen. Manager,
Alabama Power Company,
Birmingham, Ala.

Dear Mr. Barry:

We have your letter of the 10th in which you state that you would like to visit Sheffield and discuss with our Commission the matter referred to in our letter of the 9th, but because of the rate hearing on the 20th you will be busy until that time.

We will be glad to see you as soon after the 20th as you may find it convenient. Will thank you to advise us a couple of days in advance of your coming that we may arrange a meeting to suit your convenience.

Yours very truly,

W. H. RICHESON
President—City Commission.

53

Commission
City of Sheffield
Alabama

August 31, 1933.

Alabama Power Company,
Birmingham, Alabama.

Gentlemen: Re: City of Sheffield-Alabama.

The City of Sheffield has ascertained that it will be impossible to borrow money from the Federal Emergency Administration of Public Works for the purpose of buying existing electric systems and that they will lend money only for the purpose of erecting new systems.

The City of Sheffield wishes to enter into negotiations with your company for the exchange of its proposed 4% twenty year revenue bonds for your system now in use in the City. These bonds will be of the same mature and secured by the same security as those the city proposes to pledge to the Federal Emergency Administration of Public Works for the payment of money borrowed for erection

of a new system in Sheffield. These bonds to be revenue bonds and secured by pledge of revenue and mortgage on system.

We would appreciate hearing from you in regard to the above matter. Thanking you, we are,

Yours truly,

Board of Commissioners,
Sheffield, Alabama
By W. H. RICHESON
President.

54

City of Tuscumbia
Tuscumbia, Alabama

Sept., 5, 1933.

Mr. Thomas Martin, Pres.,
Alabama Power Co.,
Birmingham, Alabama.

Dear Sir:

The City of Tuscumbia has made application to the Government for a loan with which to construct an Electrical Distributing System. The City proposes to pay the Government with 4%, 20 year electrical income bonds at par.

Please advise at the very earliest date whether you will accept such bonds in payment for your local electrical distributing system. The bonds would be secured by mortgage on the distributing system and would not be a general obligation of the City.

It has been rumored that the City cannot borrow money with which to purchase your local system.

If you are willing to accept such bonds, please arrange for immediate negotiations for the purchase of your system.

The City is obliged to begin construction on a new system within a month from the date of the grant of the Government loan. Negotiations for the purchase of your system must therefore be concluded by that time.

Your prompt advice will be appreciated.

Yours very truly,

W. L. FARR
Mayor.

55

Alabama Power Company
Birmingham, Alabama

Thomas W. Martin
President

September 6, 1933.

Hon. W. L. Farr, Mayor,
City of Tuscumbia,
Tuscumbia, Alabama.

Dear Mr. Farr:

We beg to acknowledge your letter of the 5th of September concerning the purchase by the City of Tuscumbia of our distribution system. We are giving consideration to the matter in accordance with your suggestion, and will be glad to discuss it with you in the very near future.

I am,

Yours very truly,

THOMAS W. MARTIN,
President.

56

City of Tuscumbia
Tuscumbia, Alabama

September 11, 1933.

Alabama Power Company,
Birmingham, Ala.,

Gentlemen:

We have had no definite reply to our letter of September 5th and we are asking if your are interested in selling us your electrical distributing system in the City of Tuscumbia, taking in payment therefor, 20 year 4% bonds secured by a mortgage on the property.

Unless we have advice from you not later than September 14th naming a price that is satisfactory to us, to be paid in 20 year 4% bonds secured by the property, said bonds to be issued under an indenture that will permit the borrowing of funds from the Government to improve and extend the system, we will understand that you are not interested in selling the system to us and will proceed accordingly.

Yours very truly,

W. L. FARR
Mayor.

57 Alabama Power Company
Birmingham, Alabama

Thomas W. Martin,
President

September 12, 1933.

Mr. W. L. Farr, Mayor,
City of Tuscumbia,
Tuscumbia, Alabama.

Dear Mr. Farr:

Referring to your letters of the 5th and 11th of September:

We beg to advise that we will sell to the City of Tuscumbia our electrical distribution system, taking in payment therefor revenue bonds secured by a mortgage on the property. A representative of our company is prepared to meet you at your convenience to agree upon the items and price of the property you wish to purchase, and the terms and conditions of the mortgage and bonds.

We await your further suggestions.

Yours very truly,

THOMAS W. MARTIN,
President.

58 Alabama Power Company
Birmingham, Alabama

Thomas W. Martin
President

September 12, 1933.

Mr. W. H. Richeson, President,
Board of Commissioners,
Sheffield, Alabama.

Dear Mr. Richeson:

Referring to your letter of the 31st of August:

We beg to advise that we will sell to the City of Sheffield our electrical distribution system, taking in payment therefor revenue bonds secured by a mortgage on the property. A representative of our company is prepared to meet you at your convenience to agree upon the items and price of

the property you wish to purchase, and the terms and conditions of the mortgage and bonds.

We await your further suggestions.

Yours very truly,
THOMAS W. MARTIN,
President.

TWM-c
Blind copies to:
Mr. Yates
Mr. Barry
Mr. Turner
Mr. Stanley.

59 September 28, 1933

Messrs. Lyde & Adler,
Woodward Building,
Birmingham, Alabama. *Attention Mr. Julian E. Adler*

Gentlemen:

We are handing you herewith an inventory of our electrical distribution systems serving the cities of Sheffield and Tuscumbia and environs.

At our meeting in Sheffield with yourselves and City Officials of Sheffield and Tuscumbia, on Monday the 18th instant, you advised it was your desire to purchase only a part of our system. The inventory we are submitting herewith was made under direction of J. E. Sirrine & Company of Greenville, S. C., and gives in detail all items of distribution system property. Those items noted with an asterisk are the items which we understand from our meeting at Sheffield, were not to be included in the purchase by the cities. The other items on the inventory are the ones which we understood at this meeting you desired to include in the purchase.

It was the writer's understanding at the Sheffield meeting that you gentlemen would price this inventory on behalf of the two cities; we would likewise price copy of the inventory, and when the pricing was completed our engineers would meet with you as engineers for the cities and discuss the pricing, endeavoring to agree upon the price of as many items of property to be conveyed to the cities as it were possible for us to agree upon. Such items as could not be agreed upon would remain for discussion with the respective City Officials.

In your letter of September 23rd to our Mr. E. W. Robinson you have indicated a desire on the part of the cities to also include in the inventory the office buildings, warehouses, etc. We are bringing our inventories up to date on these latter items and will present them to you not later than Monday, October 2, 1933.

60 Please advise us the date and hour suitable to you gentlemen to have a meeting in Birmingham to discuss each others pricing of the inventories and we shall be very glad to conform ourselves thereto.

Very truly yours,
ALABAMA POWER COMPANY,
By W. M. STANLEY
Vice President

CC- Mr. W. L. Farr, Mayor
Tuscumbia, Alabama.
Mr. W. H. Richeson, Pres. Brd. of Comm.,
Sheffield, Alabama.
BC- Mr. Lee Andrews
Mr. T. W. Martin
Mr. J. M. Barry
Mr. E. W. Robinson

61 Lide & Adler

Consulting and Constructing Engineers
Woodward Building
Birmingham, Alabama
Electrical, Mechanical and Civil Engineers
Industrial Architects

Martin J. Lide
Julian E. Adler

September 28th, 1933.

Mr. W. M. Stanley, Vice President,
Alabama Power Company,
City.

Dear Sir:—

This will acknowledge your letter of this date together with copies of inventories of your Sheffield and Tuscumbia properties which were delivered by messenger at noon.

We had expected that you would have named a price for your properties; this was our understanding following the Sheffield meeting of the 18th. Regardless, however, of any

misunderstanding following that meeting it would appear that this point was cleared up by our letter of the 22nd which was written following receipt of your Mr. Robinson's letter of the 20th to confirm our phone conversation following receipt of that letter. We quote from our letter as follows:—

"At the time of the conference with Mr. Stanley and others in Sheffield we understood that your inventory had been prepared. We stated at that time that we were prepared to consider a price from you, that we had our ideas of the value to the Cities of the usable portion of your system, and that we were prepared to recommend the purchase thereof if the price named by you was satisfactory." "We understand that you will pass this information on to Mr. Stanley."

We will be in your office at 9 A. M. next Monday,
62 October 2nd as agreed; we understand that you will be prepared at that time to name a price on your properties, and also your attorneys will be present and be prepared to agree upon the general terms of the proposed bonds.

Yours very truly,
LIDE & ADLER,
By JULIAN E. ADLER

Copies to
MR. RICHESON
MR. FARR

63 October 5, 1933.

City Commission,
Sheffield, Alabama.

Gentlemen:

I enclose copy of proposal for sale of our distribution system in Sheffield, the original of which was delivered to Messrs. Lide & Adler this morning in accordance with our agreement of October 2.

Yours very truly,
J. M. BARRY
Vice President.

JMB:h
Encl.
b/c- Mr. E. A. Yates
Mr. T. W. Martin
Mr. P. W. Turner
Mr. J. L. Andrews

64 October 5, 1933.

Mayor and Board of Aldermen,
Tuscumbia, Alabama.

Gentlemen:

I enclose copy of proposal for sale of our distribution system in Tuscumbia, the original of which was delivered to Messrs. Lide and Adler this morning in accordance with our agreement of October 2.

Yours very truly,

J. M. BARRY
Vice President.

JMB:h
Encl.
b/c- Mr. E. A. Yates
Mr. T. W. Martin
Mr. P. W. Turner
Mr. J. L. Andrews

65 Alabama Power Company

Birmingham, Alabama.

October 5, 1933.

Mayor and Board of Aldermen,
Tuscumbia, Alabama.

Attention Messrs. Lide & Adler, Engineers.

Gentlemen:

In accordance with your request, we are submitting the following proposal for the sale of our distribution system in Tuscumbia. Our willingness to sell the local distribution system grows out of the fact that our franchise has expired.

Properties included:

Tuscumbia primary, secondary, and street lighting distribution system complete; building and equipment of Tuscumbia city substation; but no land or right of way; all as agreed upon in detail between your Mr. Lide and our Mr. Robinson, and noted on our respective copies of the appraisal of our properties in Tuscumbia, dated September

30, 1933, made under the direction of J. E. Sirrine & Company.

Price: $104,000.00

In payment for the properties we will accept at par your revenue bonds bearing interest at four per cent, maturing in series in such amounts and at such times as may be mutually agreeable and secured by a first mortgage on the properties sold you. The mortgage will contain proper provision with respect to revenue bonds, adequate provisions for depreciation and maintenance, a provision for a thirty-year franchise in case of foreclosure, and such other provisions common to utility mortgages for the protection of the mortgagee. Details, covenants, conditions, etc., of the mortgage, together with the legality of the bonds, are to be subject to the approval of our counsel. The trustee in such mortgage shall be a corporation authorized to
66 act and mutually acceptable to the parties.

One of the problems with which we are faced is the release of the properties from the lien of our respective mortgages, to which consideration must be given in working out the details of the proposed mortgage.

We consider the price offered fair and reasonable for the adequate and well-maintained properties which we propose to sell. The distribution system has been almost completely rebuilt since we purchased the properties in 1925, as is clearly brought out by the fact that our actual cost of net additions and betterments to the properties which we propose to sell since their purchase in 1925 exceeds $88,000.

You will observe that the betterments made during our ownership of the property are almost equal to the price at which we have offered the property. In other words, we are disposing of a going property the greater part of which is practically new.

We are convinced that under present conditions of rising prices of commodities and labor a system as good as ours, exclusive of those parts of our system which you do not wish to purchase, could not be constructed for less than $116,000; particularly in view of the maximum hours and minimum wage scale now prescribed for both skilled and unskilled labor and the uncertainty of the cost of money.

We have not included in our price any element of sev-

erance damages and going concern value, which would be proper matters for consideration under the law in disposing of a going property. There is, of course, a real value to the City in taking over a going property, fully developed, with complete meter records, maps, load studies, etc.

As the Board is aware, we have freely made available to your engineers our distribution maps and other records, in order to furnish every possible assistance to you and them in reaching a conclusion in this matter. In order to get a disinterested viewpoint, we engaged the ser-
67 vices of J. E. Sirrine & Company to make an appraisal of the property which you are considering purchasing. A copy of this appraisal has been furnished your engineers. The reputation of Sirrine & Company throughout the South for accuracy and fairness is sufficiently well-known to require no comment from us.

In conclusion, we express our appreciation of the discussions with you and indulge the hope that the City will purchase our system at a definite and stated sum, rather than proceed with the construction of a new system, the cost of which is indefinite and unknown.

Yours very truly,

ALABAMA POWER COMPANY

By J. M. BARRY
Vice President

68 Alabama Power Company

Birmingham, Alabama

October 5, 1933.

City Commission,
Sheffield, Alabama.

Attention Messrs. Lide & Adler, Engineers

Gentlemen:

In accordance with your request, we are submitting the following proposal for the sale of our distribution system in Sheffield. Our willingness to sell the local distribution system grows out of the fact that our franchise has expired.

Properties included:

Sheffield primary, secondary, and street lighting system complete; II KV substations at King Manufacturing Company and Southern Cotton Oil Company; major portion of equipment at Sheffield city substation; part of 11 KV tap to King Manufacturing Company; part of 11 KV line on Sixth Street, Sheffield; 6.6 KV distribution line in Nyhoff subdivisions; but no land or right of way; all as agreed upon in detail between your Mr. Lide and our Mr. Robinson, and noted on our respective copies of the appraisal of our properties in Sheffield, dated September 30, 1933, made under the direction of J. E. Sirrine & Company.

Price: $164,000.00

In payment for the properties we will accept at par your revenue bonds bearing interest at four per cent, maturing in series in such amounts and at such times as may be mutually agreeable and secured by a first mortgage on the properties sold you. The mortgage will contain proper provision with respect to revenue bonds, adequate provisions for depreciation and maintenance, a provision for a thirty-year franchise in case of foreclosure, and such other provisions common to utility mortgages for the protection of the mortgagee. Details, covenants, conditions, etc., of the mortgage, together with the legality of the bonds,
69 are to be subject to the approval of our counsel. The trustee in such mortgage shall be a corporation authorized to act and mutually acceptable to the parties.

One of the problems with which we are faced is the release of the properties from the lien of our respective mortgages to which consideration must be given in working out the details of the proposed mortgage.

We consider the price offered fair and reasonable for the adequate and well-maintained properties which we propose to sell. The distribution system has been almost completely rebuilt since we purchased the properties in 1925, as is clearly brought out by the fact that our actual cost of net additions and betterments to the properties which we propose to sell since their purchase in 1925, exceeds $150,000.

You will observe that the betterments made during our

ownership of the property are almost equal to the price at which we have offered the property. In other words, we are disposing of a going property that is practically new.

We are convinced that under present conditions of rising prices of commodities and labor a system as good as ours, exclusive of those parts of our system which you do not wish to purchase, could not be constructed for less than $200,000, particularly in view of the maximum hours and minimum wage scale now prescribed for both skilled and unskilled labor and the uncertainty of the cost of money.

We have not included in our price any element of severance damages and going concern value, which would be proper matters for consideration under the law in disposing of a going property. There is, of course, a real value to the City in taking over a going property, fully developed, with complete meter records, maps, load studies, etc.

As the Board is aware, we have freely made available to your engineers our distribution maps and other records, in order to furnish every possible assistance to you and them in reaching a conclusion in this matter. In order to get a distinterested viewpoint, we engaged the services of J. E. Sirrine & Company to make an appraisal of the property which you are considering purchasing. A copy of this appraisal has been furnished your engineers. The reputation of Sirrine & Company throughout the South for accuracy and fairness is sufficiently well-known to require no comment from us.

70

In conclusion, we express our appreciation of the discussions with you and indulge the hope that the City will purchase our system at a definite and stated sum rather than proceed with the construction of a new system, the cost of which is indefinite and unknown.

Yours very truly,

ALABAMA POWER COMPANY
By J. M. BARRY
Vice President

71

Lide & Adler

Consulting and Constructing Engineers
Woodward Building
Birmingham, Alabama

October 5th, 1933.

Alabama Power Company,
City.

Gentlemen:

The undersigned, acting under authority vested by the City Commission of Sheffield, and by the Mayor and Council of Tuscumbia, hereby acknowledge for said cities the receipt of your tenders to sell your distribution systems in the respective cities, said tenders being signed by your Vice President, Mr. J. M. Barry, and dated October 5, 1933.

In behalf of said Cities, and subject to formal ratification by their governing bodies, we hereby respectfully decline the acceptance of your proposals and beg to submit for your consideration the following counter proposals:

1. The Cities are not in accord with the estimates of construction costs or the estimates of depreciation submitted in the appraisals of Messrs. J. E. Sirrine & Company. They are, however, willing to accept these appraisals as tentative bases of negotiation in an effort to be fair and reasonable.

2. The Cities feel that since you have no franchise they will be entitled to a thirty percent grant from the Government on a loan with which to construct a new system. They also feel that the depreciated existing systems cannot be worth more than the cost of new systems, which with the Government grant, cannot exceed seventy percent of their construction costs. They are, therefore, unwilling to pay for the usable portion of your distribution systems as set forth in your tenders, and as concurred in by the undersigned, more than seventy (70%) percent of their depreciated value as appraised by Messrs. J. E. Sirrine &
72 Co. They will, however, pay that much.

3. The Cities are unwilling to pledge under a mortgage lien a thirty year franchise. In event of foreclosure on account of default your position would revert to its present status by your taking possession of the property and operating it without a franchise as at present.

4. The Cities would not be willing to give you a closed mortgage on the properties since this would probably preclude the possibility of securing Federal Public Works funds for necessary extensions of the distributing systems. The Cities, however, would, subject to concurrence by the Public Works Administration, pay you with part of an authorized issue of 4%-20 year serial bonds, said issue being sufficient in amount to pay at par for the distribution systems purchased from you, and also to pay the cost of the immediately proposed additions and betterments necessary to adequately supplement the systems and to connect them with a source of power. The terms of the mortgage indenture must also provide means to finance future additions and betterments by the issuance of bonds under the same conditions as are stipulated in the indenture of the Alabama Power Company's 1967 Series of 4½% bonds.

5. The Cities shall be given the right, following the consummation and ratification of formal contracts by the parties hereto, embodying the provisions of this tender, and such other provisions as may be mutualy agreed upon, to take possession of the distributing systems and facilities as at present constituted and in active use. As a consideration for the use of the unpurchased parts thereof, the Cities will pay a monthly rental of 2/3rds of one percent of their appraised value for such period as may be required to complete the necessary extensions and additions to the municipal systems—said period to be not longer than one year from the final ratification of formal contracts by the
73 parties hereto; such ratifications shall not be unnecessarily or unreasonably delayed by any of the parties hereto.

6. The Cities request that a final answer be given by you, accepting or rejecting in toto the provisions of this tender, to the undersigned not later than 12 o'clock noon, Monday October 9th, 1933.

In behalf of the Cities and ourselves, we wish to express appreciation of the uniform courtesy and cooperation extended by the officers and members of your organization throughout these negotiations, and of the evident spirit of fair play and good will manifested by them. We further express the hope that these proposals may be acceptable to

your company, and that contracts fair to all parties may be speedily entered into.

Yours very truly,

LIDE & ADLER
By MARTIN J. LIDE

Copy to Mr. W. H. Richeson,
President, City Commission,
Sheffield, Ala.,

Copy to Mr. W. L. Farr, Mayor,
Tuscumbia, Ala.,

74 October 9, 1933.

Messrs. Lide and Adler, Engineers,
Woodward Building
Birmingham, Alabama.

Gentlemen:

We have your letter of October 5 relative to purchase of this company's electric distribution systems in Tuscumbia and Sheffield, and note that you require our acceptance or rejection of your terms and conditions without change by noon of October 9.

During the past thirty days an appraisal of these properties was made by J. E. Sirrine & Company, one of the outstanding engineering firms in the South and the proposals submitted by us were much lower than their appraisals less depreciation.

We gave serious thought and due consideration to the circumstances surrounding our position and to the facts mentioned in your letter and feel that we have made the respective cities fair and reasonable offers and are quite sure that in the end they will save money in accepting them.

We have adequate systems in these cities which we feel have been reasonably priced to you, the purchase of which would not result in a destruction of property and which would be of an immediate and continuing advantage to the cities. Feeling so, we cannot use a hypothetical net payment of 70% as a basis for selling these properties payable in 4% bonds at par. The outstanding bonds of both cities are now selling at a heavy discount; some of Tuscumbia's issues being in default of principal and interest.

You state the cities are unwilling to pledge under a mortgage lien a thirty-year franchise, and in event of foreclosure on account of default our position would revert to its present status of operating without a franchise. The failure of the mortgage to carry a franchise in case of foreclosure will force the purchaser at the foreclosure sale to scrap the properties unless a franchise could then be
75 obtained, which in effect would destroy the security. It is only reasonable to expect that if money is obtained from other sources by a loan secured by a mortgage on the system a franchise will be required for the protection of the lender.

If the cities desire to retain a position so as to be able to re-acquire the properties in case of a foreclosure, we are willing to incorporate a condition in the franchise whereby the cities will have an option at five-year intervals of purchasing the respective systems at an appraised value. Of course, if there is no default and foreclosure of the purchase money mortgage, the franchises would never become operative. Inasmuch as we are willing to accept the 4% bonds of these cities at par we cannot but feel that our position is fair and reasonable.

As to the form and conditions of the mortgage securing the purchase money you must appreciate that it is impossible to reach any definite arrangement until the plan and desires of the cities are more definitely known. In making our proposal, however, we purposely made these provisions as general as possible. We are entirely willing to cooperate with the cities in making the mortgage as flexible as reasonably possible as to the amount of each series of bonds and times of payment thereof and as to the refunding provisions. We are willing to defer the first payment on principal for two years after delivery of the property to the cities. We are also willing to incorporate in the mortgage provisions which would permit a foreclosure only after six months' default of an interest payment or of a principal payment, or upon failure for six months after written notice to comply with other provisions of the mortgage. Our counsel so expressed such willingness to your counsel at a conference held in the city of Sheffield on September 18. We, of course, cannot agree to accept a mortgage on the property which we are selling securing additional bonds

without knowing the amount of the bonds desired or
76 without some idea as to the nature of the bonds and the security desired by the Public Works Administration.

It is also a very unusual condition to require that we shall deliver possession of our properties upon the signing of the contract and before the details of the sale have been completed. This is such a radical departure from accepted business methods, we do not see how we could justify an acceptance of such a proposal. Again we call attention to the fact that one of the legal problems with which we are faced is the securing of a release from the lien *on* our mortgages on the property under discussion. This alone would prevent the acceptance of such a proposal.

In view of the fact that we are advised that your proposal must be accepted or rejected in toto, we regret that we have no alternative except to reject the same.

We entered into the negotiations for the sale of these properties in good faith upon the invitation of the governing bodies of these cities, believing that all parties concerned were interested sincerely in working out a mutually satisfactory purchase of these properties along sound business lines. We believe now that this may be done if regard for the equities involved are considered.

We hope that the conclusions as expressed in your letter are not as summary as indicated and that the cities will give consideration to the views expressed in this letter.

Yours very truly,
ALABAMA POWER COMPANY,
By J. M. BARRY,
Vice President

JMB:LTD

77 Lide & Adler
Consulting and Constructing Engineers
Birmingham, Alabama

October 12th, 1933.

Mr. J. M. Barry, Vice President,
Alabama Power Company,
City.

Dear Mr. Barry:—

We are pleased to acknowledge in behalf of our clients, the Cities of Sheffield and Tuscumbia, receipt of your letter of the 9th inst., replying to our letter of the 5th inst.

1. The Cities are strongly disposed toward acquiring your distribution systems by purchase, and are sympathetic with much that is in your letter, but in view of certain statements in your letter there does not appear to be any feasible plan by which this may be accomplished.

2. The Cities feel that while the prices you have named for the purchase of the systems are under ordinary circumstances not unreasonable, it nevertheless would be impossible to justify before their constituents the paying of more than seventy (70%) percent of the present value of the systems in view of the Government grants of thirty (30%) percent. After all, a thing is only worth the price at which it may be secured.

3. The Cities are adamant against pledging any franchise whatever in case of foreclosure. They feel that (a) it is not incumbent upon them to make this concession since it is not a condition of a Government loan for a new system, and (b) that if they did make the concession the P. W. A. would be almost certain to refuse to provide the additional funds required to extend and connect the systems to Government power.

Moreover it is very doubtful if the electorate would ratify the grant of a franchise.

4. The cities do not concur in your statement that
78 "the failure of the mortgage to carry a franchise in case of foreclosure will force the purchaser at the foreclosure sale to scrap the properties unless a franchise could then be obtained, which in effect would destroy the security." With no franchise granted to anyone your company could be the only possible purchaser at a foreclosure sale, and you could then operate just as you are now operating. Your position then would certainly be no worse than at present provided the property had been properly maintained, and the Cities would not object to setting aside a reasonable reserve for this purpose.

5. While we have not discussed the point with our clients, and cannot, therefore, predict their reaction to it, we nevertheless feel that it would be fair and reasonable for the Cities to agree, in event of foreclosure, not to grant a franchise to others than the mortgagee. We would be disposed to recommend such a provision in case agreement on all other points in disagreement would be promptly arrived at.

6. The points raised in the 7th paragraph of your letter are fair and conciliatory, and tend to facilitate agreement.

7. There was not misunderstanding with reference to the 8th paragraph of your letter. It was intended that you should deliver your properties after the signing of the necessary contracts and the completion of the details attendant thereon. This is the customary procedure in the transfer of real estate and it would, therefore, seem reasonable and customary in this instance. We did, however, attach the unusual provision of requiring a lease at a reasonable figure on the property in use but not purchased. In as much as this property consists largely of rights of way which would probably bring no rental whatever after the distribution system was sold, this proposal was believed to be fair and conciliatory.

8. The Cities have no desire to be summary and
79 abrupt in the termination of these negotiations. They appreciate the friendly cooperation and good faith which your company has displayed. They have, therefore, every desire to save your company from unnecessary loss if it can be arranged, but when it becomes evident, as it now appears, that the parties are hopelessly apart in their negotiations, it is to the interest of the Cities to terminate the negotiations as promptly as possible. We very much trust that you can appreciate their position, and that you can accept their views without further delay. If this acceptance is not promptly forthcoming we will be compelled to consider the negotiations as closed, and to take appropriate steps accordingly.

Yours very truly,

LIDE & ADLER
By MARTIN J. LIDE

Copies to Mr. W. H. Richeson,
President, City Commission,
Sheffield, Ala.,
Mr. W. L. Farr, Mayor,
Tuscumbia, Ala.,

80 Alabama Power Company
Birmingham, Ala.

October 20, 1933.

Messrs. Lide & Adler, Engineers,
Birmingham, Alabama.

Dear Sirs:

We acknowledge receipt of your letter of the 12th and thank you for the consideration given to the position outlined in our letter of October 9.

We are glad to note that the cities feel the prices we have named for the sale of the systems are under ordinary circumstances not unreasonable. We are not unmindful of the fact that the ultimate responsibility for acquisition of electric systems will rest with the governing bodies of the respective municipalities. However, we do know that we have made a fair and reasonable offer to the cities and can not see how we can justify making a thirty per cent. grant to them on the theory that the United States government is authorized to make a maximum grant of thirty per cent.

You state that after all, a thing is only worth the price at which it may be secured. While this is true, there is another factor to be considered; namely, does the thing desired to be purchased meet the requirements of the purchaser commensurate with the price paid? In case our properties are purchased, the cities will acquire systems in existence, at a fixed cost and on liberal terms. If the cities should be able to secure an equivalent number of dollars with the maximum thirty per cent. grant, still they would have no guarantee or assurance that those dollars would reproduce properties as good and efficient as those offered, especially in view of the uncertainties in the cost of labor and materials. On the other hand, these properties have a cash value to us, and the interest rate and the value of the bonds which we have offered to accept should be given consideration. Our money costs us more than four
81 per cent., which means that we should have to carry them at a loss, and of course we could not afford to dispose of the bonds at the prices which they would command under the present financial position of the respective cities.

We regret that the cities are taking the position in respect to the franchise s ıation indicated in your letter. As heretofore stated, we ____ that our offer in this respect is entirely reasonable, business-like and contemplated in the statutes authorizing the execution of such mortgages by municipalities. It must be borne in mind that our offer is to accept revenue bonds, and that the general faith and credit of, the cities are not to be pledged. If the operations by the cities succeed, of course the pledge of a franchise means nothing. If they are not a success, the holders of the bonds must look solely to the properties for their money, and can not require the cities to pay any deficiencies. On the other hand, the security for this kind of obligation is a mortgage on a going concern vested with the right to operate. We cannot see how anyone could object to giving the bondholders an opportunity to save themselves from a situation with which they will certainly be faced in case they are forced to take the property. It is certain that no private capital could afford to make additions and extensions to new customers without having a franchise running for a definite term. The cities would thereby be deprived of adequate service.

Under the circumstances, we are wondering if the real difficulty is not the lack of understanding by each party as to what the other party desires. We certainly are handicapped in not knowing just what arrangement the cities desire to make and, of course, just what will be acceptable to the Public Works Administration to supply additional funds. It may be that by a clearer understanding some agreement both as to price and security could be reached; therefore, before discontinuing these negotiations, would it not be wise for representatives of this Company and
82 representatives of the cities to get together to discuss the problems before us in an effort to work the matter out? We shall be glad to enter into such a conference at once.

Yours very truly,

ALABAMA POWER COMPANY

BY J. M. BARRY

Vice President.

83

Lide & Adler

Consulting and Constructing Engineers
Birmingham, Alabama

October 21st, 1933.

Alabama Power Company,
Mr. J. M. Barry, Vice President,
City.

Dear Mr. Barry:—

We acknowledge receipt of your favor of the 20th inst. in answer to our letter of October 12th, and desire to advise as follows:—

1. The Cities of Sheffield and Tuscumbia, through their representatives, will be pleased to continue discussions with your Company provided those discussions do not interrupt or delay the prosecution of their plans to acquire municipal electrical distribution systems. As set forth in previous letters from the Cities themselves, applications for Government loans have been pending since August 30th, and the moment satisfactory loans are granted negotiations for the purchase of the existing systems must automatically terminate in view of the time restrictions preparatory to beginning construction demanded by the Public Works Administration.

2. The Cities feel that past discussions have developed certain fundamental differences of view point which seem incapable of reconciliation. Both sides understand and appreciate these differences of viewpoint. We have endeavored to set them forth clearly in previous letters. Since neither side will yield, it is to the interest of the Cities to proceed with their plans without further delay.

3. While we feel that the prices named by you are under ordinary circumstances not unreasonable, we do not feel that the systems are bargains at these prices as compared with the cost of new systems. On the contrary a de-

84 tailed study convinces us that the present systems can be improved in many particulars by new construction.

4. The position taken in the fourth paragraph of your letter, while well stated, is open to attack from three quarters, as follows:—

(a) It ignores the equity rights of the Government which would hold part of the bonds and would, therefore, also be entitled to security in case of default. If you solely recaptured the system with a new franchise, the government rights would be infringed.

(b) It ignores the possibility of a practical substitute for the pledge of a francise as suggested in sections 4 and 5 of our letter of the 12th inst.

(c) It ignores the practical dangers attending clauses in contracts giving municipalities at stated intervals the right of recapture of franchises through purchase of systems, as clearly shown in 222 Ala. 689.

5. As representatives of the Cities, and subject to the limitations of Section 1 herein, the undersigned would be pleased to confer with representatives of your Company to discuss these problems with a view to solving them. For your information we would suggest that this be done very promptly however, since we are now taking active and definite steps to secure a Government loan.

Yours very truly,

LIDE & ADLER
BY MARTIN J. LIDE

Copy to Mr. W. H. Richeson
President, City Commission,
Sheffield, Ala.,
Mr. W. L. Farr, Mayor,
Tuscumbia, Ala.,

85 November 3, 1933.

City Commission,
Sheffield, Alabama.

Gentlemen:

Reference is made to the recent negotiations concerning the possible sale of our electrical distribution system to the City.

The principal point of difference between us has been the price for the properties which the City considered purchasing. The Company offered these properties for $164,000, which the City's engineers characterized as "under ordi-

nary circumstances not unreasonable." In other words, the City recognized our price as a fair one for the properties considered.

There seems to be no doubt that the City and the Company would have gotten together were it not for the fact that the N. I. R. A. provides for possible maximum grants of 30 per cent and loans of the remainder in public works expenditures. The potential grant of 30 per cent on new construction led the City to fix as the maximum price for our properties 70 per cent of the depreciated value as appraised by J. E. Sirrine & Company. This is tantamount to offering us $126,000 for properties which we have offered for $164,000. We have been unable to see the justice of this form of reasoning, and accordingly the City and the Company are still $38,000 apart.

We are still desirous of settling this matter to the satisfaction of both parties, for we feel that it is an economic waste to destroy a well-designed, adequate system and replace it with a new one that will do the job no better.

During the past week we have had an opportunity of examining the estimates of your engineers for the construction of a new system. It is our judgment that the new system will cost considerably more than the amount which your engineers estimate. If we are correct in this viewpoint, it of course places a different aspect, from your viewpoint, on the price which you would be willing to pay for our system. We ask that you re-examine this question.

86

We feel that the question of pledging a franchise does not present an insurmountable obstacle, and if we could reach an agreement as to the price, the matter of security could be solved in some way.

Feeling as we do as to the fairness of our offer, therefore, in a final effort to reach an agreement on the price, we suggest that the question of a fair price be referred to a group of three men, one to be named by the City, one by the Company, and one by the two so named. We agree to sell the property included in our offer (or any of the remaining property in our system in the City of Sheffield, if the City so desires) at the price named by such a group, regardless of what the price may be. If the City is disposed

to accep' this proposal, we are ready to proceed promptly and without delay.

Yours very truly,
ALABAMA POWER COMPANY
BY J. M. BARRY
Vice-President

cc—Messrs. Lide & Adler, Engineers,
Birmingham, Alabama.

87 November 3, 1933.

Mayor and Council,
Tuscumbia, Alabama.

Gentlemen:

Reference is made to the recent negotiations concerning the possible sale of our electrical distribution system to the City.

The principal point of difference between us has been the price for the properties which the City considered purchasing. The Company offered these properties for $104,000, which the City's engineers characterized as "under ordinary circumstances not unreasonable." In other words, the City recognized our price as a fair one for the properties considered.

There seems to be no doubt that the City and the Company would have gotten together were it not for the fact that the N. I. R. A. provides for possible maximum grants of 30 per cent and loans of the remainder in public works expenditures. The potential grant of 30 per cent on new construction led the City to fix as the maximum price for our properties 70 per cent of the depreciated value as appraised by J. E. Sirrine & Company. This is tantamount to offering us about $79,000 for properties which we have offered for $104,000. We have been unable to see the justice of this form of reasoning, and accordingly the City and the Company are still $25,000 apart.

We are still desirous of settling this matter to the satisfaction of both parties, for we feel that it is an economic waste to destroy a well-designed, adequate system and replace it with a new one that will do the job no better.

During the past week we have had an opportunity of examining the estimates of your engineers for the construc-

tion of a new system. It is our judgment that the new system will cost considerably more than the amount which your engineers estimate. If we are correct in this judgment; it of course places a different aspect, from
88 your viewpoint, on the price which you would be willing to pay for our system. We ask that you reexamine this question.

We feel that the question of pledging a franchise does not present an insurmountable obstacle, and if we could reach an agreement as to price, the matter of security could be solved in some way.

Feeling as we do as to the fairness of our offer, therefore, in a final effort to reach an agreement on the price, we suggest that the question of a fair price be referred to a group of three men, one to be named by the City, one by the Company, and one by the two so named. We agree to sell the property included in our offer (or any of the remaining property in our system in the City of Tuscumbia, if the City so desires) at the price named by such a group, regardless of what the price may be. If the City is disposed to accept this proposal, we are ready to proceed promptly and without delay.

Yours very truly,
ALABAMA POWER COMPANY
BY J. M. BARRY
Vice President

JMB:h

cc- Messrs. Lide & Adler, Engineers,
Birmingham, Alabama.

89 Lide & Adler

Consulting and Constructing Engineers
Birmingham, Alabama

November 4th, 1933.

Mr. J. M. Barry, Vice President,
Alabama Power Company,
City.

Dear Mr. Barry:—

Copies of your letters of November 3rd to the Cities of Sheffield and Tuscumbia are duly acknowledged.

We recognize in your letters, and believe the Cities also will recognize in them, an adroit maneuver to take out of our hands the conduct of the negotiations for the purchase of your systems, and to place those negotiations in hands such that the stalemate which has been in progress for about two months can be indefinitely maintained. With more than 80% of the Public Works money already allocated, we do not believe that the Cities will be caught in any such trap.

In the second paragraph of your letters we were correctly quoted, viz:—that the prices quoted by you are not, under ordinary circumstances, unreasonable. If you were operating under ordinary circumstances under franchises, your prices, in our judgment, would not be unreasonable; in that case the cities would not be entitled to grants. But you have no franchises. What you have been for weeks demanding is that the Cities make your Company a present of most of the 30% grant to which, under the law, they are clearly entitled.

As previously stated, we do not consider that your existing systems would be bargains at the prices named by you. A detailed investigation indicates clearly that the systems are not only inadequate in places, but that they could be materially improved by new construction. Furthermore, as previously stated, we are not in accord with the estimates of depreciation submitted by J. E. Sirrine & Co. We merely accepted their figures as a basis of negotiation in order to facilitate and expedite the negotiations.

For weeks you have been demanding that the Cities pledge a franchise in case of default. Are we now to understand from the sixth paragraph of your letter that you have withdrawn this demand? If so, we are at a loss to understand why, for several weeks, you were so insistent in your demand for a provision which you do not now enjoy. It seems to us that if you had been sincerely desirous of expediting the sale of your property, you would not have been obdurate in pressing a demand which was untenable, and which, in the end, you felt compelled to relinquish.

We also note your comments as to our estimates. If they are so low as you seem to think that fact will develop when

bids are received, and the Cities will be duly forewarned. The fact that our figures are within a few per cent of those submitted by J. E. Sirrine & Co., your appraising engineers, leads us to feel that they are sufficiently accurate.

Yours very truly,

LIDE & ADLER
BY MARTIN J. LIDE

Copies to Mr. Richeson, Sheffield,
Mr. Farr, Tuscumbia

91 John E. Delony, Jr.

Attorney at Law

Tuscumbia, Ala.

November 7th, 1933.

Alabama Power Company,
Birmingham, Alabama.

Gentlemen:

The City of Tuscumbia acknowledges receipt of your letter in regard to the appointment of three persons to determine the price to be paid for your municipal lighting plant in Tuscumbia.

The City Council discussed this matter and decided that this was not the proper way to determine this matter. They have this matter under advisement.

Respectfully yours,

JOHN E. DELONY, JR.

92 James M. Barry

Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the City of Florence, Alabama, with reference to the negotiations between the city and the company for the sale of the company's distribution system in Florence, Alabama, to the city. This folder of correspondence was offered as Plaintiffs' Exhibit No. 2 and was received in evidence. Plaintiffs' Exhibit No. 2 contains the following letters:

93 LEE GLENN, President Board and Exo. Mayor.
City of Florence Alabama
Commission Government

Florence, Ala. July 20, 1933

Mr. Thomas W. Martin,
President, Alabama Power Co.,
Birmingham, Alabama.

Dear Sir:

The City of Florence has employed Mr. J. W. Johnson, of Florence, Alabama, to make for us an estimate of the cost of a new distributing system for Florence and an estimate of the value of the existing facilities of the Alabama Power Company.

The City Commission, when in your office some weeks ago, stated to you that if you would cooperate with us in appraising your distributing system that it would save us considerable money and at that time you stated that you would be delighted to do so, and assist us in any way possible. I assure you that this disposition on your part is very much appreciated by the City of Florence and the citizens of Florence.

Mr. Johnson informs me that to facilitate the valuation of the substations and of substation equipment that it would be of great value if you would permit us to examine the prints of the construction drawings of the two Florence substations and, if available, the bills of material and complete specifications covering the same.

I am informed that these prints, specifications and bills of material are in the Birmingha n office and that they might have to be sent to the Sheffield office for safe keeping and they would only be taken out of the office during brief periods in the field to facilitate the checking of equipment. We would take good care of the same and guarantee to return them in their original condition.

We would also like to request certain meter data, including the records of all meters which are served
94 through the Florence system. I understand that the route books for Florence are regularly kept in the

Huntsville office and that it might be inconvenient for you to have them outside of that office for any period longer than the time required for meter reading. We desire in no way to inconvenience you and if sending these meter records to the Sheffield office will cause you any inconvenience we would send a man to Huntsville to take the data we would require from the meter records.

We would like to request one blank copy of the several forms used in the meter route book in Florence and one blank copy of the forms for all power and primary metering apparatus for all power customers not included in the meter route book. We would like to request one copy of each of the forms used for the meter set records. If you would send us these blank forms at once it would enable us to print the forms necessary should we have to send men to Huntsville to make a copy of your meter books.

Cooperation by you in these matters will be a great favor to the City of Florence and would save us considerable expense and I assure you would be remembered should we engage in negotiations with you for the purchase of your system.

Yours very truly,

LEE GLENN

95 July 25, 1933.

Hon. Lee Glenn, President,
City Commission,
Florence, Alabama.

Dear Mr. Glenn:

Mr. Martin is away from the city, so I am taking the liberty of replying to your letter of July 20th to him, asking for certain information to assist your engineers in appraising the Florence properties.

Under separate cover, I am sending you copies of the plans and specifications of the two Florence substations. I believe that these will give you the information which you require. I should appreciate it if you would return these plans to me after they have served their purpose.

We shall be glad to assist in the compilation of meter data as requested in your letter of July 20th. We should

prefer to get up this information with our own clerks, in the form which you desire. I would suggest that one of your representatives go to Huntsville with Mr. Jackson and decide while there just what information is wanted and in what form. I think that this would be the most practicable plan.

While in Huntsville, your engineer could go over our various forms, and we shall be glad to furnish him copies of what he needs. We should also be pleased to explain to your representative the office routine in connection with customer's accounts.

I am enclosing copies of several of the forms in which you are interested.

Yours very truly,

J. M. BARRY,
J. M. BARRY,
Vice President and General Manager.

B/c—J. O. H.
—J. T. J.

96

November 16, 1933.

Hon. Lee Glenn. President,
City Commission,
Florence, Alabama.

Dear Mr. Glenn:

Reference is made to the recent discussion between the City Commission, the City's engineers, and representatives of this Company relative to the sale of our distribution system in Florence to the City.

The recent conference brought out widely divergent views of the City and the Company as to the portions of our system which would be usable to the City, and the present value of the properties to be sold. In order, however, that the matter be placed concretely before the City, we are submitting the following proposal for the sale of our property in Florence.

Properties Included:

Our complete distribution system in Florence, including 11000 volt and 2300 volt primary lines, secondaries, trans-

formers, services, meters, street lighting lines and equipment, and substations, except the following which you do not require:

(a) East Florence substation and lot.
(b) 44000 volt portions, and 1500 kva transformer bank at Florence Central substation.
(c) 11000 volt line from McFarland's Coal Yard to bridge.
(d) 11000 volt line on Tennessee River bridge.
(e) 11000 volt line to Rogersville.
(f) Weeden Heights distribution system.
(g) All "old style" meters.
(h) All "dead" new style meters.
(i) Telephone system.

Price: $195,000.

97 In payment for the properties we will accept at par your revenue bonds bearing interest at four per cent, maturing in series in such amounts and at such times as may be mutually agreeable and secured by a first mortgage on the properties sold you. The mortgage will contain proper provision with respect to revenue bonds, adequate provisions for depreciation and maintenance, a provision for a thirty-year franchise in case of forecloure, and such other provisions common to utility mortgages for the protection of the mortgagee. Details, covenants, conditions, etc., of the mortgage, together with the legality of the bonds, are to be subject to the approval of our counsel. The trustee in such mortgage shall be a corporation authorized to act and mutually acceptable to the parties.

One of the problems with which we are faced is the release of the properties from the lien of our respective mortgages to which consideration must be given in working out the details of the proposed mortgage.

We consider the price which we have made a fair and reasonable one. J. E. Sirrine & Company, independent engineers with widespread experience in appraisal work, estimated the present value of the properties which are offered for sale to be more than $230,000. We are aware of the fact that your engineers anticipate an extremely heavy increase in load under municipal operation and for this

reason are inclined to depreciate heavily various items of the existing system. Although we expect to see domestic consumption increase year by year, we do not agree fully with your assumptions in this respect; therefore, we can not subscribe fully to your views as to the adequacy of our system in Florence. We feel that the existing system will, with moderate additions and betterments, take care of the requirements of Florence for many years to come.

98 As a partial measure of the reasonableness of our offer, we mention the fact that our actual net cost of additions and betterments to the properties which we propose to sell, since their purchase in 1925, amounts to more than $165,000.

The Commission is aware that we have freely made available to your engineers our maps, blue prints, various records, and the Sirrine appraisal of our Florence system, in order to furnish them every possible assistance in reaching a conclusion in this matter.

In considering the construction of a new system, we are sure that the Commission and its engineers will weigh fully the present trend of labor and materials, particularly on P. W. A. work. It may be of interest to note that, according to press reports, the minimum labor rates of P. W. A. work in Alabama were only yesterday revised upward for a number of crafts.

We take this opportunity of expressing to the Commission our appreciation of the uniformly cordial relations which have marked all our discussions.

Yours very truly,

ALABAMA POWER COMPANY
By .....
Vice-President.

99 James M. Barry

Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the City of Decatur, Alabama, with reference to the negotiations between the city and the company for the sale of the company's distribution system in Decatur, Alabama, to the city. This folder of correspondence was offered as

Plaintiffs' Exhibit No. 3 and was received in evidence. Plaintiffs' Exhibit No. 3 contains the following letters:

100 January 19, 1934.

City of Decatur,
Decatur, Alabama.

Attention Mr. James A. Nelson, Mayor

Gentlemen:

We acknowledge receipt of your letter of January 11 referring to our recent contract with the Tennessee Valley Authority, under which we agreed to negotiate for the sale of our electric distribution systems to the municipalities in a certain area in Alabama. Decatur is included in the area referred to.

We shall be glad to discuss this matter with representatives of the City at a convenient time in the near future. We suggest some day during the week beginning January 28. We shall be glad to have representatives go to Decatur, or, if you prefer, the City's representatives could meet us in our office in Birmingham. Please let us know your wishes in the matter.

Yours very truly,
ALABAMA POWER COMPANY
BY J. M. BARRY,
Vice Pres. & Gen. Mgr.

b/c- Mr. Martin
Mr. Stanley
Mr. Yates

101 City of Decatur Alabama

January Eleventh,

1 9 3 4.

Alabama Power Company,
Birmingham, Alabama.

Gentlemen:

Attention: Mr. Thos. W. Martin, President:

We understand that in your recent contract with the Tennessee Valley Authority, you allotted this territory exclu-

sively to them to serve electric energy and that you agreed to begin negotiations with the municipalities within in an effort to convey your distribution systems to them.

If it your desire to negotiate with the City of Decatur please advise us.

CITY OF DECATUR
BY JAMES A. NELSON
Mayor

C. C:Francis & Haley,
Engineers,
334 Brown-Marz Bldg,
Birmingham, Alabama.

102 City of Decatur Alabama
January Twenty-Two,
1934.

Alabama Power Company,
Birmingham, Alabama.
Attention: Vice Pres. & Gen. Manager.

Gentlemen:

In reply to yours of 19th:

It will be necessary that the entire City Council participate in the negotiations concerning your electric distribution system, and following your suggestion as to time, the City Council will meet your representatives at the City Hall, in Decatur, any day of the week, beginning January 28th, except February 1st.

Kindly notify me exactly which date will suit your convenience.

Very truly yours,

JAMES A. NELSON
Mayor

103 January 24, 1934

Hon. James A. Nelson, Mayor,
City of Decatur,
Decatur, Alabama.

Dear Sir:

Replying to your letter of January 22 with reference to negotiations concerning our electric distribution system in

Decatur, our representatives will be pleased to meet your City Council at the City Hall in Decatur on Friday, February 2 at 11 A. M. Kindly let me know if this date and time suit your convenience.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

104 City of Decatur Alabama
January Twenty-Six,
1934.

Mr. J. M. Barry,
Vice Pres. & Gen. Mgr.,
Alabama Power Company,
Birmingham, Alabama.

Dear Sir:

Reply to yours of 24th:

The date, Friday, February 2nd at 11 A. M., is entirely satisfactory for conference between your representative and City Council.

Yours very truly,

JAS. A. NELSON
Mayor

105 February 5, 1934.

Mr. T. M. Francis, Consulting Engineer,
Birmingham, Alabama.

Dear Mr. Francis:

In accordance with our understanding, I am enclosing herewith valuation of our electric distribution system at Decatur, giving the replacement cost as of December 1, 1933. This valuation was prepared by experienced valuation engineers and is based on a detailed field inventory and a careful pricing based on the then current labor and material prices for this class of work. You will observe that the replacement cost as of December 1, 1933, of the physical properties embracing the distribution system is $359,809. These are the properties which we have offered to sell to the City

The valuation does not include a number of items used and useful in connection with our operations at Decatur. Some of these items will be conveyed to Tennessee Valley

Authority under our agreement of January 4, and other items, such as organization expense, taxes during construction, and going-concern value, which are elements of value of a going property, have not been included in the figure of $359,809 mentioned above.

In case we negotiate the sale of the distribution system to the City of Decatur, we should of course not desire to retain other properties in Decatur useful in the operation of such system after ceasing to do business there. We should like to have the City take over such properties on a mutually satisfactory basis. Among these properties are the following:

Warehouse building and site.
Tools and testing equipment
Transportation equipment
Office furniture and improvements.
Merchandise stock
Materials and supplies.

106 The items listed above have a replacement cost as at December 1, 1933, of $54,485. There seems to be absolutely no question that certain of these items should be taken over by the City when it begins operating the local system, and we very much hope that the City will see the wisdom and fairness of buying them all.

If you have any questions in connection with this valuation, we shall be very glad to go over them with you in detail.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

JMB:h
Encl.

107 City of Decatur Alabama

February 8, 1934.

Alabama Power Company,
Birmingham, Alabama.

Attention of Mr. J. M. Barry, Vice-President.

Gentlemen:

Since your meeting with us on February 2, the City Council has conferred, and it occurs to us that *is* should not be

very difficult to determine the present day value of the property which you propose to convey to the City of Decatur.

The City is not in position to make a cash offer. The best and only thing we can offer you is bonds secured by the revenue from the operation of the system. Under these conditions we trust that these terms will be agreeable to you.

Please let us have your decision as promptly as possible in order that we may proceed further with these negotiations.

Yours very truly,

JAMES A. NELSON,
Mayor.

JAN:C
CC:
T. M. Francis
Paul J. Haley

108 February 15, 1934.

Mr. James A. Nelson, Mayor,
Decatur, Alabama.

Dear Mr. Nelson:

I wish to acknowledge receipt of your letter of February 8 relative to the position of the City with respect to our recent offer to sell our distribution system to the City.

We believe, as you do, that it will not be difficult to agree upon a price for the properties which would be satisfactory to both parties.

We are sorry to note that the City is not in a position to make a cash offer, and we hope in this connection that the City will investigate further the possibility of securing funds from either Government or other sources. We regret very much that the Company can not accept the revenue bonds of the City in payment for its properties.

As I explained to the Mayor and Council in our meeting of February 2, our company is constantly in need of funds for the continuing requirements of its business. During 1933, for example, the worst year of the depression, the Company expended for improvements and betterments, and extensions in the ordinary course of business, more than $500,000. The State regulatory laws are such that the Company is allowed to earn not more than a fair return on the reasonable value of its property. In recent years its return has been less than this. The Company's securities

have depreciated in price to such an extent that it would be impossible for us to raise money through the sale of securities. The loss of territory in Northwest Alabama will of course impair our earnings to a considerable extent. Looking at these facts squarely, we feel sure the City will appreciate the reasonableness of our position in requiring the payment of cash for those properties which we propose to sell.

109 We assure you of our desire to carry out fully the spirit of our contract with Tennessee Valley Authority, and we sincerely hope that the City will find a source of funds with which to pay for our property in Decatur. We look forward to a continuance of negotiations.

I am enclosing copy of the valuation which I handed to Mr. Francis on February 5; also copy of my letter of transmittal to Mr. Francis.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

JMB:h
cc-Mr. T. M. Francis
Birmingham, Ala.

110 James M. Barry: Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the City of Russellville, Alabama, with reference to the negotiations between the city and the company for the sale of the company's distribution system in Russellville, Alabama, to the city. This folder of correspondence was offered as Plaintiffs' Exhibit No. 4 and was received in evidence. Plaintiffs' Exhibit No. 4 contains the following letters:

111 City of Russellville
Russellville, Ala.

January 19, 1934.

Mr. Thomas W. Martin, President,
Alabama Power Company,
Birmingham, Ala.

Gentlemen;

We understand that under your agreement with the Tennessee Valley Authority it is contemplated that you will sell your municipal distribution system to the municipalities.

We would be pleased to enter into negotiations with you for the purchase of your distribution facilities in and around Russellville, and suggest a conference at the earliest possible date.

We will appreciate a prompt reply.

Very truly yours,

W. W. RAMSEY
Mayor

CC-Tennessee Valley Authority.
Knoxville, Tenn.

112 January 24, 1934

City of Russellville,
Russellville, Ala.

Attention Mr. W. W. Ramsey, Mayor

Gentlemen:

We wish to acknowledge receipt of your letter of January 19, addressed to Mr. Martin, referring to our agreement with the Tennessee Valley Authority under which it is agreed that we negotiate for the sale of our electric distribution systems to the municipalities in a certain area in Alabama. In your letter you express a desire to enter into such negotiations for the distribution facilities in and around Russellville and suggest a conference at an early date.

We shall be pleased to discuss this matter with your representatives at a convenient time in the near future. Owing to other engagements, it would be difficult for us to meet with you before Tuesday, February 6. Please let us know if this date will be satisfactory. We shall be glad to have representatives go to Russellville, or, if you prefer, the City's representatives could meet us in our office in Birmingham. Kindly let us know your wishes in this matter.

Yours very truly,

ALABAMA POWER COMPANY
By J. M. BARRY
Vice Pres. & Gen. Mgr.

113 City of Russellville
Alabama

January 29, 1934.

Alabama Power Company.
Birmingham, Ala.

Attention Mr. J. M. Barry, V-Pres & Gen/Mgr.

Gentlemen;

This will acknowledge receipt of your letter of January 24, in answer to *ouy* January 19th., letter addressed to Mr. Martin, with reference to your agreement with the Tennessee Valley Authority.

We would be pleased to have your representative meet with the Mayor and City Council in Russellville February 6th.

If this date is possible with you we will try to be ready for your representative by 10 o'clock A. M. Feb. 6th.

Kindly advise if this date is agreeable with you,

Very truly yours

W W RAMSEY
Mayor.

CC: Tenn. Valley Authority.
Knoxville, Tenn.

114 January 30, 1934.

Mr. W. W. Ramsey, Mayor,
City of Russellville,
Alabama.

Dear Sir:

In answer to your letter of January 29, we shall be pleased to get with the Mayor and City Council in Russellville on February 6. It would perhaps be better to fix the time at 10:30 or 11 A. M., as we shall probably drive up from Birmingham that morning.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

115 City of Russellville Alabama

January 31, 1934.

Alabama Power Company,
Birmingham, Ala.

Attention Mr. J. M. Barry, Vice-President & Gen. Mgr.

Gentlemen:

This will acknowledge your letter of January 30th., advising that you will meet with the Mayor and City Council at 10:30 A. M. February 6th, 1934.

The Mayor and Council will expect you and will be ready at that time to go into the matter thoroughly with you.

Very truly yours,

W W RAMSEY
Mayor.

CC; Tennessee Valley Authority.
Lide and Adler, Engineers.

116 James M. Barry. Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the City of Hartselle, Alabama, with reference to the negotiations between the city and the company for the sale of the company's distribution system in Hartselle, Alabama, to the city. This folder of correspondence was offered as Plaintiffs' Exhibit No. 5 and was received in evidence. Plaintiffs' Exhibit No. 5 contains the following letters:

117 The Thomas Abstract Company

Abstract Books for Morgan and Limestone Counties
Abstractors
Decatur, Alabama

Rutledge S. Thomas
Manager. December 22nd, 1933.

Hon. Chas. H. Eyster
Decatur, Alabama.

Dear Mr. Eyster:— Re-Minutes City of Hartselle

Regarding the Minutes of the City of Hartselle concerning the call of election, etc., in a recent Municipal Power Election. I called at the office of the City Clerk of Hartselle, to-day, and asked to see these Minutes, but he advised me

that the Minutes of the City Council were not available at this time and would not inform just where they were at this time.

I am very sorry that I am unable to furnish you with certified copy of the information you desire.

If I can be of further service advise me,

Very truly yours

RUTLEDGE S. THOMAS.

118 December 22, 1933

Mayor and Members of the
City Council of the
City of Hartselle, Ala.

Gentlemen:

On December 21st, 1933, an effort was made by and through a reputable representative of the Alabama Power Company to review the minutes of the City Council of the City of Hartselle, and to obtain certified copy of the minutes relating to the proceedings of the City of Hartselle in passing resolutions or ordinances to call an election for the purpose of borrowing money to build, acquire, etc., an electric distribution system.

Request was also made for an examination of the books of the City of Hartselle for information showing amount of cash receipts for the year ending September 30, 1933, also cash disbursements for the year ending September 30, 1933, and the amount of indebtedness of the City of Hartselle on September 30, 1933, and the amount of return for assessment for 1933, and the tax rate prevailing at Hartselle for said year.

These requests were made by representatives of the Alabama Power Company a tax payer of your city.

The requests are hereby respectfully renewed for information on the several questions above outlined and stated.

In making this request, it is entirely agreeable for one or more representatives of the City to be present at all times, and to assist in compiling the information.

The information the Alabama Power Company is requesting, is such information as it is advised is public information, and available upon the request of any tax payer.

The Alabama Power Company as a Tax payer is respectfully requesting herewith that it be given the above information promptly.

Very respectfully,

119 ALABAMA POWER COMPANY
By CHAS. H. EYSTER
Attorney

120 December 23rd. 1933.

Mr. W. H. Stewart, City Clerk,
Hartselle, Alabama.

Dear Will:

I have considered the written request presented by the Alabama Power Company for certain information from the records of the City of Hartselle.

No reason is assigned for the request. I understand, of course, the records of a municipality are in their nature public records and subject to inspection by anyone who has any reason to inspect the record, but I doubt if the municipality is required to submit its records to a person making the request for the submission unless some valid reason is assigned, however, from what you tell me, I assume the reques is made in connection with the application of the city to the Alabama Advisory Board of the Public Works Administration for a loan to be used in the establishment of an electric lighting system. You tell me all the information requested is now in the hands of the Advisory Board, but that this board under instructions from the Public Works Administration declings to submit the information to the Power Company. There must be some valid reason why the administration is unwilling to submit this information, and in view of this fact it occurs to me that it would be better for the Power Company to first remove this objection and let the information requested come directly from the Advisory Board. In view of this peculiar situation, I hope the Power Company will withdraw its request and, if it has not already done so, submit its reasons for the information to the Administration, and I am sure if the reasons are valid the Administration will withdraw the order to withhold this information.

I notice from the press that requests are being made upon other municipalities which have applications for loans for power purposes. I do not know what attitude these
121 municipalities will take. I would not want to advise you to go contrary to their attitude.

I am sending you a copy of this letter in order that you may furnish it to the Power Company.

Yours very truly,

TT/B TENNIS TIDWELL.

122 City of Hartselle
Hartselle, Alabama

January the Ninth 1934

Alabama Power Company,
Birmingham, Alabama.

Gentlemen:

Under the contract entered into by and between your company and the Tennessee Valley Authority, it is our understanding that the following is stipulated:

Alabama Company covenants and agrees to convey its urban distribution systems in the above named counties in Alabama, said distribution systems being listed in Exhibit B, to the respective municipalities in or adjacent to which such systems are located, together with all franchises, contract rights, and going business thereto appertaining, when it has agreed with any such municipality on the price to be paid for the same. Alabama Company agrees to make every reasonable effort to come to an early agreement with said municipalities for such sales. In the event that any such municipality is unable to arrive at a satisfactory price after three months of bona fide negotiations with Alabama Company, or if some other reason the sale of any such system cannot be consummated, Authority shall have the right to serve such municipality or municipalities irrespective of whether such municipalities have purchased the distribution system from Alabama Company. Authority covenants and agrees to use its best endeavors to assist in bringing about the purchase of such distribution systems by the respective municipalities at fair prices.

The citizens of this municipality have voted affirmatively in a recent election on the question of acquiring an electrical

distribution system. The City has filed with the Federal Emergency Administration of Public Works an application for a loan with which to construct such a system. It is our desire to make use of your present distribution facilities in-so-far as possible, and to that end we request that you advise us promptly under what terms and conditions you will sell us your existing distributive system. We will assume that your price will be determined by the appraisal method; the question of terms and conditions of payment, however, must be such that it will be possible for us to comply therewith. In other words, as you no doubt appreciate, we cannot sell securities in the open market to raise cash with which to buy your system. Will you consider accepting from us in payment bonds secured by a mortgage on the system? If you will consider the acceptance of such securities, can you indicate the rate of interest that you would expect them to bear, and also over what period of years you would expect them to mature?

123

If you would prefer a conference to discuss these matters instead of answering any of the above questions specifically, will you kindly name the date and the place that we can confer so that this matter can be expedited as much as possible.

We will appreciate a prompt reply.

Yours very truly,

CITY OF HARTSELLE
By J. P. HODGES
Mayor

CC: Lide & Adler,
Birmingham, Ala.

CC: Tennessee Valley Authority,
Knoxville, Tenn.

124

January 13, 1934

City of Hartselle,
Hartselle, Alabama.

Attention Mr. J. P. Hodges, Mayor

Gentlemen:

We wish to acknowledge receipt of your letter of January 9 calling attention to the contract recently negotiated between certain Southern power companies and the Ten-

nessee Valley Authority under which we agreed to negotiate for the sale of our electric distribution systems in a certain area in Alabama. In your letter you express a desire to purchase our distribution system in Hartselle and ask us to advise you promptly under what terms and conditions we will sell our system.

Your letter correctly quoted the provision of the contract concerning the proposed sale of our distribution systems, and we shall proceed as promptly as possible with negotiations with Hartselle. Preliminary to these negotiations, we are now having made an accurate inventory and appraisal of the Hartselle distribution system. We anticipate that it will take at least two weeks to complete this appraisal. As soon as it is complete we think that it would be desirable to have a conference between representatives of the City and of the Company in an effort to reach a mutually satisfactory agreement as promptly as possible.

We regret that we cannot give you a definite answer at this time concerning your questions as to the terms and method of payment for the system. We are glad to consider your suggestions and will be in a position to discuss them fully with you at our first conference.

It would be very helpful if you would kindly send us complete information concerning the financial status of the City of Hartselle, so that we shall have an opportunity to go over this in anticipation of our first meeting.

125 As soon as the appraisal of our system in Hartselle is ready, we shall advise you promptly and request a conference.

Thanking you for your letter, we are,

Yours very truly,
ALABAMA POWER COMPANY
By J. M. BARRY
Vice President

126 February 8, 1934

City of Hartselle,
Hartselle, Alabama.

Attention Mr. J. P. Hodges, Mayor

Gentlemen:

Reference is made to your letter of January 9 and our reply of January 13 concerning conference to discuss pos-

bama. Plaintiffs then introduced this map as Plaintiffs' Exhibit No. 6 and it was received in evidence.

(Here follows Map marked Page 130.)

131 James M. Barry. Whereupon the plaintiffs having finished with the witness, the defendants stated that they did not wish to cross-examine him, and the witness was dismissed.

Whereupon the plaintiffs offered in evidence certificates of convenience and necessity issued by the Alabama Public Service Commission to the Alabama Power Company, conferring upon the company right to build the dams that were licensed by the Federal Power Commission.

"Mr. Turner. They are offered for the purpose of proving that we have certificates of convenience and necessity in Alabama.

• • • • • • • • • • •

"The Court. I should assume that they are proper for the purpose of showing that the company had obtained the requisite certificates under the State law as a condition precedent to the construction and operation of its plants. Isn't that what you want?

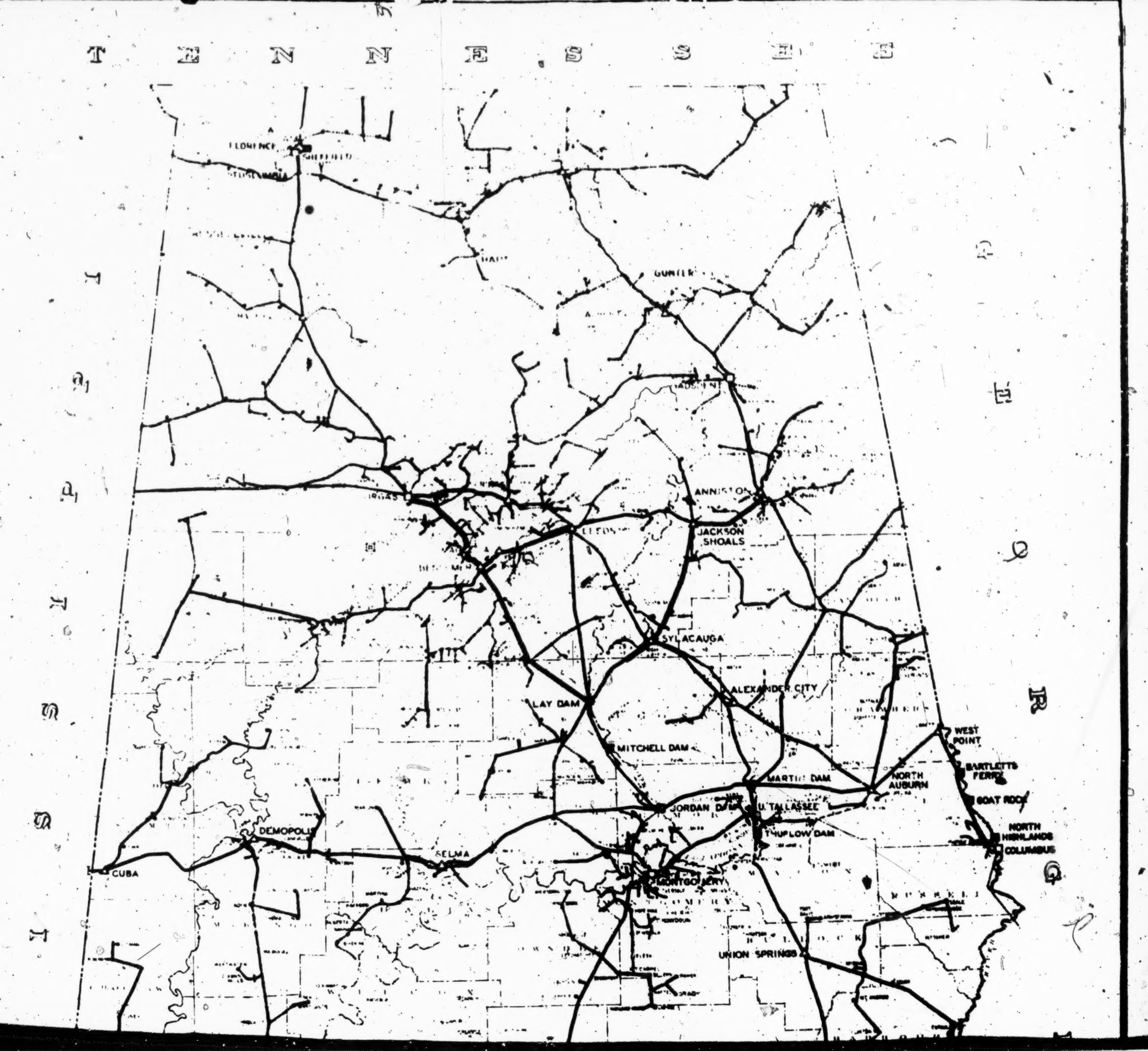
"Mr. Turner. That is the purpose.

"Mr. Scott. Is the offer conditioned that it is for the purpose of showing only the authority and not for the recitals contained therein?

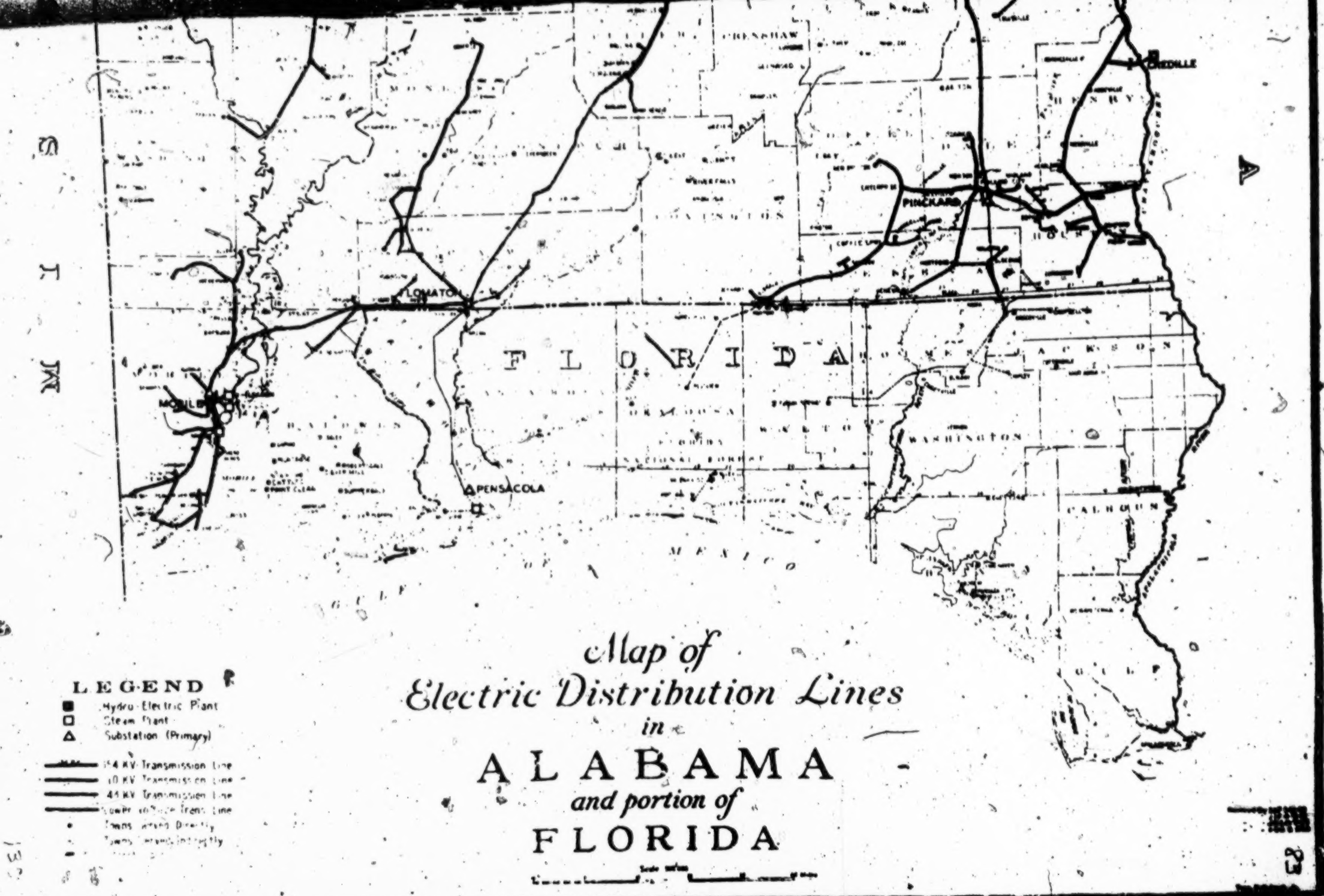
"Mr. Turner. Yes, we limit it to that purpose. We limit to the purpose stated by his Honor.

"Mr. Scott. Then that is all right."

Whereupon the plaintiffs offered the certificate of convenience and necessity issued by the Alabama Public Service Commission to the Alabama Power Company for the construction and operation of Mitchell Dam, being Docket No. 3059, which certificate was marked as Plaintiffs' Exhibit No. 7, and was received in evidence. In this certificate the Alabama Public Service Commission found that the Mitchell Dam project of Alabama Power Company "is a well-considered one and is peculiarly fitted to tie into
132 its present development and one that will conserve the water resources of the region and while being an



T E N N E S S E E
FLORENCE
SHEFFIELD
GUNTER
ANNISTON
JACKSON SHOALS
SYLACAUGA
ALEXANDER CITY
LAY DAM
MITCHELL DAM
MARTIN DAM
NORTH AUBURN
WEST POINT
BARTLETTS FERRY
GOAT ROCK
NORTH HIGHLANDS
COLUMBUS
JORDAN DAM
U. TALLASSEE
THURLOW DAM
DEMOPOLIS
SELMA
CUBA
MONTGOMERY
UNION SPRINGS



Map of Electric Distribution Lines in ALABAMA and portion of FLORIDA

83

sible sale of our electrical distribution system in Hartselle to the City.

Representatives of the Company would be glad to meet with the Mayor and Council of the City of Hartselle on some mutually convenient day next week. We suggest Tuesday, February 13, at 10:30 A. M. We shall be glad to go to Hartselle for this conference, or if you prefer, it can be held at our office in Birmingham. If February 13 is not satisfactory to the City, another date may easily be agreed upon. Kindly let us know your wishes in the matter.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

JMB:h
b/c-Mr. Stanley
Mr. Bingham
Mr. Weiss
Mr. Shepard

127

City of Hartselle
Hartselle, Alabama

February 8th, 1934

Alabama Power Company,
Birmingham, Alabama.

Attention Mr. J. W. Barry, Vice President

Gentlemen:—

We, again, take the liberty of writing and inquiring as to when we may expect a conference with you, regarding the purchase of your electric distribution system, located in the City of Hartselle.

In your letter of January 13th, 1934, you anticipated that the appraisal of your system would require two weeks and upon completion, a conference would be in order.

This letter is prompted by the fact that a period of three weeks has elapsed since receipt of your letter of January 13th, without advice from you regarding a date for the conference.

Thanking you for a reply at your earliest convenience, we are.

Yours very truly,

CITY OF HARTSELLE
By J. P. HODGES
Mayor

128 February 9, 1934.

City of Hartselle,
Hartselle, Alabama.

Attention Mr. J. P. Hodges, Mayor

Gentlemen:

I wish to acknowledge receipt of your letter of February 8, which evidently crossed in the mails my letter of the same date. For your convenience, I am enclosing carbon copy of my letter.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

129 City of Hartselle
Hartselle, Alabama
February 10, 1934.

Alabama Power Company,
Birmingham, Alabama.

Attention Mr. J. M. Barry, Vice President

Gentlemen:—

In acknowledgement to your letter dated February 8th, with reference to a conference to discuss possible sale of your electrical distribution system.

It will be convenient for representatives of the City of Hartselle to meet in your office in Birmingham on Tuesday, February 13th at 10:30 A. M.

Yours very truly,

By direction
W. H. STEWART, *Clerk*

130 James M. Barry. Whereupon the witness identified the following map as a true and correct map of Alabama Power Company's system in the State of Ala-

aid to navigation will enable petitioner to produce at a reasonable cost a large quantity of power to feed into its extensive system," and, also found "That it is to the best interest of all concerned that the contemplated improvements as detailed in the petition be made as speedily as possible.

Whereupon the Plaintiffs offered a certificate of convenience and necessity issued by the Alabama Public Service Commission to the Alabama Power Company and Alabama Interstate Power Company, with respect to the transfer and assignment by the Alabama Interstate Power Company to the Alabama Power Company of all the rights, powers and authority theretofore granted by the Commission to said Alabama Interstate Power Company under and by virtue of the certificate of convenience and necessity issued by this Commission on September 8, 1932, insofar as it affected the construction of a power project at the location of one of the dams across the Tallapoosa River, namely, Cherokee Bluffs, (Martin Dam), being Docket No. 4279. This certificate was received in evidence as Plaintiffs' Exhibit No. 8. In this certificate the Alabama Public Service Commission found "that it is to the best interest of the petitioners, the public, and all parties concerned that the transfer and assignment by said Alabama Interstate Power Company to Alabama Power Company of said rights, powers, and authority be made as contemplated by said petition."

Whereupon plaintiffs offered the certificate of convenience and necessity issued by Alabama Public Service Commission to the Alabama Power Company and the Alabama Interstate Power Company for a hydroelectric development on the Tallapoosa River for the construction and operation of four dams across the Tallapoosa River, being Docket No. 4279. This certificate was received in evidence as Plaintiffs' Exhibit No. 9. In this certificate the Alabama Public Service Commission found "That the pro-
133 posed plan is well-considered and will make available a large amount of power for the operation of the several proposed power plants in conjunction with the power developments of the Alabama Power Company in this region so as to secure as great benefit as possible from the stored waters; that a plan for thus coordinating these several developments will be best adapted to developing, conservation and utilization in the public interest the navi-

gation and water resources of the region; and that the storage reservoirs proposed by petitioner should have an important effect in minimizing damage for flood conditions", and, "That it is to the best interest of all parties concerned that the contemplated improvements as proposed in the petition be made."

Whereupon plaintiffs offered in evidence a certificate of convenience and necessity issued by the Alabama Public Service Commission to the Alabama Power Company for a hydroelectric power development on the Coosa River near Wetumpka, Alabama, being Docket No. 4681. This certificate was received in evidence as plaintiffs' Exhibit No. 10.

In this certificate the Alabama Public Service Commission found "that the construction of the dam, powerhouse and other works necessary or incidental to said development and for the construction of necessary transmission lines to connect said proposed power houses with the system of Alabama Power Company so that power generated at said proposed power house may be transmitted through its distribution system to the public, is reasonably necessary for the convenience of the consumers and the public; that the applicant has complied with all the laws of Alabama, with the administration of which this commission is charged."

Whereupon **Edgar W. Robinson** was called as a witness for and on behalf of the plaintiffs and having been first duly sworn, was examined and testified as follows:

134 *Direct examination*

I am connected with Alabama Power Company in the capacity of superintendent of transmission and distribution. I am familiar with the distribution system of Alabama Power Company in the seven towns involved in this litigation. All of them are supplied from our transmission system which includes high voltage lines from our generating plants up to the various load centers, which include the towns in litigation, and several substations which reduce the voltage from the transmission voltage to distribution voltage, which is 11,000 volts or 2300 volts. In each of these towns we have a modern and more or less conventional distribution system consisting of primary stations, overhead pole lines, transformers, secondaries, services and feeders, all being the usual adjuncts of a distribution system. Each

of these seven distribution systems is adequate to take care of our present demands in these places, and most of them have considerable surplus capacity. These systems are all very well maintained. I am familiar with the company's personnel in each of these seven cities. Florence; Sheffield and Tuscumbia are operated as a district and in that district we have 28 local employees, and from time to time, emergency employees in varying numbers. At Russellville, we have 9 regular employees. At Decatur we have 28 regular employees. At Hartselle we have 3 regular employees and at Guntersville, 2. In addition to those local employees, there are certain divisional employees whose duties cover the whole northern division. These cities are in the northern division of the company. Our operations are split up into six divisions, this area being about half of the northern division. There are about 20 divisional field employees who spend a portion of their time in this area and whose duties lie in this area. In addition to these there are certain divisional general employees, part of whose
135 duties lie in this area and in these seven cities. Our company personnel is filled at the present time. We have all the employees we need.

Whereupon the plaintiffs having finished with the witness, the defendants stated that they did not wish to cross-examine him and the witness was dismissed.

Whereupon **Fernand Carl Weiss** was called as a witness for and on behalf of the plaintiffs, and, having first been duly sworn, was examined and testified as follows:

Direct examination

I am connected with the Alabama Power Company in the capacity of manager of engineering and construction. I have been with Alabama Power Company about 22 years. I am an electrical engineer I am familiar with the construction of Lay Dam, Mitchell Dam, Jordan Dam and Martin Dam, and, I am familiar with the drawings relating to the navigation on the three dams on the Coosa river. I was familiar with them while they were being constructed. I am familiar with the extent of the excavation work done by the company for locks and canals at Mitchell and Jordan Dam. The Mitchell Dam space was excavated at the East end, east abutment, and temporary closures were made in

such a manner that a lock could be constructed around this section. Heavy rock fills were placed on which timber cribs were constructed in a manner to conform with the requirement of the Army engineers at this point. Surveys were made of the river channel at the upper end of the reservoir made by Mitchell Dam and plans for an 8-foot channel were laid out to permit navigation to extend up to the upper dam, which is Lay Dam. This direct construction work was undertaken at a cost of $70,466. The lands for these lock facilities, approximately 40 acres, were provided by the Alabama Power Company at and around the abutment of Mitchell Dam. At Jordan Dam, the next one down
136 stream on the Coosa River, a 60-foot concrete channel was constructed through the west abutment of the dam, and was temporarily closed. This abutment was so built that lock gates could later be installed without injury to the dam. An approach channel was excavated for a distance of 2400-feet and to a width of 150-feet at the bottom. A portion of the lock wall was also constructed by the power company. This work involved excavation in excess of 198,000 yards of dirt and 41,700 yards of rock, and the placement of 41,300 yards of backfill and over 9,000 yards of concrete, all this being done in accordance with the requirements for lock provisions in this structure. These provisions for the lock at Jordan Dam alone, cost Alabama Power Company $334,301. I have estimated the cost to the Alabama Power Company to meet the requirements in the Federal Power Commission licenses, providing for the maintenance of gauges and lighting Government houses at those locks, and for power to actuate the locks when put in. The gauging stations, for gauging the flow of the river, have been erected. As we constructed dams down river, we had to replace the gauging station which was then farthest down stream with a new one. The ones now in service on the Coosa River include a gauge at Childtonsburg and one below at Jordan Dam. There is a gauging station on the Alabama River near Montgomery and two gauges on the Tallapoosa River, one at Wadleigh and one below Thurlow Dam. These gauge stations cost Alabama Power Company in excess of $7,100 and entail to the company a current annual operating and maintenance expense in excess of $2,500. The contingent liability of Alabama Power Company for lock

operations and facilities for the lock tenders for Lay Dam is 290 H. P.; for Mitchell Dam, 285 H. P.; for Jordan Dam, 600 H. P., making a total of 1,175 H. P., which will cost Alabama Power Company around $300 per H. P. investment cost.

Whereupon the plaintiffs having finished with the witness, the defendants stated that they did not wish to cross-examine him and the witness was dismissed.

Whereupon **James A. Emery** was called as a witness on behalf of the plaintiffs and having been first duly sworn was examined and testified as follows:

Direct examination

My name is James A. Emery and I live in Montclair, New Jersey, a suburb of New York City. I am Senior Vice-President of Ford, Bacon & Davis, Inc., whose business is general engineering. The firm was established in 1894 and conducts a general engineering business in industrial and public utilities properties, covering engineering, designing, construction and management. The firm engages in appraisal and valuation of properties, which is a very important part of our work.

I was graduated from the Massachusetts Institute of Technology in 1893 as a civil engineer. I was engaged in the Institute for one year thereafter as an assistant instructor. Then I was engineer and draftsman for companies making street railway special track work. Then I conducted an independent engineering office in Boston. Since 1898 I have been almost continuously associated in this engineering work with Messrs. Ford, Bacon and Davis of New York, and the successor corporation, Ford, Bacon & Davis, Inc. During all that period I have had to do with valuations of all kinds of properties, and principally with public utilities properties. I have had experience as an operator of public utilities, being for four years engaged in charge of the operation of the Birmingham Railway Light & Power Company in Birmingham, Alabama, operating all of the electric light, electric railway and gas facilities in Birmingham.

I have made an appraisal of the properties of Alabama Power Company involved in this litigation, which properties are located in the cities of Florence, Sheffield, Tus-

138 cumbia, Rusellville, Decatur, Hartselle and Guntersville. I made a valuation of the property of the company in those seven cities. Our valuation of this physical property of Alabama Power Company in Florence amounts to $271,066; in Sheffield, $227,840; in Tuscumbia, $121,800; in Russellville, $121,684; in Decatur $299,885; in Hartselle $62,174; in Guntersville, $83,057; the total being $1,187,206. I have made a study of the damage that would result to the remaining system if the properties of Alabama Power in these seven cities are separated from the company's system.

"Q. What do you find to be the damage to the remaining part of the system by reason of the severance of these seven towns?

"Mr. Scott. We object to that, if the Court please, because it is incompetent, irrelevant and immaterial, it calls for a conclusion of this witness. No foundation has been laid in his testimony of speculative damages projected into the future.

"The Court. I will overrule the objection.

"Mr. Scott. We will note an exception.

"(By Mr. Turner)

"Q. State what you found? "A. The total estimate of damages to the remaining property is $704,073."

Cross-examination

I did not, and never have, made an appraisal of all of the company's property. These particular appraisals, with the exception of Guntersville were made in 1935 on the request of the Chemical National Bank in connection with its trusteeship. I have not made a more recent appraisal, with the exception of Guntersville properties of the company. I personally made the appraisal of the going concern value and of the severance damages. I was in direct charge of the work of physical appraisal but did not have anything to do with the details.

"By the Court:

"Q. In estimating the damage you testified to,
139 how did you go about it? What does that really mean? A. It covers briefly the loss that the company will suffer with respect to certain of the property in the territory that is to be taken, such as a loss on its real es-

tate; namely, that it would not pay to sell the real estate for its value as an operating property. It would be subjected to some loss in the removal of fixtures and supplies.

"It would be at a loss with respect to the use of a high-tension transmission line that serves many of those places. That is, if this load is taken off, its full use cannot be obtained again.

"It will suffer a loss with respect to the carrying charges on that portion of its power-production facilities and transmission facilities that are made idle until such time as the other load grows sufficiently to absorb it.

"It will also lose the cost of that certain general property, which cost or proportion of cost has been absorbed by the business in these towns.

"It will also suffer a loss by reason of certain of the general expenses, a proportion of which is now carried by the business in these towns and which will be thrown back on the remainder of the system until such time as the system grows sufficiently to cover the loss or offset the loss.

"Q. The value of these properties in these seven towns you have stated to be about $1,100,000. If those properties, having that value, were severed from the rest of the company's plant in Alabama, your estimate would be that the rest of the plant would be worth some $700,000 less than it is now? A. Yes.

"Q. That is the theory of it? A. That is right, your Honor."

140 *Re-direct Examination.*

James A. Emery. There has not been a substantial change in prices going into electric distribution systems since my appraisal of these properties in 1935.

Re-cross examination

I did not make any estimate of damages in case of competition from another plant. My entire conclusion as to damage has to do with a complete severance of these plants now in operation. My estimate is based on the assumption that the entire property of the company, property and business, in those towns would disappear. My estimate is based upon the resultant damage that would be caused by the erection in any of these towns of a municipal power plant which

would compete and take all the business. It is an anomalous condition in these days to have two electric distribution systems competing with each other indefinitely in places like Florence, Sheffield, Tuscumbia, Decatur, Hartselle, Guntersville and Russellville. I assume that the company would rather take its loss than spend money fighting it indefinitely. Assuming that a municipal plant is erected in each of these cities and that they are in competition with the distribution systems therein operated by Alabama Power Company, and further, assuming that the rates charged for power by the municipally operated plants higher than the rates charged by Alabama Power Company, the company would still suffer some damage. I do not know what the damage would be under such assumed conditions and have made no estimate concerning same.

Whereupon the plaintiffs having finished with the witness, the defendants stated that they did not have any further cross-examination to make of him and the witness was dismissed.

Whereupon plaintiffs offered the application of
141 the city of Decatur, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $285,000 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 11. This application is substantially the same in form and type of information given as the application of Hartselle set forth herein as plaintiffs' Exhibit 14. The following statements, among others, are contained in Plaintiffs' Exhibit No. 11:

"(c) *Economic and Social Value:* The present electric light and power distribution system is being operated by public utility. The construction of a municipal system would be of great economic and social value to the inhabitants of the community.

In the first place, the construction would put many unemployed men to work.

In the second place, the distribution of cheap power from the Tennessee Valley Authority will cause a large increase in the use of power in the homes and by industry. The larger use of power in the homes will tend to reduce drudg-

ery, increase conveniences and make for a happier home life.

The larger use of power by industry will tend to increase pay rolls, which in turn will increase the demand for business and professional service.

The successful application of the cheap TVA power will tend to reduce electric light and power rates in other communities.

IV. (d) *Relation to General Plant:* The project
142 is in line with the National Plan to promote the happiness and prosperity of the people by making available cheap electric power.

(e) *City or Regional Planning Roard:* There is no city Planning Board. Decatur is in the Tennessee Valley and is within the area to be served by the Tennessee Valley Authority. The Authority has indicated willingness to supply power if the city can secure the funds with which to construct the distribution system.

(f) *Metropolitan District:* The city is an independent community and this question is not applicable.

(g) *Endorsements:* The citizens of Decatur endorsed the project in an election held on October 31, 1933 by a vote of 1,415 to 501. The Mayor and Counsel are unanimously in favor of the Project.

(h) *Objections:* No objections have been filed with the city authorities.

(i) *Competition:* The project will compete with a similar enterprise of Alabama Power Company, unless its distribution system should be taken over.

(j) *Status of Project:* Surveys, estimates and specifications have been made.

Bids can be received within three weeks after the approval of the loan and grant and the funds made available. Construction can begin within ten days after letting of contract and can be completed in eight months.

(k) *Number of Men Employed:* It is estimated that an average of 100 men will be employed directly on the work for a period of eight (8) months and that employment will be given to about 300 men for the same period, for the manufacture of equipment and material.

(l) *Priority of Project:* In view of the fact that
143 Decatur is right on the Tennessee River, is only 45

miles from Muscle Shoals (only 20 miles from Wheeler Dam); is the largest city on the Tennessee River below Chattanooga; and the people are so overwhelmingly in favor of cooperating with the Administration by making use of TVA power, it seems that this project should be given prior and preferential consideration.

(m) *Sequence:* There is no dependent construction. A house to house canvas has been made, which indicates that more than 95% of domestic, 70% of commercial, and 75% of industrial consumers will take power from the municipal plant on TVA rates as soon as service can commence.

(n) *Regenerative Character:* It is expected that the application of Cheap TVA electric power rates will cause the purchase and use of electrical appliances for household use, which will stimulate the manufacture and sale of such articles.

In our estimate of labor, Page 3 section (b) and Page 4 section (k), we assumed an average employment of 50% skilled and 50% unskilled labor.

The low TVA rates will tend to bring in new industries. This of course will call for the employment of both skilled and unskilled labor in construction of plants and housing for employes.

(o) *Permanence:* The construction of the project as submitted will take care of the needs of the community for some months. With relatively small outlays (which can be taken care of out of current earnings) the project will answer the needs of the community for many years.

* * * * * * * * *

144 (r) *Unemployment:* There are about 1,000 unemployed persons in the City, and the County Emergency Relief Committee has been spending about $12,000.00 per month on relief.

(s) *Incidence of material Orders:* Except untreated lumber, sand and gravel all material must be secured from without the County. Cement, iron roofing, and treated poles normally come from Birmingham, Alabama. Electrical equipment and supplies and copper wire come from the north and east. Gas and oil come from Louisiana and Texas.

* * * * * * * * *

Estimating operating expenses for the System is shown below in detail for the year 1935, the first full year of operation:

Power at Wholesale from TENNESSEE VALLEY AUTHORITY:
$38,058

* * * * * * * * *

V. (d) *Discussion of Estimated Revenue and Expense:* The financial table indicates a reasonable margin of surplus during the life of the loan. The increases in the revenues shown are in line with the expected development of the area as the Community gets to using TVA cheap power.

* * * * * * * * *

(e) *Schedule of Rates:* The following are the rates to be charged. These rates may be changed by the Municipality with the approval of TENNESSEE VALLEY AUTHORITY, provided no rate shall be higher than the rate for similar service authorized by Alabama Public Service Commission for public utility.

TVA Rates are attached.

* * * * * * * * *

145 (1) *Receipts and Expenditures of the City:* The budget of the city has been balanced for many years. There is nothing to indicate that the present current expenditures will exceed the prudently estimated ordinary revenues, and the assurance is given that the budget will be balanced. Below is a table showing the receipts and expenditures for the past four years:

	1930	1931	1932	1933
Revenues	$154,915.24	$143,045.35	$127,447.15	$125,900.49
Expenditures	127,941.23	155,047.16	103,073.46	97,848.53
Surplus	26,974.01		24,373.69	28,051.96
Deficit		12,001.81		

(Thereupon follow details)

(m) *Description of City:* • • • • •

Decatur is 40 miles East of Muscle Shoals and only 20 miles from Wheeler Dam. The completion of the Wheeler Dam will make possible water transportation the year found.

• • • • • • • •

334 Brown Marx Building,
Birmingham, Alabama,
December 14, 1933.

Honorable Mayor and Council,
City of Decatur, Alabama.

Gentlemen:

We have made field surveys, studies, investigations and estimates for a proposed Municipal electric light and power distribution system for your City, including a line and distribution system for Austinville.

The proposed system covers the entire business and residential section of Decatur and Austinville.

146 It is estimated that the distribution system will cost $371,743.00, of which $285,000.00 is to be a loan and $86,743.00 is to be a grant from the Federal Government.

Details of the estimated cost are as follows:

(Thereupon followed the tabulated details of cost)

• • • • • • • •

We have gone very carefully into the matter of power rates, both wholesale and retail.

We feel that our estimates of expected Revenue are ultra-conservative: We took the actual customers who signed request for you to construct a municipal distribution system and figured the bills on the proposed TVA rates. We assumed an annual increase of only 5% of this number for the first five years, which brings the number of customers only to the number of buildings now wired for electric service.

Our estimates indicate that with the extremely low retail TVA rates the operation of the municipal system will pay all operating costs, the amortization of the loan within 20 years, all State, County, School District, and City taxes

and licenses at same rates as public utility, and then have a comfortable surplus each year.

In addition the consumers will have a saving of about 40% on their power bills.

On account of the fact that an intensive appliance campaign is being projected by the TENNESSEE VALLEY AUTHORITY to put energy consuming devices on the market, we feel that within a few months the energy consumption by domestic consumers will be largely increased.

* * * * * * * * *

147 The amount of $38,058 for power at wholesale from TENNESSEE VALLEY AUTHORITY on the application of Decatur, Alabama, is for energy to be purchased at their regular quoted schedule, as follows:

1,810 K.W. demand		@ .90	$1,629.00
100,000 k.w.h. energy		@ .004	400.00
200,000 "	"	@ .003	600.00
217,000 "	"	@ .0025	542.50
517,000	Total per month		$3,171.50
	Total per year		$38,058.00

* * * * * * * * *

We are advised by the TENNESSEE VALLEY AUTHORITY that transmission lines will be run into the city and the main part of the sub-station supplied by T.V.A., including the step-down transformers at no cost to the city. They propose to furnish the current and meter on the low side of the main transformers at a distribution voltage of approximately 2300 volts.

* * * * * * * * *

It seems very desirable that the distribution system be constructed at once for several reasons:

1. To put men to work.

2. To cooperate with TENNESSEE VALLEY AUTHORITY in making available cheap power rates to the residents of the community.

3. Because loans and grants are available from the Federal Emergency Administration of Public Works on liberal terms.

We recommend that you immediately take the necessary steps to apply for a loan of $285,000 and a grant of
148 $86,743 from the *Federal Emergency Administration of Public Works.*

Assuming favorable action on the loan and grant we recommend that you contract for power from TENNESSEE VALLEY AUTHORITY for power at wholesale.

Respectfully,

T. M. FRANCIS.
PAUL S. HALEY.
Consulting Engineers."

(The application also pointed out a large amount of bonds and notes of the city that were in default both as to interest and principal.)

Whereupon Plaintiffs offered the application of
149 the city of Guntersville, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $100,000 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 12. This application is substantially the same in form and type of information given as the application of Hartselle set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiffs Exhibit No. 12:

"II. *Summarized General Information:*

* * * * * * * *

d. Consulting Engineer: Lide & Adler, Woodward Building, Birmingham, Alabama.

* * * * * * * *

IV. *Project:*

a. *General description:*

The project under contemplation will consist of a complete and new electric light and power distribution system for a city of about 3000 population. It is proposed that the distribution system be energized from a transformer sub-

station located near the center of the city, which sub-station will be furnished by the Tennessee Valley Authority and supplied by them with energy from Muscle Shoals and Wheeler Dam.

The distribution system is intended to practically suplicate and supplant a public utility distribution system. The city has secured ten year contracts from practically all of the consumers now in the city, which contracts read as follows:

(Thereupon follows the Contingent Power Con-
150 tract which is exactly the same as the one set forth in Exhibit 14 herein)

The estimates of cost and of earnings are based upon the signed customers. Some of these customers are at present disconnected. Inasmuch, however, as this loan is for a long period, these customers will be connected to the system when normal business resumes, and especially when cheap power is offered. It is proposed to construct a new system complete without removing the old system.

It is also proposed to construct a central distributing sub-station near the center of the city, which sub-station will be equipped with transformers furnished by the T.V.A.

* * * * * * * * *

b. *Estimates of the Cost of the Project:*

* * * * * * * * *

The cost estimates are based upon the number of consumers signed up and upon their classification. The loads of the industrial consumers were ascertained by inspectors. The consumption of the domestic and commercial consumers is predicated upon a return to normal business conditions and upon the normal stimulation of consumption by the low promotional rates to be put into effect by the T.V.A.

* * * * * * * * *

Economic and Social value of the project:

c. The lower rates resulting from this project will stimulate the industrial and commercial development of the city, and with the use of household electrical appliances the drudgery of house-keeping will be greatly relieved,
151 thus improving home life for the residents.

d. The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the regions within transmisson distance of the Muscle Shoals power development.

. . . . . .

f. The city is an isolated town on the Tennessee River, and is a part of the T.V.A. project.

. . . . . .

i. The project will not be competitive since practically all of the consumers are signed up for a ten (10) year period.

. . . . . .

The field and office labor incident to the work will entail about 20% of the total cost, or about $20,000.

. . . . . .

V. *Revenues & Expenses:*

. . . . . .

b. The estimated income is predicated upon the assumption (a) of a return to normal business conditions during the period of the loan, (b) that the town will not grow in population during this period, and (c) that the low T.V.A. rates will stimulate customer consumption. These assumptions seem conservative.

. . . . . .

Much of the present industrial load is seasonal, which will have the effect of increasing the KW demand and decreasing the load factor of the city's purchased power. The T.V.A. power demand rates to municipalities, however, provide for this contingency so that the annual weighted
152 demand will not be greatly increased.

. . . . . .

The annual weighted demand is estimated at about 500 KW. On the basis of 500 KW and 1,348,000 KWH per year, the cost of T.V.A. power would be $10,800 per year.

. . . . . .

Jan. 10, 1934

Mr. George J. Davis, Jr.
State Engineer,
Alabama Advisory Board,
Federal Emergency Adm. of P. W.
Montgomery, Alabama.

Dear Mr. Davis:—.

IN RE: Application of Guntersville, Alabama for loan for construction of electrical distribution system.

This is in reply to your favor of December 29, 1935, requesting additional information in connection with the above application.

* * * * * * * * *

III. It is estimated that about 20% of the customers signed up to take power from the municipal plant are at present not taking service from the existing utility system. This is due largely to the general economic conditions and the high existing rates for electric energy.

* * * * * * * * *

It is anticipated that greatly increased consumption of electricity will arise from the promulgation of the
153 low T. V. A. rate schedules, in connection with the projected Electrical Home & Farm Appliance, Inc., which will enable the residential customers to buy electric appliances and thereby increase their demands.

* * * * * * * * *

The annual weighted demand is estimated at about 450 KW. On the basis of 450 KW and 888,000 KWH per year, the cost of T.V.A. power would be about $8,400.

* * * * * * * * *

The above tabulation is predicated upon a grant of 30% of the cost of labor and material, which will enable the municipality to make effective immediately the low rates, in cooperation with the Tennessee Valley Authority's program. This grant, as shown above, will carry the project thru its period of development. If the grant is applied as shown above, there will be a fair margin of safety even under the conservative estimates of income.

* * * * * * * * *

If there is any further additional information desired we will be glad to supply same upon request.

Yours very truly,

LIDE & ADLER

By JULIAN E. ADLER

JEA/T

Whereupon plaintiffs offered the application of the
154 city of Florence, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $486,122.48 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 13. This application is substantially the same in form and type of information given as the application of Hartselle set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiffs Exhibit No. 13:

"IV. THE PROJECT:

a. *General Description:*

* * * * * * *

The present distribution system is supplied by two transmission lines which connect with the Alabama Power Company's transmission network through the high tension substation, now leased by the United States to the Alabama Power Company, which is located near the Steam Plant of U. S. Nitrate Plant No. 2.

* * * * * * *

It was the intention of the City of Florence, until very recently, to purchase such of the existing distribution equipment as could be advantageously used in the municipal distribution system, and to repair and extend the usable portions of the existing system to make them conform to the service and capacity requirements of the City's proposed distribution system. A detailed survey was made of the existing system by the Consulting Engineer for the City of Florence to determine the value of the existing system and the value of such of the existing properties as the

City of Florence might advantageously use as a part of the municipal distribution system. The survey revealed:

That much of the existing system will not fit into the plans of an independent municipal system such as the City of Florence will require; that the condition of the existing system is, in general, very poor because of deferred maintenance; that the usable properties, if acquired by the City, will require very extensive repairs and enlargements to put the system in a proper serviceable condition and to provide the capacity for the increased demands which lower rates will induce; that the present value of such of the existing equipment as the City could advantageously use, when due account is taken of depreciation and obsolescence, is less than 40% of the value which the Alabama Power Company places on the same equipment.

In view of the foregoing, it appears that no satisfactory negotiations, which will be acceptable, to the City of Florence, can be effected with the Alabama Power Company for the purchase of any considerable portion of the existing distribution system. Therefore, the Board of Commissioners of Florence propose that the City should build an entirely new Electric Distribution System which would be better adapted to the operating and service requirements of the City than is the existing system. THE FRANCHISE, UNDER WHICH THE ALABAMA POWER COMPANY HAS BEEN PERMITTED TO OPERATE THE ELECTRIC DISTRIBUTION UTILITY IN FLORENCE, ALABAMA, EXPIRED MARCH 12, 1933. A SIX MONTHS EXTENSION OF THE FRANCHISE, WHICH WAS GRANTED, EXPIRED SEPTEMBER 12, 1933. SINCE THE LATTER DATE, THE ALABAMA POWER COMPANY HAS BEEN OPERATING THE ELECTRIC UTILITY IN FLORENCE WITHOUT A FRANCHISE AND AT SUFFERANCE ON THE PART OF THE CITY.

Upon completion of the new system, the City will declare the existing equipment of the Alabama Power Company, which is in a very poor state of repair, to be a public nuisance, and compel them, under existing Alabama law, to remove their equipment from the streets of Florence.

The new system which the City of Florence proposes to build, as compared to the existing system, will have greater capacity and will permit of more flexible and more reliable operation.

* * * * * * * * *

c. *Economic and Social Value:*

* * * * * * * * *

The residents of Florence and of the Muscle Shoals District have, for more than a generation, been cognizant of the enormous industrial possibilities of this section, which awaited only the economical development and proper disposition of the power potentialities of the Tennessee River. These people have given tremendously of their time and money in their effort to promote the proper development and utilization of the power resources of the Tennessee River, and particularly for the development of Wilson Dam, which is situated contiguous to the corporate limits of Florence, and Dam No. 3, which will be located about 16 miles upstream from Wilson Dam.

They were encouraged to believe when Wilson Dam was begun and completed by the Government that their
157 objective was in sight and that the low cost power, which had been for so long a time their vision and hope, was to be made available at rates which would stimulate industrial development and permit greater use of electricity in the homes.

Since the completion of Wilson Dam in 1925, it has been operated by the Government, but the efforts of the private power companies and an administration sympathetic with the purpose of the power interests, have delayed the realization of the hope for cheaper power, which the people of this district have so long fostered and labored for.

The present Government has recognized the principle that the people have a right to be served through Government agencies with the power produced from Government owned and operated power plants, and has accordingly created the Tennessee Valley Authority to perform this function. The State of Alabama has likewise enacted legislation which recognizes this right, and enables towns and cities in Alabama to own and operate municipal distribu-

tion plants, and also enables them to be served from government operated generating plants.

The rates now being charged for electricity in Florence, Alabama are in excess of the schedules which are suggested and approved by the Tennessee Valley Authority for resale by municipalities.

Because of the close proximity of Florence to the Wilson Dam Hydro-Electric Plant, which is now being operated by the Tennessee Valley Authority, the people of
158 Florence believe that rates much lower than they are now paying for electricity can be obtained through municipal operation of the electric distribution system and the wholesale purchase of electricity by the municipality from the Tennessee Valley Authority.

Accordingly, the citizens of Florence, in an election which was held on June 30, 1933 to decide this question, expressed their desire to have the City of Florence acquire, by purchase or construction, and operate a municipal electric distribution system by a vote of 919 for and 63 against.

There are many people living in Florence who are unable to use electricity at the rates now being charged. The lower rates, which will be effected under municipal operation, will enable many to take electricity who are now unable to use it. The lower rates under municipal operation will encourage a larger use of electricity by all domestic consumers, thereby increasing the comfort and convenience of the homes.

* * * * * * * * *

Our economic and social wellbeing is, to a large degree, dependent upon the use and application of electricity. To lower the cost of electricity is to extend these benefits, and this is the desire of the people and the purpose of the City of Florence.

* * * * * * * * *

Financial Soundness of the Project: This project is not supported by taxation, but is supported by revenue derived from the sale of electricity. If it should develop that the resale rates proposed in Section V-e of this application do not yield sufficient revenue to meet expenses, then a revision of the rates upward to secure the necessary revenue will

159 be effected to insure the financial soundness of the project.

d. *Relation to General Plan:* The project is a portion of a long range program for the development and growth of a municipal distribution system, whereby the domestic, commercial and industrial consumers may be served at lower rates for electricity.

* * * * * * * *

h. *Objections:* It is known that the Alabama Power Company, which owns and operates the existing distribution system in Florence, together with several of their employees, are opposed to having the City of Florence engage in municipal distribution of electricity. Effort has been made to find a voter or taxpayer, or both, to file an objection, but without success.

i. *Competitive Character:* The franchise of the Alabama Power Company has expired. The City has refused to renew same, choosing to serve its own citizens as a governmental function. The project will, therefore, have no competition from other existing projects of the same character. It will compete with the existing gas company to some extent, for cooking and heating service, which may result in compelling a reduction of the present gas rates. The present gas rates in Florence are too high. The rates for gas are: For the first 500 cubic feet per month, $2.00; for the next 9,500 cubic feet, and for all over 10,000 cubic feet per month at $1.25 per 1,000 cubic feet. It should be of great benefit to the consumers of gas if the gas company is compelled to reduce rates.

* * * * * * * *

160 k. *Number of Men Employed:* It is estimated that an average of 90 persons will be employed directly on the work for a period of 7 months, and that employment will be given to about 200 persons for the same period for the manufacturing of equipment and materials.

* * * * * * * *

m. *Sequence:* The project, when completed, will be immediately put into operation. The city is assured of its power supply from the Tennessee Valley Authority. As previously mentioned in this application, the Alabama Power

Company, who are now operating without franchise, will, under the Alabama law, be required to remove the existing distribution equipment.

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r. *Unemployment in District Involved:* A table compiled from the report of the Relief Department of Lauderdale County, of which Florence is the County seat, covering the period from July, 1933 to October, 1933, inclusive, is presented below. This table shows the number of destitute families and unemployed persons in the County that are now receiving funds and food through this department and the funds expended.

Month	Number of Families	Number of Persons	Amount Expended	Administration
July	793	3,619	$6,629.61	$894.60
August	1,216	5.943	10,698.08	1,024.32
September	1,492	7,251	10,663.95	1,157.12
October	1,162	5,660	12,338.80	1,463.33
	Total		$40,330.44	$4,539.37
Grand Total				$44,869.81

The population of Lauderdale County is approximately 40,000. The population of Florence is approximately 16,000.

Approximately 50% of the unemployed for Lauderdale County reside in the City of Florence. 161

About 65% of the relief funds were expended in the City of Florence.

s. Incidence of Material Orders: The steel and most of the building materials will probably be produced in Alabama. The poles and much of the pole line hardware will probably be produced in Alabama. The transformers, switching equipment, line devices, and meters will probably be manufactured in Pennsylvania, New York, Massachusetts and Wisconsin. The wire will be of copper, probably produced either in Arizona or the northwestern states and manufactured probably in the eastern states.

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e. *Schedule of Rates:* The following rate schedules were obtained from the Tennessee Valley Authority; they are the rate schedules under which the Tennessee Valley Authority proposes that the City of Florence shall purchase and resell electricity:''

* * * * * * * * *

(The application showed that the total outstanding funded debt of the City is $2,278,000.00, all of which, except $410,000 of waterworks bonds, are presently in default. The application states that the City of Florence has attained its legal debt limit but that the proposed obligations have been construed by the Supreme Court of Alabama as not constituting debts of the city.)

Whereupon plaintiffs offered the application of
162 the city of Hartselle, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $95,500, for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 14, and is set forth below as follows:

Application of Hartselle, Alabama

for

Loan and Grant of $95,500

To Construct an

Electrical Distribution System

I. *General:*

This application has been prepared and the date is presented in accordance with Circular No. 2 of the Federal Emergency Administration of Public Works. If additional data is needed it will be promptly furnished by the correspondent upon request.

II. *Summarized General Information:*

a. *Applicant:* City of Hartselle, Morgan County, Alabama.

b. *Correspondent:* J. P. Hodges, Mayor, Hartselle, Alabama.

c. *Attorney:* Tennis Tidwell, Decatur, Alabama.

d. *Consulting Engineer:* Lide & Adler, Woodward Building, Birmingham, Alabama.

e. *Population:*

1910—1374)
1920—2209) From U. S. Census Report
1930—2204)

III. *Loan Requested:*

a. *Amount:* $95,500

b. Security: Revenue Bonds, secured by a pledge of the net revenues of the electrical distribution system,
163 and, if required, by a first mortgage lien on the physical properties constructed with the proceeds of this loan.

c. *Maturities:* Serial Bonds—One (1) to Twenty (20) years.

d. *Application of Grant:* It is requested that the grant be applied against the earliest maturing interest and principal payments.

e. Schedule of Funds Required: Funds will be required approximately as follows:

$2000 on approval of loan, balance in approximately five (5) equal monthly installments, beginning two to three months after approval of the loan.

IV. *Projects:*

a. *General Description:*

The project under contemplation will consist of a complete and new electric light and power distribution system for a city of about 2500 population. It is proposed that the distribution system be energized from a transformer sub-station located near the center of the city, which sub-station will be furnished by the Tennessee Valley and supplied by them with energy from Muscle Shoals and Wheeler Dam.

The distribution system is intended to practically duplicate and supplant a public utility distribution system. The City has secured ten year contracts from practically all of

the consumers now in the city, which contracts read as follows:

"Contingent Power Contract"

"For and in consideration of One ($1.00) Dollar in hand paid by J. P. Hodges, Mayor of the City of Hartselle, Alabama, on behalf of said City, the receipt whereof is hereby acknowledged, and in further consideration of the opportunity to secure lower electric rates for myself, and of the benefits that will accrue to me as a citizen of or business man of said city by reason of the net revenue which should be earned by the City from the municipal operation of its own electrical distribution system, it is hereby agreed as follows:

1. That when, and if, the City of Hartselle, Ala. has electrical energy of the required voltage and phase available for sale at the premises of the undersigned, the City will supply, and the undersigned, so long as he is a purchaser of electrical energy in the territory served by the City's municipal distribution system, will purchase his entire requirements of electrical energy from the City for a period of ten (10) years beginning as soon as the service is available, but not later than January 1, 1935.

164

2. It is further agreed that the rates for electricity to be charged by the City and to be paid by the consumer shall be those prescribed by the Tennessee Valley Authority, and that such rates shall be lower than the present public utility rates paid by the undersigned."

The estimates of cost and of earnings are based upon the signed customers. Some of these customers are at present disconnected. Inasmuch, however, as this loan is for a long period, these customers will be connected to the system when normal business resumes, and especially when cheap power is offered. It is proposed to construct a new system complete without removing the old system.

It is also proposed to construct a central distributing sub-station near the center of the city, which sub-station will be equipped with transformers furnished by the T. V. A.

* * * * * * * *

b. *Estimates of the Cost of the Project:*

* * * * * * * *

The consumption of the domestic and commercial consumers is predicated upon a return to normal business conditions and upon the normal stimulation of consumption by the low promotional rates to be put into effect by the T. V. A.

* * * * * * * *

Economic and Social values of the project:

c. The lower rates resulting from this project will stimulate the industrial and commercial development of the city, and with the use of household electrical appliances the drudgery of house-keeping will be greatly relieved, thus improving home life for the residents.

165 *Long Range Development:*

d. The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the regions within transmission distance of the Muscle Shoals power development.

e. The city has no regional planning board.

f. The city is an isolated town about 11 miled South of Decatur, Ala. and is a part of the T. V. A. project.

g. The project was endorsed by a majority of the popular vote in the recent municipal election.

h. The objections which have been raised against the project are believed to have been inspired by the existing utility.

i. The project will not be competitive since practically all of the consumers are signed up for a ten (10) year period.

j. No drawings are believed to be essential at this time, but if the Board desires them they can be prepared. The design of a modern distribution system is a matter of tremendous detail, highly standardized, which at this stage is believed to be unnecessary. Maps of the City of Hartselle can be supplied the Board if it so desires. Plans and specifications for the distribution system can be prepared in approximately 60-days from the date of the completion of details incident to the Government's financing of the project.

Work can begin within 15-days from the date of completion of the drawings. The project should be completed within 5-months. The field and office labor incident to the work will entail about 20% of the total cost, or about $19,000. At an average rate of 61½c per hour, the number of man hours required will be 31000. This will give employment to approximately 50-men for five months for field work alone.

V. *Revenues & Expenses:*

a. The project is a new system.

b. The estimated income is predicated upon the
166 assumption (a) of a return to normal business conditions during the period of the loan, (b) that the town will not grow in population during this period, and (c) that the low T. V. A. rates will stimulate customer consumption. These assumptions seem conservative.

* * * * * * * * *

Much of the present industrial load is seasonal, which will have the effect of increasing the KW demand and decreasing the load factor of the City's purchased power. The T. V. A. power demand rates to municipalities, however, provide for this contingency so that the annual weighted demand will not be greatly increased.

* * * * * * * * *

The annual weighted demand is estimated at about 612 KW. On the basis of 612 KW and 1,320,000 KWH per year, the cost of T. V. A. power would be $11,760 per year. (Whereupon followed a detailed earning statement of the proposed project.)

VI. *Financial Data:*

b. Inasmuch as this application involves a loan and a grant for a revenue producing project and the applicant's collateral will be revenue bonds, which are not a general obligation, it appears unnecessary (by reason of special instructions of October 14 issued by Col. H. M. Waite, Deputy Administrator to the State Advisory Board) to answer specifically all details under Section 6 of Circular #2.

g. So far as is known there are no outstanding obligations in default.

(Whereupon followed a legal memorandum prepared by the city attorney concerning the proposed project, its financing and operation)

(Whereupon followed a certified copy of the proceedings of the city council with regard to the municipal election concerning the municipal distribution system.)

Jan. 10, 1934

Mr. George J. Davis, Jr.
State Engineer.
Alabama Advisory Board,
Federal Emergency Adm. of P. W.
Montgomery, Alabama.

167 IN RE: Application of Hartselle, Ala. for loan for construction of electrical distribution system.

Dear Mr. Davis:—

This is in reply to your favor of December 29, 1933, requesting additional information in connection with the above application.

1. The project was approved by the electorate on October 10, 1933. (296 votes for—18 votes against).

II. The anticipated profits and proposed payments on debt service thruout the 20-yr. proposed term of the loan are estimated as follows:

The application, page 6, indicates a net operating income available for interest and amortization of $10,230. This was based on a reasonable assumption that under the low T. V. A. promotional rates and on improved economic conditions the average gross income over a 20-yr. period would be $30,050. For the purpose of making the tabulation below we have used the earning statement as shown on page 6 of the application, for all except the first year of operation.

For the first year of operation, a large part of which will be in the Year 1935, at which time it is reasonable to expect greatly improved economic conditions, the net operating income is estimated to be $4,820, calculated as follows:

(Thereupon followed a detailed income statement.)

* * * * * * *

On the basis of 550 KW and 857,000 KWH per year, the cost of T. V. A. power would be $9,870.

(Thereupon followed a detailed earning statement, and a tabulated estimate of the net income available for each of the twenty years for the annual interest charges and principal maturities of the Serial Bonds)

The above tabulation is predicated upon a grant of 30% of the cost of labor and material, which will enable the municipality to make effective immediately the low rates, in cooperation with the Tennessee Valley Authority's program. This grant, as shown above, will carry the project thru its development period. If the grant is absorbed as shown above, there will be a fair margin of safety even under the conservative estimate of net income.

. . . . . .

III.

(a) The assessed valuation of taxable property for the last three fiscal years was as follows:

1930—$1,546,694
1931— 1,422,596
1932— 1,191,240

(b) There are no defaults on either principal or interest payments.

(c) The tax rate is:

168

State & County — 17 mils.
School — 4 "
City — 5 "
Based on 60% valuation.

(d) Amount of taxes levied and collected are as follows:

Year	Levied	Uncollected
1930	$7,733.46	$73.43
1931	7,112.98	431.31
1932	6,956.20	189.11

IV. Copies of the Alabama Power Company's franchise are hereto attached.

V. We estimate that about 10% of the customers signed up to take power from the municipal plant are at present

not taking service from the existing system. This is due largely to the general economic conditions and the high rates.

VI. The sub-station cost, as shown on page 3 of the application, is itemized as follows:

(Thereupon followed a detailed statement of the cost of the sub-station)

This letter is being sent in quadruplicate, as requested.

If there is any further additional information desired we will be glad to supply same upon request.

Yours very truly,
LIDE & ADLER
By— Julian E. Adler"

JEA/T

169 Whereupon plaintiffs offered the revised application of the city of Tuscumbia, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $127,244 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the revised application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs' Exhibit No. 15. The following statements, among others, are contained in Plaintiffs Exhibit No. 15:

"*Revised Application to Federal Emergency Administration of Public Works for Loan for the Construction of an Electrical Distribution System for the City of Tuscumbia, Alabama*

The original application for this loan was filed with the Alabama Advisory Board of Public Works, in Montgomery, Alabama, on August 30th, 1933. No action has yet been taken by that Board except as indicated by their letter of September 29th, 1933; a copy of said letter as well as the reply thereto is herewith attached.

The original application is revised in the following respect.

1. In cooperating with the Tennessee Valley Authority to immediately build up greater consumption of electrical

energy, especially for domestic use, the original investment in transformers, meters and secondary wiring has been increased. In the original plan it was contemplated that the investment in these items would take place over a period of years and be paid for out of operating profits.

2. A revised tabulation of income and expenses
170 has been prepared based on consumption for the year 1932 (the latest figures available) and at rates suggested by the Tennessee Valley Authority.

3. Estimates of cost have been revised to take care of the $1.00 per hour wage for skilled labor; the order establishing this rate was made after August 30th, 1933.

THE CITY OF TUSCUMBIA,
ALABAMA.
By Authority of the Board of Mayor & Alderman
LIDE & ADLER, ENGINEERS.
By JULIAN E. ALDER

III. *The Loan Requested*

• • • • • • • • • •

(d) It is preferred that the grant be applied against principal and interest payments to the extinguishment of the serial bonds maturing earliest together with the interest during such period to the extent that the grant will permit. This is particularly desired in order that the City may cooperate with the Tennessee Valley Authority and immediately promulgate very low rates, particularly for domestic consumption. Under this procedure the operating income will be adversely affected until consumer consumption is increased. Experience has demonstrated the fact that when promotional rates are promulgated the consumption will increase to such an extent that the revenues will ultimately equal those received prior to the reduction in rates.

• • • • • • • • • •

171 IV. *The Project*

• • • • • • • • • •

This is the more modern system and will better serve the higher load density which will result from the low T. V. A. rates.

(Thereupon followed a detailed tabulated estimate of the cost of the Project.)

Revenues and Expenses

* * * * * * * * *

The average annual consumption per residential consumer in the above tabulation is 825 kw hours, with an average rate of 4.72¢. In Tacoma, with an average rate of 1.87¢ the consumption averages 1,500 kw hours. The following tabulation of annual income assumes that the consumption per customer will not increase even though rates are materially reduced. It is based on an application of the rates proposed by the TVA to the actual consumption of each residential customer for the month of April 1932. It also assumes a reduction of 33 1/3% in rates to commercial consumers, and 25% reduction in industrial rates. The consumption and income from street lighting is assumed to remain unchanged.

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Copy of Letter From Lide & Alder, Engineers, to the State Engineer of the Public Works Board at Montgomery, in Reply to His Letter of Sept. 29, 1933.

Birmingham, Ala., Sept. 30, 1933.

Mr. George J. Davis, Jr.
State Engineer, P.W.A.
Montgomery, Ala.,

172 Re: City of Tuscumbia Electric Distributing System.

Dear Sir:—

This letter is in response to your favor of the 29th inst. which seeks further information concerning application of the above submitted on August 30th, 1933. Answers follow:—

1. At the time of filing the application there was no ruling to cover a wage scale of $1.00 per hour for skilled labor, but only that of the 40¢ per hour for unskilled. To comply

with the present ruling the following changes should be made with respect to the application—Section IV, page 7.

Estimated Costs	*Material*	*Labor*	*Total*	*Man Hours*
Grand Total	$77,565	$16,963	$94,528	28,273
Labor increase due to hindrance add 33 1/3% to distribution labor		4,800	4,800	8,000
Contractor's fees—10% of $94,528		9,453	9,453	2,500
	$77,565	31,216	108,771	38,773
Engineer's fees—5%			5,439	1,000
			114,210	39,773
Interest during construction			1,140	
Total of Loan			$115,350	

6 The salvage value of the distribution system to the utility itself—exclusive of real estate—is probably about $35,000 to $40,000.

Yours very truly,

LIDE & ADLER
(Signed) MARTIN J. LIDE

173 Whereupon plaintiffs offered the revised application of the City of Sheffield, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $228,317.12 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original revised application, furnished to the plaintiffs by the defendants, and was received in evidence as Plaintiffs Exhibit No. 16. This application is substantially the same in form and type of information given as the application of Tuscumbia set forth herein as Plaintiffs Exhibit 15. The following statements, among others, are contained in Plaintiffs Exhibit 16:

"*Revised Application to Federal Emergency Administration of Public Works for Loan for the Construction of an Electrical Distribution System for the City of Sheffield, Alabama*

The original application for this loan was filed with the Alabama Advisory Board of Public Works, in Montgom-

ery, Alabama, on August 30th, 1933. No action has yet been taken by that board except as indicated by their letter of September 29th, 1933; a copy of said letter as well as the reply thereto is herewith attached.

The original application is revised in the following respect.

1. In cooperating with the Tennessee Valley Authority to immediately build up greater consumption of electrical energy, especially for domestic use, the original investment in transformers, meters and secondary wiring has been increased. In the original plan it was contemplated that the investment in these items would take place over a period of years and be paid for out of operating profits.

2. A revised tabulation of income and expenses has been prepared based on consumption for the year 1932
174 (the latest figures available) and at the rates suggested by the Tennessee Valley Authority.

3. Estimates of cost have been revised to take care of the $1.00 per hour wage for skilled labor; the order establishing this rate was made after August 30th, 1933.

THE CITY OF SHEFFIELD,
ALABAMA
By Authority of the City Commission,

LIDE & ADLER, ENGINEERS,
By MARTIN J. LIDE.

* * * * * * * * * *

It is preferred that the grant be applied against principal and interest payments to the extinguishment of the serial bonds maturing earliest together with the interest during such period to the extent that the grant will permit. This is particularly desired in order that the City may cooperate with the Tennessee Valley Authority and immediately promulgate very low rates, particularly for domestic consumption. Under this procedure the operating income will be adversely affected until consumer consumption is increased. Experience had demonstrated the fact that when promotional rates are promulgated the consumption

will increase to such an extent that the revenues will ultimately equal those received prior to the reduction of rates.

* * * * * * * * * *

This is the more modern system and will better serve the higher load density which will result from the low T. V. A. rates.

* * * * * * * * * *

The following tabulation of annual income assumes that the consumption per customer will not increase even though rates are materially lowered. It is based on an applicataion of the rates proposed by the TVA to the actual consumption of each residential consumer for the month
175 of April 1932. It is also based on a reduction from existing commercial rates of 33 1/3%, and from industrial rates of 25%. The consumption and income from street lighting is assumed to be unchanged.

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Copy of Letter From Lide & Adler, Engineers

Birmingham, Ala., Sept. 30, 1933.

Mr. George J. Davis, Jr.
State Engineer, P. W. A.
Montgomery, Ala.,

Re: City of Sheffield Electric Distributing System

Dear Sir:—

This letter is in response to your favor of the 29th inst. which seeks further information concerning application of the above submitted on August 30th, 1933. Answers follow:—

1. At the time of filing the application there had been no ruling to cover the wage for skilled labor of $1.00 per hour, but only that to provide a minimum of 40¢ per hour for labor. To comply with the present rule the following changes should be made with respect to our application—Section IV, page 7. Estimated Costs.

	Material	*Labor*	*Total*	*Man Hours*
Grand Total	$142,030.39	$29,500	$171,530.59	49,209
Labor increase due to hindrance—add 33 1/3% to distribution labor		6,600	6,600	11,000
Contractor's fees—10% of $171,530		17,153	17,153	4,000
			$195,283	64,209
Engineer's fees—5% of $195,283			9,764	1,500
Interest during construction period 5 months—4% of $205,000 x 1/2			1,720	
Total of Loan			$206,767	65,709

176

* * * * * * * * * *

6. The salvage value of the distribution system to the utility itself (exclusive of real estate) is probably about $70,000.

* * * * * * * * * *

Yours very truly,

LIDE & ADLER
(Signed) MARTIN J. LIDE."

177 Whereupon plaintiffs stated that the defendants had agreed to furnish them with photostatic copies of the original applications of Sheffield and Tuscumbia and wished to reserve exhibit numbers for these two applications. Plaintiffs Exhibits Nos. 17 and 18 were reserved for these two original applications. At a later time during the hearings plaintiffs offered the original application of the City of Sheffield, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $200,000 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received as Plaintiffs Exhibit No. 17. This application is substantially the same in form and type of information given as the application of Hartselle set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiff's Exhibit 17:

"(d) Martin J. Lide and Julian E. Adler, 903 Woodward Building, Birmingham, Ala.. Consulting Engineers.

* * * * * * * * * *

IV. *The Project*

(a) The project under contemplation consists of a complete municipal electric light and power distribution system for a city of about 6,000 population, and a transmission line to connect it with a source of power from the Government Reservation at Muscle Shoals, Alabama. The distribution system is intended to practically duplicate and to supplant a public utility distribution system whose franchise has expired, which is in a state of depreciation due both to obsolescence and wear, and which, moreover, under the laws of Alabama can be declared to be a nuisance and ordered by the City to be removed from the streets.

It is intended to construct the new system com-
178 plete before removing the old.

* * * * * * * * * * *

The City of Sheffield adjoins the Government Reservation at Muscle Shoals. The Tennessee Valley Authority will construct a double circuit 11,000 volt, three phase, four wire transmission line a mile long to the boundary line, from which place it will be extended by the City to its main distribution sub-station, and to a consumer sub-station (The King Foundry Co.)

* * * * * * * * * * *

IV. *Economic and Social Value of the Project*

* * * * * * * * * * *

Long Range Development

(d) The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the Tennessee Valley largely through the instrumentality of cheap power.

* * * * * * * * * * *

According to Mr. Llewellen Evans, Consulting Engineer for the Tennessee Valley Authority, the consumption per residential consumer in Tacoma is 1,800 kw hours per year, at an average rate of 1.87¢ per kw. hour. If for conservatism we decrease this consumption to 1,500 kw hours, assume an average rate of 2.2¢, with 1,200 customers the income from residential service would be approximately $40,000."

* * * * * * * * * * *

(The application shows that a large amount of the outstanding bonds of the city are in default.)

179 Whereupon the plaintiffs introduced the original application of the City of Tuscumbia, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $110,000 for the purpose of financing the construction of a municipal electric distributing system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit 18. This application is substantially the same in form and type of information given as the application of Hartselle, set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiff's Exhibit 18:

"IV. *The Project*

(a) The project under contemplation consists of a complete municipal electric light and power distribution system for a town of about 4,500 population, and a short transmission line to connect it with a power source at Sheffield supplied from the Muscle Shoals Government Reservation adjoining Sheffield.

* * * * * * * * * *

The distribution system is intended to practically duplicate and supplant a public utility distribution system whose franchise has expired, which is in a state of partial depreciation due to both obsolescence and wear, and which, moreover, under the laws of Alabama can be declared a nuisance and ordered by the City to be removed from the streets. It is intended to construct the new system complete before removing the old.

* * * * * * * * * *

The Tennessee Valley Authority will construct a double circuit 11,000 volt 3 phase, 4 wire transmission line a mile long to the boundary line, from whence it will be extended

180 by *tye* City of Sheffield to the King Iron Foundry Co. Substation (as indicated on the map) and from there on by the City of Tuscumbia to its own substation."

* * * * * * * * * *

6. The salvage value of the distribution system to the utility itself—exclusive of real estate—is probably about $35,000 to $40,000.

• • • • • • • • • • •

IV. *The Project*

• • • • • • • • • • •

(d) *Long Range Development*

The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the Tennessee Valley largely through the instrumentality of cheap power.

• • • • • • • • • • •

V. *Revenues and Expenses*

• • • • • • • • • • •

According to Mr. Llewellen Evans, Consulting Engineer for the Tennessee Valley Authority, the consumption per residential consumer in Tacoma due to a low rate schedule proposed for the Tennessee Valley is 1,800 kw hours per year at an average rate of 1.87¢ per kw. hour. If for conservatism we should decrease this to 1,500 kw hours at an average rate per residential consumer of 2.2¢, with 800 residential consumers, the income from the residential consumers would be approximately $26,667.

• • • • • • • • • • •

Under the Tennessee Valley Authority proposed rates for wholesale power, the cost of power would be as follows:—

• • • • • • • • • • •

Tennessee Valley Authority
Wilson Dam
Florence, Ala.

181 August 31st, 1933.

Mr. W. L. Farr, Mayor,
Tuscumbia, Alabama.

Dear Sir:—

Martin J. Lide and Julian E. Adler, Consulting Engineers, Birmingham, Alabama, have asked that we furnish information on two points for use in presenting your application to the Federal Emergency Public Works Administra-

tion for funds to provide the City of Tuscumbia with distribution facilities for electricity.

Item 1. As to the rates that the Tennessee Valley Authority would charge the City of Tuscumbia.

In this connection, no rates or rules have yet been adopted by the Authority, but the rates now being considered are similar in form to those used by your Engineers, and are somewhat lower.

Item 2. Will Tennessee Valley Authority control the resale price to be established by the City of Tuscumbia.

This question is answered by the provisions of Section 12 in the Tennessee Valley Act, H. R. 5081, which reads as follows:

"Provided further, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contracts shall be voidable at the election of the board if a discriminatory rates, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: And provided further, That as to any surplus power not so sold as
182 above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just and fair.

Yours very truly,

TENNESSEE VALLEY AUTHORITY
(Signed) Llewellyn Evans,
Consulting Engineer."

• • • • • • • • • • •

The application shows that the annual disbursements of the city for the years 1927, 1928, 1929, and for the years 1931, and 1932, were in excess of its annual receipts.

183 Whereupon the plaintiffs introduced the application of the City of Russellville, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $148,000 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 23. This application is substantially the same in form and type of information given as the application of Hartselle, set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiffs Exhibit No. 23:

"Consulting Engineer: Lide & Adler, Woodward Building, Birmingham, Alabama.

* * * * * * * * * * *

IV. *Project:*

a. *General Description:*

* * * * * * * * * * *

It is proposed that the distribution system be energized from a transformer sub-station located near the center of the city, which sub-station will be furnished by the Tennessee Valley Authority and supplied by them with energy from Muscle Shoals and Wheeler Dam.

The distribution system is intended to practically duplicate and supplant a public utility distribution system. The City has secured ten year contracts from practically all of the consumers now in the city, which contracts read as follows:

(There is included at this point the same contingent power contract as set forth in Exhibit 14 herein.)

The estimates of cost and of earnings are based upon the signed customers. Some of these customers are at present disconnected. Inasmuch, however, as this loan is for a long period, these customers will be connected to the sys-

184 tem when normal business resumes, and especially when cheap power is offered. It is proposed to construct a new system complete without removing the old system.

It is also proposed to construct a central distributing sub-station near the center of the city, which sub-station will be equipped with high tension transformers furnished by the T. V. A.

* * * * * * * * * *

b. *Estimates of the Cost of the Project:*

* * * * * * * * * *

The consumption of the domestic and commercial consumers is predicated upon the return to normal business conditions and upon a normal stimulation of consumption by the low promotional rates to be put into effect by the T. V. A.

* * * * * * * * * *

Economic and Social Value of the project;

c. The lower rates resulting from this project will stimulate the industrial and commercial development of the city, and with the use of household electrical appliances the drudgery of housekeeping will be greatly relieved thus improving home life for the residents.

Long Range Development:

d. The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the regions within transmission distance of the Muscle Shoals power development.

e. The city has no regional planning board.

f. The city is an isolated town about 22-miles from the Tennessee River, and is a part of the T. V. A. project.

g. The project was endorsed by a majority of the popular vote in the recent municipal election. (405 in favor; 103 against—on December 11, 1933).

h. The objections which have been raised against
185 the project are believed to have been inspired by the existing utility.

i. The project will not be competitive within the city limits since practically all of the domestic and commercial consumers are signed up for ten years, and most of the industrial consumers. It is expected to sign up sufficient additional industrial load to insure the predicted income in normal years.

* * * * * * * *

The field and office labor incident to the work will entail about 20% of the total cost, or about $30,000.

• • • • • • • •

V. *Revenues & Expenses:*

• • • • • • • •

b. The estimated income is predicated upon the assumption (a) of a returns to normal business conditions during the period of the loan, (b) that the town will not grow in population during this period, and (c) that the low T. V. A. rates will stimulate customer consumption. These assumptions seem conservative.

It is regretted that the classified customer consumption and income for the past three years cannot be made available for the examiners, but this information was refused the City by the existing utility. This refusal is deemed arbitrary and illegal since under Alabama law the utility is required to pay the City a license of 2% of its gross revenue and the customer income data is of importance in checking the local utility income. The data could probably be secured by legal means, but it might require a year to secure it and it would therefore be too late to be of service."

• • • • • • • •

Whereupon **Lee Glenn** was called as a witness for
186 and on behalf of the plaintiffs and, having been duly sworn, was examined and testified as follows:

Direct examination

My name is Lee Glenn and I am mayor of the city of Florence, Alabama. I have been mayor of Florence Since April, 1931. Alabama Power Company is at the present time furnishing electric service to the city of Florence and its residents. The company's former franchise expired in March, 1933, at which time the city of Florence granted the company an additional six months franchise. Since the expiration of the six-months franchise, no formal franchise has been granted to the Alabama Power Company. Alabama Power Company is at present operating in the city with sufferance on the part of the city. Alabama Power Company has paid the occupation tax or license to the city of Florence since the expiration of this franchise up to the

first day of 1936, at which time we refused the license. The company has paid their license to do business, that is, the privilege license, every year since the franchise has expired up to January, 1936, at which time it was tendered but refused. So far as the city is concerned, there is no franchise tax on the power company. There is no other person, firm or corporation that is situated to furnish light and power to the city of Florence at the present time. We feel that there might be a legal technicality arise whereby, if we granted the company a privilege license to do business, the company might, in the event that we were able either to purchase, build or buy our own distribution system, contend that the license for a year would con-
187 stitute a right to do business for a year, and, therefore we preferred not to issue them any license at all. It is our purpose, if we acquire a distribution system for the city, to terminate the right of the Alabama Power Company to engage in the electric utility business in the city. We have not as yet given notice to the Alabama Power Company to vacate the streets and other public places within the city, but we propose to do so if we acquire a system of our own that will take care of the needs of the city. Our city has filed an application with the Public Works Administration for a loan and grant of money to build a municipal electric distribution system and an allotment of the amount asked for has been made by the Public Works Administration. That money is now available but for this suit.

The population of the city according to the 1930 census was nearly 13,000 and at present is nearly 16,000. The total assessed valuation of the taxable physical property within the city based upon 60 percent valuation for taxes for 1933 was $5,563,986; for 1934, $5,372,165; for 1935, $5,374,480. The total bonded indebtedness of the city is $2,824,600. Of this amount there are $597,000 of refunding bonds; $430,000 of school bonds; $685,000 of water works bonds; $1,066,000 of public improvement bonds, and $46,600 of floating debt. All the bonds are in default, both as to principal and interest, except $390,000 of first mortgage water works bonds. If the city builds an electric distribution system it will have two or three possible sources of supply of power. We filed an original application for a

Public Works Administration loan with the intention of buying Tennessee Valley Authority Power. We later were enjoined from that in the Ashwander case in Birmingham which went to the Supreme Court, and, in order to get around the injunction, we changed it whereby we might
build a steam plant if necessary, or, if possible, buy
188 from the Alabama Power Company; or, if the question was ever determined that the Government had the right to sell power at Wilson Dam, to buy from that source. Since it has been determined that the Tennessee Valley Authority has the right to sell power from Wilson Dam, we have not made a contract with Tennessee Valley Authority to supply us with power for this municipal system. I would feel very badly if the Tennessee Valley Authority would not supply us with power, but I have no contract with them. They have proposed to serve us with power at a certain rate. I would seek to renew the type of contract we had before wherein that rate was set out. Tennessee Valley Authority prescribes the rates at which the city shall resell the power:

"Q. Mr. Glenn, I hand you some certified copies of the minutes of the Commission of the City of Florence, containing a document headed 'Power Contract between Tennessee Valley Authority and the City of Florence, Alabama.' I will ask you to examine that and state if that is correct. A. Yes, sir, that is correct.

"Q. That is a correct copy of the contract between the Tennessee Valley Authority and the City of Florence, which you say has been cancelled? "A Yes, sir.

"Mr. Turner. If the Court please, we offer that contract with the minutes.

"The Court. That raises the same question.

"Mr. Scott. The same question, your Honor, because this witness has clearly testified that no contract exists.

"The Court. That is along the lines that you have already outlined, showing--

"Mr. Turner. Showing the common purpose, in connection with Tennessee Valley Authority, Public Works
189 Administration, and Rural Electrification Administration.

"The Court. Showing that negotiations were going on, and why they were stopped.

"Mr. Turner. Yes.
"The Court. I will receive it.
"Mr. Scott. Exception."

Whereupon the identified copy of the power contract between Tennessee Valley Authority and the city of Florence, Alabama, was received in evidence as Plaintiffs' Exhibit No. 19. This contract reads as follows:

190

Power Contract Between
Tennessee Valley Authority
and
City of Florence, Alabama

THIS AGREEMENT, made and entered into this day of 1934, pursuant to the Tennessee Valley Authority Act of 1933, between the Tennessee Valley Authority, hereinafter called "AUTHORITY", a corporation created by and acting under said act, and the City of Florence, a municipal corporation duly organized, created and existing under and by virtue of the laws of the State of Alabama, hereinafter called "CONTRACTOR",

WHEREAS AUTHORITY, by Section 1 of said Act, is authorized to sell the surplus power generated by it and not used in its operation, and is directed to give preference to States, Counties, Municipalities and cooperative organizations of citizens or farmers not organized or doing business for profit; and

WHEREAS, by Section 11 of said Act it is provided that the sale of power, by AUTHORITY shall be primarily for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available; and

WHEREAS, the electors of the CONTRACTOR have by referendum authorized CONTRACTOR to acquire by construction or purchase a municipal electric distribution system, and CONTRACTOR intends, with all possible diligence and expedition, to acquire by construction or purchase and to operate such a system; and

WHEREAS, CONTRACTOR desires to purchase power from AUTHORITY for municipal purposes and for resale and proposes to make the necessary appropriations in payment therefor; and

WHEREAS, CONTRACTOR has by ordinance of its council duly authorized the making of this contract, and AUTHORITY, by its by-laws and resolutions, has likewise so authorized;

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

1. *Term of Contract:* This contract shall become
191 effective upon the execution hereof, and shall continue in effect for thirty years; *Provided, however,* that all obligations of the parties hereto with regard to the rendition of service and payment therefor shall begin at such times (hereinafter designated "date of initial delivery") as CONTRACTOR shall have acquired its distribution system, or any part thereof, and shall be in physical position to take such service for its said system or part thereof. All service and payment periods hereinafter referred to shall be computed (as) from the date of initial delivery.

2. *Acquisition of Plant.* CONTRACTOR agrees to use all reasonable diligence in acquiring by construction or purchase a municipal distribution system for the City of Florence with the utmost expedition, and to do all acts and things which it may legally do, which may be necessary or helpful in effectuating such acquisition. AUTHORITY agrees, upon request of CONTRACTOR, to render to CONTRACTOR without compensation such accounting, legal and engineering assistance looking to the acquisition of said system as AUTHORITY may deem helpful or advisable.

3. *Power Supply.* AUTHORITY will, from the date of initial delivery to the expiration hereof, supply electrical energy to CONTRACTOR for municipal purposes and for re-sale. CONTRACTOR agrees to purchase from AUTHORITY, and AUTHORITY agrees to supply, the entire power requirements of CONTRACTOR. Said energy will be delivered in the form of three phase, alternating current at approximately 60 cycles per second and approximately 4,000 volts, or at such voltage as the parties may from time to time agree. The maximum amount of electricity (called "reserve power") which AUTHORITY agrees to supply within the first two year period is 7,500 KW, but there-

after CONTRACTOR shall have the right to increase such maximum demand as herein specified, and AUTHORITY shall deliver the same to CONTRACTOR. After two years from the date of initial delivery, as CONTRACTOR
192 foresees the necessity for more than 7,500 KW, CONTRACTOR shall make written demand upon AUTHORITY for an increase of reserve power. Such increase shall take effect nine months after date of demand if the amount demanded be less than 5,000 KW, twelve months after date of demand if the amount demanded be over 5,000 KW, and not over 10,000 KW, and two years after date of demand if the amount demanded be in excess of 10,000 KW.

4. *Conditions of Use and Service.* (a) Point of Delivery: The energy to be supplied CONTRACTOR hereunder shall be delivered at the outgoing side of main switch or switches on the low tension side of the main step down transformers of the substation to be owned and operated by the AUTHORITY, and to be located on Lot 170 in the City of Florence, Lauderdale County, Alabama, said Lot fronting on Sweetwater and Chestnut Streets in said City, or at such other point as AUTHORITY may select which will not occasion greater costs to CONTRACTOR.

(b) *Grant of Franchise to AUTHORITY:* CONTRACTOR agrees to grant AUTHORITY a franchise, extending to the date of termination of this contract, in a form acceptable to AUTHORITY, for the use of the streets and alleys of CONTRACTOR for the construction of poles and lines serving CONTRACTOR'S substation or substations and/or areas outside the corporate limits of CONTRACTOR.

(c) *Joint Use of Poles:* AUTHORITY agrees to permit CONTRACTOR, subject to such reasonable conditions as AUTHORITY may prescribe in the interest of safety and the prevention of electrical interference, to permit CONTRACTOR to use AUTHORITY'S poles within CONTRACTOR'S corporate limits, within the term of this contract, for local distribution wires.

(d) *Use of Substation Facilities:* AUTHORITY agrees, during the term of this contract. to permit CONTRACTOR the exclusive use of the 2300 volt portion of the Florence Central Substation, beginning at the load side of AU-

THORITY'S metering apparatus, located on Lot
193 170 in the City of Florence, together with all equipment and appurtenances. CONTRACTOR undertakes, at its own expense, to operate, maintain and repair, and to extend or alter as the situation may require, such substation facilities as are granted for the use of CONTRACTOR, and to save AUTHORITY harmless with respect thereto. CONTRACTOR shall be responsible for any damage to such facilities from any cause whatsoever. CONTRACTOR agrees to pay AUTHORITY for such use the sum of Twelve Thousand ($12,000.) Dollars, at the rate of Two Hundred ($200) Dollars monthly beginning two years after the date of initial delivery. All facilities which CONTRACTOR may install shall be considered personalty and at the expiration of this contract, CONTRACTOR may remove all facilities which it has purchased and installed without expense to AUTHORITY. AUTHORITY will from time to time as it contemplates a change in the physical characteristics of the supply system, notify CONTRACTOR of the resulting short-circuit characteristics, so that CONTRACTOR MAY GOVERN its use of the aforesaid equipment accordingly. It is understood and agreed that AUTHORITY has an option to purchase said Florence Central Substation, and that the covenants of this sub-article are conditioned on the exercise of such option.

5. *Schedule of Rates:* Attached hereto, and hereby made a part hereof by reference, the same as though physically incorporated herein, is a "Schedule of Rates and Charges." CONTRACTOR agrees to pay for the energy supplied by AUTHORITY at the rates fixed in Schedule A, entitled "Tennessee Valley Authority Wholesale Power Rates."

6. *Resale Rates:* In order to carry out the obligations of AUTHORITY with respect to the promotion of a wider use of electricity throughout the area in which it operates, CONTRACTOR agrees to charge all of its consumers the rates prescribed for the several classes of consumers in Schedule B, entitled "Tennessee Valley Authority
194 Resale Rates," and not to depart therefrom except with the written consent of AUTHORITY. AUTHORITY may from time to time prescribe additional resale schedules for special classes of customers or special uses of electricity, and CONTRACTOR agrees to be bound

thereby. If it should appear that the rates provided for in said Schedule with the surcharges provided for therein do not under economical and efficient management by CONTRACTOR produce revenues sufficient to maintain the system on a self-supporting and financially sound basis, then upon application by CONTRACTOR, AUTHORITY shall consent to such changes in rates as will provide for such increased revenues as will place the system upon a self-supporting and financially sound basis when operated under economical and efficient management.

7. *Rules and Regulations of AUTHORITY:* Attached hereto, and hereby made a part hereof by reference, the same as though physically incorporated herein, is a schedule entitled "Schedule of Rules and Regulations", and it is understood that the several provisions of said schedule, as well as the several provisions of this contract and of the Schedule of Rates and Charges, are of the essence of this contract, and that their violation by CONTRACTOR render this contract voidable at the option of AUTHORITY, unless such violations are cured upon reasonable notice.

The Schedule of Rules and Regulations is standard and of uniform applicability to all municipal customers of AUTHORITY, and the CONTRACTOR hereby agrees to be bound during the term hereof, by any future additions or amendments of such Schedule of Rules and Regulations prescribed after conference with representatives of CONTRACTOR, the same as though such additions or amendments were incorporated herein. If there should be any conflict between any Rules or Regulations prescribed pursuant to this and the following article, and the terms of this contract, the contract shall control.

195 8. *Rules and Regulations of CONTRACTOR.* In the interest of uniformity, and for the protection of both CONTRACTOR and AUTHORITY, CONTRACTOR agrees to adopt and enforce such rules and regulations for the sale of electricity to the public as AUTHORITY may, after conference with representatives of CONTRACTOR, from time to time prescribe during the term of this contract for uniform application to all of the municipal customers of AUTHORITY, deemed to have similar characteristics.

9. *Declaration of Policy.* This contract is entered into in a spirit of cooperation and with the desire on the part of AUTHORITY and CONTRACTOR so to administer the relationship established by this contract as to operate to the benefit of CONTRACTOR and its residents and of the residents of the Tennessee Valley. In furtherance of this cooperative relationship AUTHORITY will, by every means within its power, seek to further the economic welfare of CONTRACTOR by fostering and promoting the increased use of electricity within CONTRACTOR'S corporate limits, and by such other means as are provided by law. CONTRACTOR agrees to cooperate with AUTHORITY in such program within CONTRACTOR'S area of operation and to work with AUTHORITY in furthering the economic well-being of the entire Tennessee Valley. This contract shall be construed and administered in accordance with this statement of policy.

10. *Contract Not Transferable:* Neither this contract nor any interest therein shall be transferable or assignable by CONTRACTOR to any other party without the consent of AUTHORITY, other than by involuntary transfer or assignment pursuant to proceedings, brought by a governmental agency to enforce the payment of satisfaction of an indebtedness arising out of money borrowed by CONTRACTOR to finance the purchase or construction of its electric distribution plant and/or equipment.

IN WITNESS WHEREOF, the parties hereto
196 have caused this instrument to be signed and attested by their duly authorized officers, the day and year first above written.

ATTEST: TENNESSEE VALLEY AUTHORITY

..... By .....

Secretary *Chairman, Board of Directors.*

197 We had some negotiation with Alabama Power Company with respect to the purchase of its distribution system within the city. I filed the city's application with Public Works Administration, four days after negotiations with the Power Company were concluded. We have since had, and are now having, some negotiation with

the company with respect to the purchase of the property. After the allotment had been made to Florence by the Public Works Administration for this loan and grant to build the system, it was held up by Administrator Ickes for
reasons set forth in a telegram sent me, as mayor
198 of the city, by Administrator Ickes on July 11, 1934,
which telegram reads as follows:

"Wash., D. C., July 11, 1934

"Honorable Lee Glenn

"Mayor of Florence, Alabama.

"Lilienthal TVA has explained proposal to the communities north of Alabama whereby Authority will purchase distribution systems facilities Florence and other communities from Alabama Power Company rehabilitate them and turn them back to communities. Your proposal to amend your application such that Florence purchases existing facilities and uses PWA funds for rehabilitation and extensions. Lilienthal informs me all other communities in area affected have approved TVA plan that Florence alone is holding out. Policy Public Works is to support Tennessee Valley Authority. Its proposal further regional operation rural electrification pursuant to President's desires. Administration will advance no funds to Florence for expenditures inconsistent TVA plan. It will aid entire region and in our judgment is highly advantageous to you. However allotment and grant will be maintained pending completion transaction between TVA and Alabama Power Company. Suggest you promptly take appropriate action accept Tennessee Valley Authority proposal so that it may exercise its option within option period."

"(signed) ICKES, *Administrator.*"

Just subsequent to July 11, 1934, I received a telegram from Mr. David E. Lilienthal, with respect to the same matter. This telegram was addressed to me as mayor of the city. This telegram reads as follows:

"Hon. Lee Glenn and Commissioners Harlan and Redd

"City of Florence, Alabama.

"Tennessee Valley Authority considers your alter-
199 nate proposal inconsistent with major sections of
plan outlined to you on July 3. Pursuant to my

understanding with you alternate proposal was submitted this morning to Administrator Ickes who has advised you directly. Indications are formal resolutions from Alabama municipalities requesting Authority to exercise options will be in hand by next Monday at which time Authority plans exercise option. Appreciate your advising us by that time whether Florence desires Authority to include or exclude Florence distribution systems in option for purchase.

"(signed) DAVID E. LILENTHAL."

The proposal referred to in the telegram of Mr. Ickes was the purchase by Tennessee Valley Authority of the Florence distribution system from Alabama Power Company under an option the Tennessee Valley Authority had at that time, and, the resale of the distribution system to the city under certain conditions imposed by Tennessee Valley Authority. I objected to the city's purchase of the distribution system from Tennessee Valley Authority under the conditions proposed by it. And, I take the telegram from Mr. Ickes to be in response to an alternative proposal that I made to Mr. Ickes through Mr. Lilienthal. The alternative proposal that I made, and the background of it, was as follows: The Tennessee Valley Authority desired to purchase all the municipal distribution systems in its area rather than have competing systems, or, rather than build new systems. Because of this, they contracted with the Alabama Power Company whereby they obtained this option to purchase the company's municipal distribution systems in some 14 cities within the area to be served by Tennessee Valley Authority. One of these systems was the one located in the city of Florence. The city of Florence is located right at Wilson Dam. The Alabama Power Company for several years was purchasing power from Wilson Dam and we felt that we had the same right to buy the power as the power company had. We were interested in the national legislation disposing of this wartime project at Muscle Shoals. We would get what we called an advantage for buying non-transmitted power. We thought that cash-and-carry power should be less than transmitted power. In my original contract with Tennessee Valley Authority I would have bought it for 10 percent

less than the cities to which the power had to be transmitted, but, under the new proposal as submitted by Lilienthal, the Tennessee Valley Authority would exercise its option and buy the Florence distribution system from the power company and then rehabilitate it and resell it to the city of Florence. That proposal would have cost the city 20 percent in power and I objected. Florence has a good load factor, that is, probably 40 to 45 percent constant consumption of power. Some other towns had a very poor load factor, and, therefore, we would have probably contributed very heavily to l s populous towns. That was the reason that I objected to going into it.

My alternative proposal to Mr. Lilienthal was that I did not want to destroy existing power facilities. I had tried to buy the power company's system before I ever filed an application for a PWA loan. And would buy it now at a fair price but some money needs to be had to rehabilitate the existing system. And if Mr. Lilienthal would tell Mr. Ickes to let me amend my application, and pay the power company either in cash from PWA, or pay the power company in bonds and then give Mr. Ickes the remainder of the bonds, to rehabilitate it, I would do it today. That is what Mr. Ickes refused in his telegram to me.

"By Mr. Turner:

"Q. Is the rate for resale of power mentioned in that contract higher or lower than the prevailing rate of the Alabama Power Company in Florence?

201 "Mr. Scott. To which we object. It is wholly irrelevant and incompetent here. It is merely for the purpose of a comparison of rates, and the reasonableness of the Alabama Power Company's rates. It is not germane to the determination of the issues in these cases.

* * * * * * * *

"The Court. I will sustain the objection.

"Mr. Acheson. We note an exception. We offer to show at this point that the rates which will be put into effect by this city are far lower than the rates now charged by the Alabama Power Company."

Cross-examination

I became interested in the municipal operation of a power plant as a citizen before I was elected mayor. The steps I took as mayor to bring about the acquisition or construction of a municipal plant were the following: I first made an investigation of the State laws of the State of Alabama to see what they would permit a city to do that did not own its distribution system in the way of borrowing money. That investigation began, I would say, in November 1932. Florence is located abutting Wilson Dam, a power dam that is owned by the Government, built in 1917 and completed in 1928, for war purposes. After the dam was completed the water ran over it and went to waste. Part of the power therefrom was sold to Alabama Power Company. The Alabama Power Company came to Florence and purchased the tail end of a franchise in 1925. The franchise had just 8 years to run. We had no hopes of securing industries such as other towns would secure where the power company had franchises, therefore, we were very anxious, if we could, to buy power from the Government on the same basis that the Alabama Power Company was buying it. In 1927 we tried to drive a spearhead through the little town called Muscle Shoals and came to Washington and asked that they supply Muscle Shoals, which
202 is located right at us and which had given no franchise. The franchise we had given to the company still had a few years to run. We got nowhere with that. There has been a fight to engage in the power business since then. In 1932 I wrote our two senators and took it up with some neighboring towns and found that State legislation was needed as well as national legislation to assist us in this matter. In April 1933, the State of Alabama passed what is known as the Carmichael Act. It is a pretty broad Act and the major portion of it was drafted by the best city attorney in Alabama. It finally went up with many people having their fingers in it. It was adopted in April, 1933. It showed that the State of Alabama contemplated the neighboring cities borrowing money and issuing bonds and pledging the properties acquired as a security for the safety of the loan and the payment of the loan; and for the purpose of buying power from Wilson Dam, from the

Government at Wilson Dam, and for the purpose of borrowing money from the Reconstruction Finance Corporation or any other lender. Of course you do not pass a bill through the legislature in a day, you know, especially when it is contested and one of that nature. Along in March, 1933, we felt that the way would probably be clear for us to engage in the power business and we employed engineers to appraise the existing system belonging to the Alabama Power Company. The name of the engineer we employed was J. W. Johnson, who, we thought, was a very competent engineer. He employed assistants and along in July wrote to the Alabama Power Company and told them that we would like to buy their system and that we were hiring engineers to appraise it and it would be a little cheaper on us if they would help us with their records and their charts. The appraisal could be gotten by going out into the field but it would cost more. The power company was very cooperative and turned over their books and their papers to our engineer. He completed his appraisal,

203 I think, September 8, 1933. After we employed our engineer, the power company employed a firm of engineers by the name of Sirrine and Company and the appraisals were carried along, ours first and theirs just a little behind. On or about November 16, the power company and its engineers and the city and its engineers had a conference and they submitted a proposal of sale which was very liberal and fair except as to price. The terms were very liberal and fair—the interest rate, I mean. We were quite far apart on the price. They offered to sell for $195,000 and it looked like that was the last figure. I only offered them $95,000, I believe, either $95,000 or $100,000. I would have offered them $120,000, what my engineers said it was worth, but we were so far apart that we just broke off negotiations. My engineers said it was worth $120,000 but I did not like to start negotiations at that figure. After we failed in negotiations, we asked Mr. Johnson to begin preparation of an application to PWA for a loan in the event we failed to buy the existing system. The loan was for the purpose of financing the construction of a new system. The negotiations with the power company failed on November 16, 1933, and we filed our application with the PWA State Advisory Board in Montgomery for

a loan and grant November 20, 1933. I had great difficulty in getting the loan through. This file is about 400 pages and most of it is between me and my engineers and PWA trying to get the loan through. No one in PWA asked me to file this application. And the work was not greatly expedited by PWA. I had to bring Congressional and Senatorial pressure and every other sort of pressure on PWA to get them to do anything. Nobody urged me to make the application except the citizens. They voted about 14-1/2 to one to go into the power business and, I was their servant, a public official, and had been attempting to get them into the power business. My difficulties at Montgomery were very considerable and I had a hard time to get the loan through and had to bring help from Washing-
204 ton. We are still negotiating with the power company for the purchase of the system. The background of the telegram from Administrator Ickes and one from Mr. Lilienthal to me is as follows: Mr. Lilienthal, the TVA director in charge of power, had given me the contract that is now in evidence for the purchase of power from TVA if and when I could build a system or buy one. This, I think, is the last contract, and not the first contract with TVA. One was about March 1934, and the other about June 1934. There were two. Mr. Lilienthal made some minor changes in the first TVA contract and adopted a new contract and the city of Florence executed it. We took out some provisions that we thought were probably not legal. One part of it was in reference to the purchase of part of the property of TVA which could not be done. I thought it was a most favorable contract to Florence. It was the best I could do and I was anxious to get it signed. Throughout June Mr. Lilienthal promised to sign it up and then about July first he wrote me and told me that he was coming to Florence and said that he wanted a conference of all the mayors of all these 14 towns. That is the first I knew of the new plan. These 14 towns included the 7 here in litigation, with the exception of Guntersville and 8 others which are in the same area.

Mr. Lilienthal said that the system had some towns that were very profitable, like Decatur and Florence, and that it had some other towns like Courtland and Moulton, and other smaller towns that were not profitable. There was

one county that would not stand on its own feet even under the power company's rate. He said the Administration was opposed to the confiscation of property and that TVA had an arrangement, an option, with the power company for taking over all these 14 towns from the Alabama Power Company. They would have the transmission lines under another contract. The power company would just move out of this particular area and the Tennessee Valley Authority would own and operate it and would rehabilitate it, and, at some later date, would turn it over to the individual cities. Mr. Lilienthal suggested that these cities voluntarily request him to exercise this option with the Alabama Power Company. Then he proposed that TVA would purchase the distribution system within these cities from the company and take them over, rehabilitate them and operate them, TVA would put on a 10 percent surcharge on the rates, and eventually turn the systems over to the municipalities or counties. The power company had given TVA an option to acquire these properties for one million dollars. This arrangement fell through and the telegrams were sent because I did not want to go into this 14-city arrangement since it was not to my advantage, and I told Mr. Lilienthal that. He stated that the Administration did not want to destroy private systems by new systems and that this arrangement would prevent that. I told him that I was still willing to buy the power company's system but that I did not want to go into this plan with Tennessee Valley Authority. If the power company will still sell, and the Government will allow me to amend my application to buy from the power company and borrow from PWA to extend and rehabilitate it, I will still do it. If you will see Ickes and ask him if it is all right for me to do that, I will buy now. The telegrams were the result of this. Mr. Ickes and Mr. Lilienthal turned me down on this proposition.

Mr. Lilienthal did not definitely at any time offer to sell Florence the system of the power company within the city that TVA might acquire from the company under its option. He would only do it when it was rehabilitated and amortized. He did not at that time indicate the price, but subsequently indicated that he was paying the company $160,000 for its system in Florence. I had been willing

to have to pay the company $120,000 and they would have been willing to sell for $195,000. I never did amend my application in accordance with my alternate plan because they would not let me. Both contracts between the Tennessee Valley Authority and Florence have been cancelled.

206 The second contract was the one offered in evidence by the plaintiffs. I was put in this position of having to go in with TVA into the 14-cities system partly as a reason because they did not want to destroy existing systems. But that did not interest me. I said I would still buy from the Alabama Power Company if Mr. Lilienthal could get Mr. Ickes to allow me to amend my application to that end. I never filed an amendment. It developed later that if TVA had exercised its option and acquired these properties it would have been willing to sell the system in our city to us for $160,000, which was a higher price than we would have been willing to pay. That was one of my objections. I felt that they were paying more than the system was worth. I don't think that it was the attitude of either TVA or PWA to have me take steps which would destroy these properties or prevent my purchase of them from the company. They never expressed such an attitude to me, nor did their conduct ever indicate that they had that in mind. On the contrary they wanted to purchase them and not allow them to be destroyed. We could have financed the purchase of these properties without a loan from PWA in two ways: One by banking houses but at a cost of 15 or maybe 20 percent of the capital, and the other by local contributions which have been a drain on my community. Had we been unable to make a loan for the purchase, it was financially possible to purchase these properties because the power company had offered to take the city's revenue bonds.

Re-direct examination

Sometime prior to July 11, 1934, we had filed an application for a loan and grant from PWA for the purpose of building a distribution system and generating plant. On July 11th, it had been approved and the bonds were printed, and, an allotment had been made and we were ready to start. During that time TVA had entered into an arrangement with the Alabama Power Company by which TVA

was going to purchase distribution systems in 14
207 towns, one of which was our town. Mr. Lilienthal's telegram says that they wanted to avail themselves of the option. In that situation, Mr. Ickes telegraphed me that I alone was holding out, and, by that he meant that I alone was insisting on the loan and grant for the purpose of building a distributing system and generating plant. Then Mr. Ickes said in his telegram that the Administration would advance no funds to Florence for expenditures inconsistent with the TVA plan, which was TVA's plan to purchase the Alabama Power Company's properties. Mr. Ickes was saying that he would not go through with the allotment if it was inconsistent, and it was inconsistent with the TVA plan. Mr. Ickes also said that the allotment and grant would be maintained pending completion of the transaction between TVA and Alabama Power Company, by which he meant that he would maintain our allotment up until the time, if it occurred, when TVA and Alabama Power Company reached a deal on the sale of the properties.

Re-cross examination

TVA had a very short option in which to work out its negotiations with the power company for these projects. Mr. Ickes was saying that pending the TVA negotiations with the power company for purchases under this option that he would not disqualify my application. If the option was consummated my loan would be dead. If it was not consummated, my loan would be *in status quo*. Prior to July 1934, a loan and grant agreement had been signed with us. The original loan and grant agreement was dated December 28, 1934. The telegram from Mr. Ickes was July 1934. In between those dates I was advised by TVA that it was unable to consummate its plan. It was thereafter that the loan and grant agreement was executed. I was mistaken in saying that it had been executed by us but not by the Administrator. The allotment had been made and the PWA had been satisfied as to the legality of our loan and the financial structure and the engineering
208 structure prior to the date of Mr. Ickes' Telegram.

Further re-direct examination

TVA failed to consummate the option agreement to purchase these properties from the company on December 28, 1934, at the time I signed the PWA contract. Mr. Lilienthal addressed a letter to all the mayors about October or November 1934. One of the objections to my taking the Florence properties under the TVA plan was the fact that TVA attached rural lines to the municipal distribution system and required the city of Florence to operate that and sell at a price fixed by TVA. The TVA also attached small towns to the Florence system and they put on a 10 percent surcharge. I could have bought power 20 percent cheaper than I could have bought it under their plan. They wanted me to attach to the Florence system the rural lines in Lauderdale County in which Florence is situated and certain small towns in Lauderdale County and several other counties. The city of Florence, if it wanted to buy the system, would have to pay the TVA for its rural lines and for the small town distribution systems at such price as TVA deemed fair. TVA planned to take over the whole area, 14 towns and rural areas, rehabilitate the whole thing and that the 10 percent surcharge would amortize it, and then turn it back to the cities or counties. I did not know what they would return to the city of Florence and that was one of my objections to going in the plan. I was fearful that the rural lines in Lauderdale County would be turned back to the city and that the city would have to pay for them and operate them. I didn't see how you could unscramble the situation 15 years from now after the whole thing had been rehabilitated in rural areas and cities. I just preferred not to go in for many reasons. TVA submitted an ordinance to us for adoption which carried out their plan with reference to the operation of the property and we adopted it.

209 Further cross-examination

"(By Mr. Frank):

"Q. Mayor Glenn, you testified that you had received a letter from TVA concerning which opposing counsel asked you. Will you identify that letter? Is that the letter (indicating)? A. This was the document that went with that. It was an explanation.

"Mr. Frank. I would like to offer these two letters.

"Mr. Turner. Two letters?

"Mr. Frank. The one you handed the witness and the one to which the witness referred. He testified that these are what he had received, and he also received that.

"Mr. Acheson. I beg your pardon. He testified that he did not receive that. It is not addressed to him.

"The Witness. One of similar content.

"Mr. Frank. One of similar character.

"This is a letter from David E. Lilienthal, Director and General Counsel of the Tennessee Valley Authority. It is dated December 12, 1934, We offer it as Defendants' Exhibit No. 1."

"(Letter from David E. Lilienthal dated December 12, 1934, was marked 'Defendants' Exhibit 1 for identification'.)

"Mr. Frank. I ask that this enclosure be marked as Defendants' Exhibit No. 2 for identification.

"(The enclosure referred to was marked 'Defendants' Exhibit 2 for identification'.)"

. . . . . .

"The Court. I think it would be better to have them marked for identification and then to introduce them as a part of your case.

"Mr. Frank. All right. That is all."

Further re-direct examination

The import of this letter from Mr. Lilienthal was
210 that he had not notified the power company that he was going to cancel his option to purchase these distribution systems from it.

Whereupon the plaintiffs stated they had no further questions for the witness and he thereupon left the witness stand.

Whereupon **John P. Hodges** was called as a witness for and on behalf of the plaintiffs and having been first duly sworn, was examined and testified as follows:

Direct examination

My name is John P. Hodges and I am mayor of the town of Hartselle. My city made application to the Public Works Administration for a loan and grant to build an electric distribution system in our city. The clerk handled most

of the matter in connection with the application. The assessed valuation of the city of Hartselle for the year 1934 was $1,074,000 and was practically the same thing for 1935. The city has a bonded debt, the total of which is $81,000. There are no past due payments of interest or principal on those bonds. The Alabama Power Company is presently serving the city of Hartselle for its present requirements. There is no other organization at present able to serve the electricity requirements of the city of Hartselle and there is no other distribution system in the city. The clerk of the city can testify as to whether the city entered into any agreement with Tennessee Valley Authority with reference to supplying the city with electric power. I just don't know what that is.

Whereupon plaintiffs excused this witness.

Thereupon **Leon Livingston** was called as a witness for and on behalf of the plaintiffs, and, having been first duly sworn, was examined and testified as follows:

211 Direct examination

My name is Leon Livingston. I am familiar in a general way with the application of the town of Hartselle to the Public Works Administration for a loan and grant of money to build an electric distribution system. The contingent power contract, which is set forth in the application of the city to Public Works Administration for this loan and grant, is a contract whereby the customers of the Alabama Power Company agreed to take their power from the municipal system if and when it is built. I was not in office at the time the contract was circulated. My predecessor probably did circulate it. These contracts are on file in our office at this time. Practically all of the customers of Alabama Power Company signed those contracts. I do not have a copy of any of those contracts with me.

Cross examination

We had a municipal election in Hartselle on the municipal ownership of the power distribution system. The vote was 296 in favor of municipal ownership and 18 against it. The population of the city is 2300. The election was in 1933. It was held before I was in office but I have looked up the records. I took office January 1 of this year.

Whereupon there being no further questions for the witness, he was excused.

Whereupon **William J. Porter** was called as a witness on behalf of the plaintiffs and being first duly sworn testified as follows:

Direct examination

I am mayor of the town of Russellville, Alabama, and have been mayor since March 1, 1935. I was not mayor at
the time the town filed its application with the Public
212 Works Board, but I was a member of the City Coun-
cil. I am reasonably familiar with the application that the town made for a loan and grant. A contingent power contract, a copy of which was included in the application for the loan and grant, was circulated among the customers of Alabama Power Company in Russellville and signed by practically all of them. I think that at this time that something like 600 customers have signed, some have been added in the last few months. The population of Russellville at the last census was 3,060. The highest valuation of the town of Russellville for 1935 was $1,238,000 and it is practically the same for 1934. The bonded debt of the town is $77,500, none of which is in default. If the city builds its own electric distribution system it proposes to get power from the best source available. At the present time there are only two sources of power, one prospective and the other there. These sources are the Tennessee Valley Authority and the Alabama Power Company. The city had a contract with Tennessee Valley Authority for the purchase of power in event it built or acquired a distribution system. I do not know whether it is in effect or not. Under this contract we agreed to purchase all our requirements for this distribution system from the Tennessee Valley Authority and to resell the power to the customers at a price fixed by Tennessee Valley Authority. I do not know that this contract has been cancelled and I do not know whether it had an expiration date. The contract may still be in existence, but I could not answer that. I did not have all of the minutes of the town meetings but Mr. Adler has a good many in his file. Mr. Adler is a member of the firm of Lide & Adler. Alabama Power Company purchased the old distribution system in the city of Russellville and recon-

structed it. We had a very poor arrangement for light when they purchased it there in 1923. After purchasing the distribution system they rebuilt it out and out.

213 Cross-examination

We had an election in Russellville concerning whether the citizens down there wanted to build a municipal power plant. There were 508 votes cast, 405 for the erection of a municipal power plant and 103 against. The date of the election was December 7 or 13, 1933. The 30-days legal notice of the election was given and it was held following that.

Re-direct examination

I did not know the date of the allotment of funds for the loan and grant but the application was made sometime in 1933. The allotment was not to my knowledge held at any time at the request of Public Works Administration. To my knowledge there was no request by Tennessee Valley Authority or statement by Public Works Administration that they would withhold the loan and grant from the city until they could await the consummation of a deal between Alabama Power Company and Tennessee Valley Authority for the purchase of the Russellville distribution system. The city entered into an agreement with TVA whereby TVA was to purchase the distribution system and then resell it to the town. The agreement was in the form of a resolution of the City Council of Russellville, Alabama.

Whereupon the plaintiffs offered a copy of the resolution which was identified by the witness, and received in evidence as Plaintiffs' Exhibit No. 20, which is set forth in full as follows:

214 *Resolution*

WHEREAS, on the ELEVENTH day of DECEMBER 1933, the Citizens of the City of RUSSELLVILLE ALA. voted at a public referendum in favor of acquiring a municipal distribution system by purchase or construction for the purpose of distributing electricity purchased at wholesale from the Tennessee Valley Authority; and

WHEREAS, pursuant to the public mandate thus expressed, the City of RUSSELLVILLE, ALA. thereupon attempted without success to purchase the existing electric

distribution system from the Alabama Power Company; and

WHEREAS, the City of RUSSELLVILLE ALA. thereupon made application to the Federal Emergency Administration of Public Works for a loan and grant wherewith to construct a duplicate distribution system; and

WHEREAS, on THIRTEENTH day of MARCH 1934, the City of RUSSELLVILLE ALA. entered into a contract with the Tennessee Valley Authority whereby the City engaged to acquire a municipal distribution system by purchase or construction, and the Tennessee Valley Authority agreed to supply power at wholesale therefor; and

WHEREAS, it is desirable to avoid the wastes and hazards of a competitive electric distribution system if it is possible to do so without violating the mandate of the people of the City; and

WHEREAS, the Tennessee Valley Authority has been offered the existing electric distribution plant in the City at a fair price, and one substantially lower than has ever been offered to the City; and

WHEREAS, since the execution of the aforesaid contract between the City of RUSSELLVILLE ALA. and the Tennessee Valley Authority, representatives of the Authority and the City have worked out a plan whereby the City can acquire the existing distribution system without pledging its credit and without the wastes and hazards of a competitive electric plant, the said plan being as follows, towit:

1. The Tennessee Valley Authority will consummate the purchase of the existing distribution system within the City from the Alabama Power Company at a price which is fair to both consumers and investors.

2. The Authority will operate such system directly for a limited period during which the system will be completely rehabilitated, improved, extended and rearranged in order to establish it as an economic and efficient operating unit. The City will grant the Authority whatever franchise rights within its limits may be necessary for such direct operation. During such period of direct operation the Authority plans to extend the farm electric lines in the rural areas adjoining the City, such rural lines to be made a part of the existing system, and to be operated together with its urban

properties by the City. In this way, the City will assume responsibility for managing and operating a well equipped and efficient electric system which will be coextensive with the City's business and trade area so far as engineering and economic considerations permit. In cooperation with the Electric Home and Farm Authority, the Authority will further undertake an intensive program of residential, industrial, and commercial load development. All the activities which are to be undertaken by the Authority as described herein will be accomplished at the Authority's expense, but the actual net cost thereof will be added to the original cost of acquiring the system.

3. When the Authority has achieved the objectives above described, the period of direct operation by the Authority will terminate. The Authority will then transfer to the City the distribution system, so rehabilitated, improved, extended, and rearranged, at the actual cost to the Authority of such system, as recorded in its books of account, plus the actual recorded cost of such rehabilitation, improvement, extension, and rearrangement, subject to reduction as set forth below. The City will be supplied with such accounting records as may be necessary to establish the investment of the Authority in such system. The
216 transfer will be by appropriate instrument securing the interest of the Authority in said system.

4. During the period of direct operation, the Authority will add to its basic resale rates a surcharge of ten percent on all classes of customers, the proceeds of such additional charge, as well as all revenues in excess of the Authority's cost of operation to be applied toward the reduction of the purchase price to the City. Should the Authority, during such period of direct operation, operate other distribution systems in North Alabama under a similar plan, the Authority will compute the sums available for the reduction of the purchase price as for a single system, the City's system sharing pro rata in such reduction.

5. The City will pay the Authority for the system so purchased by turning over to the Authority all of its revenues from the operation of the system in excess of the cost of operation thereof. The City will purchase power from the Authority at its standard wholesale rates for transmitted

power, and will resell such power at the Authority's basic resale rates, plus an additional ten percent surcharge, until the Tennessee Valley Authority is entirely reimbursed for its investment.

6. In view of the benefits to the City arising from this plan, the City will act to modify or rescind the contract of THIRTEENTH day of MARCH 1934, with the Tennessee Valley Authority, to make it consistent with said plan, and thus enable the City to take advantage of this plan.

NOW, THEREFORE, the City COUNCIL of the City of RUSSELLVILLE, ALA. do hereby unanimously resolve that said plan be, and it is hereby, approved in every respect; that the Tennessee Valley Authority be petitioned to exercise its option to purchase the existing electric distribution system in the City and to proceed forthwith in carrying out the plan as above described; and that the contract of MARCH 13th 1934 with the Tennessee Valley Authority, be void and of no effect insofar as it may
217 conflict with the operation of said plan, the Mayor being hereby authorized to execute an agreement of amendment or rescission of said contract.

THIS 7th DAY OF JULY 1934

J H PORTER
City Clerk

W W RAMSEY
Mayor

(Imprint of seal: CITY OF RUSSELLVILLE RUSSELLVILLE ALABAMA)

218 I do not have any copies of letters in this file with Tennessee Valley Authority with reference to this resolution or the matter contained therein.

"Q. Do you know by whom this resolution was drawn?

"Mr. Scott. To which we object. It is unimportant and it is immaterial.

"The Court. I sustain the objection.

"Mr. Turner. We except, if your Honor please."

Whereupon the plaintiffs stated that they had no further questions for the witness and the defendants stated that they had no further cross-examination and the witness was excused.

Whereupon **L. D. Taylor** was called as a witness on behalf of the plaintiffs and, having been first duly
219 sworn was examined and testified as follows:

Direct examination

The population of the city of Guntersville is correctly stated in its application as 2,826. The city of Guntersville has filed an application with Public Works Administration for a loan and grant of moneys to build an electric distribution system. I am not familiar with that application. I cannot say for certain whether I was mayor of the city at the time that the application was made because I am just filling out an unexpired term. I am familiar with the contract obtained by the city whereby the citizens of Guntersville were to take their requirements of electricity from the municipal plant if and when it was established. We had an election on that to consider what they wanted and they voted for it. Afterwards we circulated a contract which was signed by the citizens to purchase the power. About 240 of the Alabama Power Company customers in the city signed this contract and about 70 did not. I do not know whether the city has a contract with Tennessee Valley Authority for the supplying of power to the municipal system if and when it is completed because the most of that business has been handled by our city attorney and I have not kept as familiar with it as I should. I think the City Council has taken action in the form of a resolution with reference to a contract with the Tennessee Valley Authority for the supply of power to the municipal system if and when it is established. The rate at which the city should resell power to the public is fixed in that resolution, I think. The city attorney knows the details.

Cross examination

We had an election in Guntersville on whether or not the citizens there desired a municipal power plant. To the best of my recollection 240 voted for it and about 60 or 70
220 against it. I do not remember when the election was held.

Whereupon, there being no further questions for the witness, he was excused.

Whereupon **Claude D. Scruggs** was called as a witness

on behalf of the plaintiffs and having been first duly sworn was examined and testified as follows:

Direct examination.

I am city attorney of Guntersville, and held that position at the time the application to the Public Works Administration was made. I am familiar with the heading in the application designating as contingent power contract. The first of these contracts was signed by approximately 300 of the consumers of electricity in Guntersville. There was a second contract which was signed by 10 or 15 fewer consumers than the first. In number that was practically all of the customers that Alabama Power Company has in that area. The assessed valuation of the city of Guntersville is shown in the application to be $990,000. The last year shown is 1933, I think. In 1934 it rose to $1,100,000 and for the year 1935, the latest available figure, it was $1,142,732, but since that assessment was made the city boundaries have been extended and there is approximately $200,000 additional added. The entire bonded general debt of the city is about $18,000. Some of the bonded debt has been paid since the application was filed, at which time it was $21,000. The city never had a contract with Tennessee Valley Authority for the supply of power. It has applied to Tennessee Valley Authority for power. We did not obtain a contract. Tennessee Valley Authority advised me that they would not negotiate or take it up with me until after the expiration of the power company contract with them to stay out of that territory. This was done orally. I know it was not done by correspondence. I talked to Mr. Lilienthal in person about it. There is no correspondence in the city's files concerning it.

221 Cross-examination.

Our city is located on the Tennessee River above Wilson Dam and we began to visualize getting some cheaper power. The first talk of it developed back about 1931 and it was about the time of the creation of the Muscle Shoals Commission by the States of Tennessee and Alabama. The Commission was created, I believe, in 1931, which first developed an interest so far as the city of Guntersville was concerned. That was when the interest began. It appears

that the Army Engineers had recommended the construction of certain dams, one of which was located near Guntersville. In 1933, I was in the Senate of the State of Alabama, and up until that time, there was very little opportunity for any of the cities to go into the power businesss in Alabama, if the cities had a competing system at that time. So in 1933 there was introduced in the House of Representatives what is known in common parlance in Alabama as the Carmichael Bill. It is my recollection that the bill passed and was approved in April 1933. It was introduced sometime prior to that but had been in the committees of the House or Senate on down to the time of its final passage. The session of the legislature adjourned before it was enacted. It finally reached the Senate and a number of us worked on it. Following the passage of this bill and after adjournment of the Senate, I went back to Guntersville and we discussed in Council meeting the feasibility of holding the election that was provided for by the Carmichael Act. This bill authorized the holding of these elections to determine whether or not the municipality should undertake these power projects. This bill permitted the city to issue revenue bonds and pledge the revenues from the system. And that money obtained from the sale of the bonds is security to the lender for the funds advanced. Our town did it on September 4, 1933. We held the election at that time and the result, I believe, was about
243 in favor of it and 70 against it. The city made
222 application to Public Works Administration about
November 20, 1933, according to my recollection. Nobody except the City Council and the citizens of Guntersville solicited us to do so. We had difficulty in getting action on the application. We got our application for the loan filed and then the matter was referred to the Advisory Board for the State of Alabama consisting of three members. The power company asked for and obtained a hearing. Later the application was sent on to Washington where no action was taken until finally in October, 1935, we got notice that the application had been granted. The loan and grant made to the amount of $87,272, being cut from $100,000 down to that. The city endeavored to purchase the property of the plaintiff located in the city. I wrote a letter on behalf of the mayor to the Alabama Power Company

asking them if they would sell it and at what price. Alabama Power Company replied in substance that they did not build the system for sale but as an investment and would not quote a price. I have not had subsequent negotiations with the company and no offer from them. I could not give the assessed valuation of the company's property in the city. I can fix it where you can figure it out. The amount of tax paid by them in the city of Guntersville, ad valorem tax, for the year 1935 was $183.76. That is based on a 5 mill tax and the assessed valuation is 60 percent of the actual valuation.

Re-direct examination

The Alabama Power Company pays a license tax, in addition to ad valorem taxes, of 2 percent on the gross receipts of the company's business in the city. The residential service amounted to $14,605.39 for the year 1935 upon which the 1936 tax is based. For commercial, it amounted to $13,535.02; for street lighting $2,418.84; and for industrial $34,182.70, making a grand total of $64,741.95. That is the amount the company paid as privilege license, that is 2 percent of that. The company also paid an addi-
223 tional privilege license for selling appliances.

Further cross-examination

The company has 380 residential consumers, 178 commercial consumers, 2 street light contracts, and 5 industrial contracts.

Whereupon there being no further questions for the witness, he was excused.

Whereupon **W. L. Farr** was called as a witness on behalf of the plaintiffs and having been first duly sworn was examined and testified as follows:

Direct examination

I am the mayor of Tuscumbia, and have been mayor a little over three and a half years. I was mayor at the time the city made an application to Public Works Administration for funds with which to build an electric distribution system. Prior to filing the application, the city, through Messrs. Lide & Adler, had negotiated with the power company for the sale of its distribution system therein, and, that was subsequent to the election whereby the citizens

voted in favor of building a municipal plant. The Alabama Power Company is the only company, person or corporation presently engaged in the electric business in Tuscumbia and is the only person able to supply the electric requirements of the city and its inhabitants. The approximate population of the city is about 4,500. The bonded indebtedness of the city is $705,276, of this amount, $677,000 are in default as to principal and interest.

Cross-examination

We had an election in Tuscumbia as to whether or not the citizens wanted a municipal plant. The election was held August 30, 1933, and the vote was about 40 to 1 in favor of going into the electric business. There were 330 votes in favor of it and 8 against it.

224 Whereupon there being no further questions for the witness, he was excused.

Whereupon **Hoyt Greer** was called as a witness on behalf of the plaintiffs and having been first duly sworn was examined and testified as follows:

Direct examination

I am president of the City Commission of the City of Sheffield, and have been president about 8 months. I have been a member of the City Commission since October 1933. I was not a member of the commission at the time the city filed its application for a loan from Public Works Administration. I am generally familiar with the application. An allotment has been made for the loan, and, we have previously entered into an agreement with Public Works Administration in reference to that. The Alabama Power Company is the only company in the city with a distribution system serving the inhabitants of the city. The city does supply lights and power for a "White Way" with a connection to the Tennessee Valley Authority plants that are adjacent to the city. The Alabama Power Company has paid the city its occupational licenses for all years except 1936. The company tendered the amount of the tax this year and the city refused it. The company has paid this occupational license tax or franchise tax ever since the expiration of its former franchise. We do not have a contract with Tennessee Valley Authority to supply power

to the municipal system when it is built. We did have such a contract which was cancelled possibly in the fall, or maybe in July, 1934. We have reasonable knowledge that we could purchase the power from Tennessee Valley Authority if we had a distribution system. Tennessee Valley Authority has power for sale and the city is in its territory, and Tennessee Valley Authority would sell it to us if we had a place to use it.

225 Cross examination

We had an election in Sheffield on the question of whether or not the city should have a municipal plant. The election was held in June 1933, I think. And there were 630 votes in favor of it and 36 votes against it.

Whereupon there being no further questions the witness was excused.

Whereupon **Clyde Hendrix** was called as a witness on behalf of the plaintiffs and having been first duly sworn, was examined and testified as follows:

Direct examination

I am a member of the City Council of Decatur and Chairman of the Finance Committee of the City Council. I have been a member of the council for about 20 years. The population of Decatur is approximately 16,000 in the last census and is estimated now at from 18 to 20 thousand. The assessed valuation of property in the city of Decatur for 1934 was $8,071,000, and for 1935, $8,550,000. It is my understanding that this figure does not include certain ad valorem values that will be coming in the next year or two or three. That is the assessment, however, for 1934 and 1935. The bonded debt of the city on January 1, 1936, was $1,777,600. The city does not have any contract with any person, firm or corporation for a supply of power to the municipal system if and when it is established. We did have such a contract with the Tennessee Valley Authority which was cancelled about July 1934. Decatur is about 30 miles from the Muscle Shoals power plant. We have about a half a million dollars in bonds in default as to principal and practically every issue is in default as to interest, with the exception of some school bonds which the taxes provide for and another issue of public improvements of about

$200,000. The city is being sued to enforce the pay-
226 ment of the bonds and interest in two different instances. One is purely a test case in connection with an increased revenue that we are undertaking to levy. You might term that as a friendly suit. The owners of the bonds have brought suit to establish the value of increased ad valorem taxation. The election to determine whether the voters would approve the acquisition of a municipal plant was held in Decatur on the 31st of October, 1933, I think. I was living in Decatur at that time. The result of the election was 1,415 for the city undertaking the venture and 501 against.

"Q. Do you know whether at that time there was in Decatur an organization known as the Tax and Rate Payers Committee of Decatur?

"Mr. Scott. I object, because it is incompetent, irrelevant and immaterial, and pertains to matters without the scope of the issues here, and is simply going to be for the purpose of laying the foundation to introduce other irrelevant matter here. That is the purpose.

"The Court. I do not quite see its relevancy.

"Mr. Jackson. It is a preliminary question, your Honor. I am asking it as a foundation question. I think, if your Honor will permit it, its relevancy will be clear.

"The Court. I will overrule your objection.

"Mr. Scott. Exception.

"The Witness. I heard of it, yes.

"By Mr. Jackson:

"Q. Were you a member of it?

"Mr. Scott. To which we object.

"The Court. I sustain the objection.

"By Mr. Jackson:

"Q. Were you a resident of Decatur at the time of the election? A. Yes, sir.

227 Whereupon the plaintiffs marked as Plaintiffs' Exhibit No. 21 for identification a paper purporting to be an advertisement in the Decatur Daily of Saturday, October 28, 1933.

The witness identified Plaintiffs' Exhibit No. 21 for identification as a newspaper advertisement in the Decatur

Daily, Saturday, October 28, 1933, which was circulated in the newspaper in Decatur at that time and prior to the municipal election of October 31, 1933, stating that he had seen this as circulated in Decatur before the election.

Whereupon plaintiffs offered in evidence, Plaintiffs' Exhibit No. 21, for identification which was duly identified by the witness, stating that the purpose for which this exhibit was offered was to show that there was a causal connection between the holding out of gifts and unsecured loans of federal funds for the construction of municipal electric plants in various places in the United States—and particularly in Decatur—and the action of the municipality in building an electric plant.

"Mr. Scott. At this time, if your Honor please, the defendants object for the reason that the exhibit offered purports to be a newspaper advertisement pertaining to a collateral and irrelevant matter. Its authority has not been properly established. The piece is hearsay, self-serving, and offered for the purpose of supporting the opinion and conclusion of the plaintiffs concerning what dominated the mental attitude of the citizens of the town in voting on the power plant.

"We object to it for the further reason that it has not been shown that any of these defendants had any connection with the printing of such advertisement. It is wholly incompetent, irrelevant, and immaterial, and without the scope of the issues here.

"Mr. Frank. May I put in somewhat simpler terms an objection I would like to make? This is a question
228 of legal causation. If your Honor allows that advertisement in, the record will look like an annual bound volume of newspaper files, because the plaintiffs have manifested, in depositions taken, an intention to clutter this record with that sort of newspaper articles. We will have, then, to go into the collateral issues—

"The Court. You do not need to say any more. I will sustain the objection. I do not think this is any occasion for newspaper advertisements.

"Mr. Jackson. We may have, I assume, an exception?

"The Court. Yes."

Plaintiffs Exhibit No. 21 for identification reads as follows:

"THE DECATUR DAILY, SATURDAY, OCTOBER 28, 1933. ANSWER TO THE TAX AND RATE PAYERS COMMITTEE OF DECATUR. JOHN PATTERSON, CHAIRMAN. ANSWERED BY MARTIN J. LYDE, CONSULTING ENGINEER.

"Q. What will this experiment cost Decatur? A. Not one penny. The Government lends the money and takes a mortgage on the distribution system. If it succeeds (and it will) the people of Decatur profit. If it fails the Government loses. The object of the loan is to promote employment. The City has all to gain and nothing to lose.

"Q. Where would we get the money and at what interest rate? A. The City would borrow it from the Government at 4%.

"Q. How will the money borrowed be repaid? A. It will be repaid out of money derived from sale of electrical power by setting aside a sinking fund of 3.36%, if the loan is for 20 years, and if the loan is for a longer period then less.

"Q. How would the loan affect the City's credit? A. It would benefit it greatly. Anybody's credit is improved by an additional income. The loan is not a general obligation of the city. It does not increase its general debt, nor
229 does it affect its credit.

"Q. When the City needs more money will electric rates be raised? A. No. Under the T. V. A. regulations the income from the distribution plant must be kept separated from the general City revenues. Under the Carmichael Act the City cannot charge rates in excess of those fixed by the Public Service Commission for similar cities.

"Q. Who will pay the taxes we lose from the local power company? A. Last year the Alabama Power Company paid the City of Decatur in License and Advalorem taxes $6,416.04. The Alabama Power Company took away from the city in gross income $179,000.00. If we get the $179,000.00 the Power Company takes away from the city, then we can well afford to lose the taxes they pay.

"Q. Can we expect good service from political operation? A. Absolutely. The plant will be designed and constructed under Government supervision. It will be managed by a non-political board under regulations prescribed

by the Authority and under a system of accounting installed by the T. V. A. It will have the constant attention and supervision of a high class corps of T. V. A. engineers.

"Q. Why not pay our present debts before incurring new ones? A. Because we can't. With the additional income from this Government investment we can improve conditions by keeping at home $179,000.00 each year that is now being taken away by the power trust."

"LOOK THE FACTS IN THE FACE. VOTE FOR MUNICIPAL OWNERSHIP NEXT TUESDAY."

"(Paid political advertisement authorized by the Citizens Committee.)"

Whereupon the Plaintiffs marked a document purporting to be an advertisement in the Decatur Daily of October 26, 1933, as Plaintiffs' Exhibit No. 22 for identification. The witness identified Plaintiffs' Exhibit No. 22 for identification as a newspaper advertisement that was circulated in Decatur prior to the municipal election of October 31, 1933.

230

Whereupon Plaintiffs offered Plaintiffs Exhibit No. 22 for identification in evidence for the same purpose as stated in connection with the offer of Exhibit No. 21 for identification. The defendants made the same objection as was made to the offer of Plaintiffs Exhibit No. 21 for identification. The Court made the same ruling as it made on the offer of Plaintiffs' Exhibit 21 for identification and the plaintiffs noted their exception to the ruling.

Plaintiffs Exhibit No. 22 for identification reads as follows:

"THE DECATUR DAILY, THURSDAY, OCTOBER 26, 1933.

"STATEMENT OF DAVID E. LILIENTHAL

"September 15, 1933—Decatur Daily:

"At the direction of the board of directors of the TVA, rates for electricity supplied from the publicly owned plant at Muscle Shoals have been formulated, after weeks of careful study of costs and market factors."

"Any municipality, in the area we plan to serve initially, which owns its distribution system, assuming half-time

use, may secure wholesale power from the Authority at an average cost to it of 7 mills a kilowatt hour. We propose that our municipal wholesale customers charge the individual residence consumer in the towns and cities thus served a maximum gross rate of 3 cents a kilowatt hour for the first block and for subsequent blocks 2 cents, 1 cent and 4 mills. For the typical general consumer this is an average of about 2 cents a kilowatt hour, and for the typical limited user an average of about 2, 3, 4 cents. For a fully electrified home—which is our objective—the rate would average 7 mills per kilowatt hour."

"The farm user, we propose, should pay the same rate for energy as the town or city householder. These schedules, both town and farm, carry with them a requirement that the customer use a reasonable amount per month as minimum requirements vary, both in urban and farm
231 territory, with the size of the customer's meter. Farm users will have a large minimum requirement wherever the greater distances between consumers result in increased cost of service."

"These wholesale rates have been computed on a constructive basis to cover the costs of furnishing the service, including operation, maintenance, depreciation and taxes. In addition to these costs, we have made provision for interest and retirement, although such provision is not required by the TVA Act. The Power project is designed to be strictly self-supporting and self-liquidating."

"We believe that these low rates will mean that the people of the Valley will greatly increase their use of electricity—which is one of the objectives of the President and Congress. If this occurs, even lower rates can be planned for the future."

"The proposed rates to the householder and farmer should be explained in more detail. Under the rate for domestic service, it is proposed that for the first 50 kilowatt hours which the householder uses he shall pay 3 cents a kilowatt. These 50 kilowatt hours, in the ordinary small or medium sized house, would care for lights, and small electrical appliances, such as the flat iron, toaster, percolator, vacuum sweeper, washing machine and similar small devices. For these 50 kilowatt hours the user would pay $1.50. If the consumer has an electric refrigerator and an elec-

tric range, which consume 200 kilowatts, 150 of these kilowatt hours per month he would get for 2 cents per kilowatt hour, and the remaining 50 kilowatts at 1 cent. If in addition to electric refrigerator and range the customer had an electric hot water heater, this service he could secure partly for 1 cent per kilowatt hour and partly for 4 mills per kilowatt hour. All these services the consumer would receive for $6.70 a month. Any other appliances which the customer installed, such as electric house heating or cooling, he could operate at 4 mills per kilowatt hour."

232 "It is apparent that the rates proposed are designated to encourage and make possible the widest use of electric service, with all the individual and community benefits which go with such wide use."

"The foregoing statement of David E. Lilienthal, member of TVA, answers all the objections of the opposition to municipal ownership.

"LAMAR PENNEY,
Chairman

H. R. SUMMER
OTTO MOEBES
ROBERT DOSS"

"(Paid political advertising authorized by the Citizens Committee)."

Plaintiffs stated that in connection with these exhibits, and other exhibits, they made a general offer to show that not only in Decatur, one of the cases involved in these suits, but in many municipalities, the holdout of gifts and liberal loans from the Federal Treasury has been an argument submitted to the voters of municipalities to persuade them to embark upon a program of municipal ownership and competition with existing electric distribution systems.

Plaintiffs also offered to show, through proof of the circulation of such advertisements as these, that elsewhere, as well as in Decatur, that the offer by these defendants of this reward, in effect, to municipalities to do the things which are injuring these plaintiffs has been used as a means of procuring municipal action to inflict the injuries here complained of.

The defendants stated on the record that this was no proper offer because it was too general and indefinite, and, furthermore, that the type of testimony outlined in the plaintiffs offer is collateral to the issues and entirely irrelevant and immaterial.

The Court gave the plaintiffs leave to prepare a
233 more careful offer and submit it later.

Whereupon there being no further questions for the witness, he was excused.

Whereupon **Edgar W. Robinson** was recalled as a witness on behalf of the plaintiffs and having been previously duly sworn testified further as follows:

Further direct examination

I am superintendent of transmission and distribution for the Alabama Power Company and I am familiar with the distribution systems at Decatur, Russellville, Guntersville and Hartselle. I am familiar with the company's operating costs of those cities with reference to the gross revenue. I am prepared to give the percentage of gross revenue from each of those cities necessary for operation and maintenance. With our present rates and the diversity of customers we have, that is the proportions of the different kinds of customers, the local costs of operation and maintenance percentage run from 20 to 25 percent of the gross revenues. That is the local costs, not the general or overhead expense. Assuming that we did lose practically all of our customers in Guntersville, Russellville and Hartselle, we would not have enough gross revenue to pay our operating cost in those cities. As long as we retained any considerable percentage of customers, say 10 or 15 percent even, they would be scattered over the distribution system so that we would have to operate and maintain all of it, which would mean that we would substantially require the same line crews and operating personnel of that sort as we now have. We have to keep our meter readers and our commercial accounting functions as long as we operated at all. We would have to have service and trouble men, our local managers and our cashiers. All those functions would continue and they would require about the same personnel, so that even if there was an enormous decrease in the number of cus-

234 tomers and the revenues, our local operating expenses would be substantially as they are now, so that it would obviously be unprofitable to continue operation.

"Q. Now, assume that in the city of Decatur, you lost 95% of your domestic customers and 70% of your commercial customers and 75% of the industrial customers, would there be in your opinion enough revenue left to pay the operating and maintenance expenses of that distribution system?

"Mr. Scott. To which we object, your Honor.

"The Court. The same ruling. I think they are entitled to show that, particularly on the question of their standing as plaintiffs.

"Mr. Scott. Note us an exception, please.

"The witness: "A. Our local operating expenses under those conditions would, in my opinion, exceed the gross revenue, based on your assumptions."

Whereupon there being no further questions for the witness, he was excused.

235 Plaintiffs introduced and there was received in evidence as Plaintiffs' Exhibit 24 the following stipulation:

The parties in Equity No. 58927, Texas Utilities Company v. Ickes, et al., by their attorneys hereby stipulate and agree for the purposes of this cause that the facts hereinafter set forth are true, and may be regarded as proved herein by competent evidence, subject to the right of either party to object to the relevancy of any fact contained herein.

Paragraph I

Texas Utilities Company is a corporation organized and existing under the laws of the State of Texas, is a resident and citizen of the State of Texas, and has its principal office and corporate domicile in the City of Plainview, Hale County, Texas.

Paragraph II

Harold L. Ickes is the duly appointed, qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States

of America dated July 8, 1933, in pursuance of the provisions of Section 201(a) of Title II of the National Industrial Recovery Act;

Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of PWA;

J. J. Madigan is the duly appointed, qualified Acting Executive Officer of PWA;

F. E. Schnepfe is the duly appointed, qualified and acting Director of Projects Division of PWA;

Henry Morgenthau, Jr. is the duly appointed, qualified and acting Secretary of the Treasury of the United States, and as such has general supervision and control over the disbursement of the public funds of the United States;

W. A. Julian is the duly appointed, qualified and acting Treasurer of the United States, and, as such, is under the supervision of the said Secretary of the Treasury, in
236 control of the payment by means of public funds of the United States of checks drawn upon him; and

Guy Allen is the duly appointed, qualified and acting Chief Disbursing Officer of the Treasury Department, and, as such, is at the head of the Division of Disbursement of the Treasury Department, and is in control of the actual drawing and issuing of checks on behalf of the United States, and the actual disbursements of the public funds of the United States.

Paragraph III

On or about the 15th day of April 1909, the City Council of the City of Plainview, Texas, passed its ordinance No. 23, a true copy of which is hereto attached, marked Exhibit "A". On or about the 17th day of November, 1915, Charles A. Malone and R. C. Malone executed an assignment of said franchise to Texas Utilities Compny, a true copy of which is attached hereto as Exhibit "B". Said Company owns an electric power plant and distribution system in said City, which system is connected by said Company's transmission lines with its central power plant at Tuco, Hale County, Texas, which supplies said distributing system with electric current, and has been and is now engaged in the business of distributing and selling electricity to the inhabitants of said City and to the City itself. A true copy of the contract in force between the said City and the said

Company regarding such electric service is attached as Exhibit "C" and made a part hereof.

Paragraph IV

Plaintiff is and for many years has been a taxpayer of the United States, and has paid many thousands of dollars in income and excise taxes to the United States, and is subject to the obligation of paying hereafter many thousands of dollars in such taxes, and is a purchaser and consumer of commodities subject to taxes payable to the United States. For the year 1934 the plaintiff paid or in-
237 curred liability to pay taxes to the United States, applicable to its electrical properties, operation and sales in Texas, in the sum of more than Twenty-Six Thousand Seven Hundred Fifty Dollars ($26,750.00).

Paragraph V

Plaintiff is and for many years has been a taxpayer of the City of Plainview, of Hale County and of the various taxing districts located wholly or in part in Hale County, and of the State of Texas, and with respect to its electrical properties, operations and sales has paid substantial amounts in taxes to said City, County and subdivisions, and State, and plaintiff is subject to the obligation of paying substantial amounts in such taxes in the future.

Paragraph VI

On or about August 17, 1935, the Federal Emergency Administrator of Public Works and the City of Plainview executed an agreement, a true copy of which is attached hereto as Exhibit "D" and made a part hereof. On or about November 18, 1935, the said parties executed another agreement, a true copy of which is attached hereto as Exhibit "E" and made a part hereof. On December 4, 1935, there was delivered to said city by said Administrator, an offer duly executed by the Assistant Administrator, a true copy of which is attached hereto as Exhibit "F" and made a part hereof. Said offer was duly accepted by said city on December 9, 1935.

Dean G. Acheson
Attorney for Plaintiff
Alexander Holtzoff
Attorney for Defendants

238 *Exhibit A.*

April 15th, 1909

Ordinance No. 28.

An ordinance granting to Chas. A. Malone, R. C. Malone, and their associates the right to construct, operate, and maintain an electric light and power plant in the City of Plainview, Texas.

Be it ordained by the City council of the City of Plainview, Texas:

Section 1. That Chas. A. Malone, R. C. Malone, their associates, successors and assigns, be and they are hereby granted the right to construct and operate and maintain over, along and across all the streets, alleys and public highways of the City of Plainview, Texas, in accordance with all reasonable ordinances of said City, now in force and hereafter to be passed by the City Council of said city, an electric light and power plant.

Section 2. The plant shall be constructed so as to not interfere with the free use of the public of all streets and alleys and public highways. Any damage done to the streets, alleys and public highways shall be properly repaired by the said Chas. A. Malone, R. C. Malone, and their associates or at their expense.

Section 3. This franchise is granted for the period of 50 years. The said Chas. A. Malone, R. C. Malone, for themselves and their associates and assigns have consented in consideration of said grant, that the City of Plainview may place a system of fire alarm wire and fixtures on all of their poles belonging to said Electric Light and Power Plant, the same to be attached under the supervision of said owners of said plant at such places as they think best, but at the expense of the City and the same shall be maintained by the City at its expense.

239 Section 4. This franchise shall lapse and be of no force and effect unless construction begins within sixty (60) days and from the passage of this ordinance and the plant shall be in operation within six months from the time of the commencement of the construction.

Section 5. The failure of the grantees herein to comply with any one or part of any one of said above sections shall operate as a forfeiture of this franchise.

Section 6. The conditions requiring the passage of this ordinance create an emergency and imperative public necessity exists, the rule requiring the ordinance to be read on three several days be suspended and that this ordinance take effect and be in force from and after its passage and it is so enacted.

Passed and approved at a called session of the City Council of the City of Plainview, Texas, this 15th day of April 1909.

(Signed) Jas. R. DeLay—*Mayor*

Attest:
(Seal)
(Signed) J. F. Bander, *City Secretary*

240 *Exhibit C.*

PUMPING AND LIGHTING CONTRACT WITH THE CITY OF PLAINVIEW

MINUTES OF THE REGULAR SESSION OF THE CITY COUNCIL OF THE CITY OF PLAINVIEW, TEXAS, MARCH 7th, 1927.

Be It Remembered that on this the 7th. day of March, A. D., 1927, the City Council of the City of Plainview, Texas, convened in regular session at the City Hall in said City, at which meeting there were present W. E. Risser, Mayor, and J. C. Hooper, J. L. Guest, D. M. Thompson, W. E. Boyd and J. B. Cardwell, being all of the Councilmen of the said City.

There came on to be considered at said meeting the proposal from Texas Utilities Company, a corporation under the laws of Texas, to furnish electric light and power and do certain pumping of the city water by contract with the City of Plainview.

And it appearing to the said City Council of said City of Plainview that said Texas Utilities Company proposes to furnish said electric light and power, and pumping service to the said City of Plainview, for the periods, in the manner and upon the conditions hereinafter fully set out in a written contract this day made and entered into by and between said City of Plainview and the said Texas Utilities Company, at the prices hereinafter set out in said contract, which is made a part of these minutes.

And the said City Council of the City of Plainview, Texas, having had said proposal under consideration, and said City Council having carefully and fully considered said proposal, and having made careful investigation with reference thereto, and being of the opinion that said proposal is fair and reasonable and to the best interest of said City of Plainview, and the inhabitants thereof, the following motion was made, seconded and unanimously adopted, the said proposal of said Texas Utilities Company be and
the same is hereby in all things accepted and adopted
241 by said City Council of the said City of Plainview,
Texas, and said proposal submitted in the form of a written contract, as hereinafter set out, be formally signed in triplicate originals for and on behalf of the City of Plainview, Texas, by W. E. Risser, Mayor, and Geo. H. H. Saigling, City Secretary, and a copy of said original contract be made a part of the official minutes of this meeting of said City Council of Plainview, Texas, and two executed copies be delivered to said Texas Utilities Company.

The said contract between the City of Plainview, Texas, and Texas Utilities Company, reduced to writing and executed by the parties as aforesaid, as constituting the contract between said parties is as follows, to-wit:

THE STATE OF TEXAS,
County of Hale, City of Plainview:

THIS AGREEMENT made and entered into this 7th day of March, A. D., 1927, by and between the City of Plainview, Texas, a municipal corporation under the general laws of Texas, acting herein by and through its Mayor, W. E. Risser, and its City Secretary, George Saigling, hereunto duly authorized by the City Council of the City of Plainview, Texas, hereinafter called the "City", and Texas Utilities Company, a private corporation of Texas, incorporated under the laws of the State of Texas, acting herein by and through I. R. Kelso, its President, and attested by J. B. Scott, its Secretary, hereunto duly authorized, and hereinafter called the "Company," Witnesseth:

Division One of Contract

City Pumping

1. Equipment Furnished by Company—The Company agrees and binds itself to furnish all wells, machinery and power necessary for the purpose, and to operate all machinery for the purpose, and to pump all of the City's water from such wells into the reservoir, elevated tanks and water works system of the City, and to furnish to the City all necessary water during the term of this contract upon the terms, conditions, in the manner and at the prices hereinafter set out.

242 2. Equipment Furnished by City—The City agrees to furnish all necessary reservoirs, tank or tanks, pipes, mains, valves and fittings requi d to connect the Company's pumping equipment to the City's reservoirs, elevated tanks or tanks and distribution system.

The wells, machinery, buildings and equipment furnished by the Company shall remain the property of the Company.

3. Certain Terms Defined—Wherever the term or expression "Present Pumping Site," is used or occurs in this contract it shall be construed to mean and refer to the present pumping plant and equipment as now located at or near the power plant of the Company.

Wherever the ter or expression, "Austin Street Lot," is used or occurs in this contract it shall be construed to mean and refer to a lot to be secured by the City for use of the Company in putting in a new well, and shall be located at or near the corner of Austin and Eleventh Streets in said City, said Austin Street Lot to be located conveniently to connect to the present eight (8) inch water mains. For convenience the Austin Street Lot shall be included in the terms or expression "Present Pumping Site."

Wherever the term or expression "New Pumping Site," is used or occurs in this contract, it shall be construed to mean and refer to a certain five (5) acre tract recently purchased by the City for its new water works site located in Block No. 11, Boswell Heights Addition to the City of Plainview, Texas, or such other site in that locality as may be acquired by the City.

4. Pumping Head—This contract for pumping water is based on the pumping head at the present pumping site and the new pumping site as follows:

The total pumping head, including lift and discharge, shall not exceed Two Hundred and Ten (210) feet; it being understood that the City shall install water mains of sufficient size for connecting pumping plants to distribution systems so that the total head shall not exceed said head of Two Hundred and Ten (210) feet.

243 5. Continuous Service—The Company agrees to furnish continuous service as hereinabove provided for, furnishing to the City a supply of water into the water mains of the City sufficient to maintain pressure in said mains of Fifty-Two (52) pounds per square inch, and it is specially stipulated that for each and every period of time exceeding Twenty-Four (24) hours during which the Company shall fail to furnish such water supply at such pressure it shall pay to the City Five Hundred ($500.00) Dollars for each and every day after the expiration of said Twenty-four (24) hour period as liquidated damages until the service and pressure, above provided for, shall be reestablished and maintained by the Company, or until the City shall declare this contract terminated, which the City shall have the absolute right to do at any time after any continuous failure to keep such supply and pressure of water for any period of Ten (10) days or more (unless such failure shall be due to the failure of the City to maintain proper mains and equipment to insure said pressure), and it is specially provided that if the City shall terminate the contract under the provisions of this paragraph that the Company shall nevertheless be bound to furnish water as herein agreed for a period of One (1) year thereafter, during which period the Company shall be bound to operate said plant and system as nearly in accordance with the provisions of this contract as may be practical, but during such year shall not be liable for the liquidated damages above mentioned, but shall be liable to the City for actual damages, and should the Company not so operate said plant at any time during said year the City shall have the right to operate same, or have same operated, and charge the expense thereof against the payments to be made by the City (as actual damages sustained by the City) to the Company for services during that time.

The Company agrees to furnish continuous service as hereinabove provided, unless prevented from doing so by

such strikes, fires, accidents, or acts of God, as to render it practically impossible to perform the services, and shall be excused from performance only in the event that
244 the Company cannot by the use of all diligence and facilities within its power, including the power which might be made available from high lines from other points or resorted to by the Company to meet the emergencies or re-establish continuous service, nor unless the Company shall use all practical diligence and resources at its command to re-establish said continuous services.

The above provision requiring continuous service shall not be construed to obligate the Company to guarantee or insure the source of water supply to the City, but is based upon pumping conditions herein agreed upon, nor as binding the Company as an insurer against loss or damage resulting from fire; but it is expressly provided that should the water supply, as contemplated by this contract, prove insufficient for use of the City that this contract may terminate at the option of the City.

6. City Reserves Right to Designate Pumping Site to Be Used—It is understood and agreed that the water shall be pumped by the Company at the present pumping site until such time as the City elects to order the Company to pump the water at the new pumping site.

It is agreed that before the new pumping site shall be available for use as a pumping site under the terms of this contract that the City shall install the necessary reservoir on said new pumping site and install the necessary mains connecting the new pumping site to the present stand pipe, said mains to be of sufficient size to comply with the conditions and requirements hereinabove set out.

7. Use of City Property—In the event that it shall become necessary for the Company to use the new pumping site, or necessary to locate a well and pumping equipment of the Company's on property belonging to the City in connection with the present pumping site, then this contract shall be considered as a lease of the necessary ground for such well and pumping equipment from the City to the Company during the term of this contract, and at the expiration of this contract, if it be not renewed, the Company shall be entitled to remove all machinery and prop-
245 erty placed thereon by the Company, provided, how-

ever, that the Company shall leave all wells on said property in good condition, so far as practical, and if requested by the City shall leave all casing in said wells, in which event the City shall, upon demand, at any time thereafter made, pay to the Company the reasonable value of said casing so left in said wells.

8. Pumping Rates—The Company agrees to pump the water supply at its present pumping site at the following schedule of rates and charges:

Five (5) Cents per One Thousand (1,000) Gallons for the first Fifteen Million (15,000,000) Gallons of water delivered to the City per month at the present pumping site;

Four (4) Cents per One Thousand (1,000) gallons for all water delivered to the City in excess of Fifteen Million (15,000,000) Gallons per month at the present pumping site.

Rates New Pumping Site:

Five and a half (5½) Cents per One Thousand (1,000) Gallons for the first Fifteen Million (15,000,000) Gallons of water delivered to the City per month at new pumping site;

Five Cents per One Thousand (1,000) Gallons for the next Ten Million (10,000,000) Gallons of water delivered to the City per month at new pumping site:

Four (4) Cents per One Thousand (1,000) Gallons for all water delivered to the City in excess of Twenty-Five Million (25,000,000) Gallons per month at new pumping site.

Division Two of Contract

Street Lighting

1. The Company agrees to install, maintain and operate a street lighting system of 283 lights consisting of 133 Whiteway Standards of 250 candle power each, located in what is known as the business section of the City, and 150 bracket type lights of 100 candle power each, located in residential sections of the City. All of said lights are to be installed at locations designated by the City Council as shown
246 on map designating locations of said lights hereto attached for reference.

2. White Way Standards—The 133 Whiteway Standards of 250 candle power each to be installed at locations desig-

nated on the map hereto attached are to be installed, maintained and operated by the Company in connection with the 150 bracket type lights of 100 candle power each to be installed under this contract, said bracket type lights to be of the type and include the brackets now installed and used for street lighting purposes in the residential district, the map for convenience is hereinafter referred to as Exhibit "A".

3. Installed when—All of said Standard Whiteway lights and bracket type lights, shown on Exhibit "A" are to be installed as soon as possible. The Company will order the materials for the street lighting system as soon as the contract is executed. The Company agrees that under favorable working conditions and reasonable delivery of materials to complete the installation of the street lighting system within approximately Ninety (90) days after the receipt of a resolution of the City Council setting out its approval of the selection of Whiteway Standards to be installed under this contract. The City agrees to pass resolution approving type of Standard to be selected from catalogue furnished the City by the Comany.

The Street Lighting System installed by the Company will be of high grade materials, and installed in a workmanlike manner, and any damage done to paving, sidewalks or curbing will be repaired by the Company without cost to the City.

4. Price of Lights—The City agrees to pay to the Company a flat rate of $595.00 Dollars per month for the 283 lights to be installed hereunder as shown on Exhibit "A".

The City agrees to pay $3.00 per month for all additional candle power Whiteway Standards installed in addition to the 133 250 candle power Whiteway Standards shown on Exhibit "A", provided, however, that the City shall have the right to order the extension of Whiteway Standards as and when the City may see fit and so order, and
247 when the City shall at any time order an extension as one job of as many as 12 Whiteway Standards installed, separated approximately the same distance as the Whiteway Standards hereinabove provided for, that the Company will install them and the City will pay for each light so installed an additional sum of $2.50 per month.

The City agrees to pay to the Company the sum of $1.75 per month for each additional 100 candle power light installed by the Company in excess of the One Hundred Fifty (150) 100 candle power lights shown on Exhibit "A" up to Six Hundred (600) 100 candle power lights, and $2.25 per 100 candle power light for each additional 100 candle power light installed in excess of the said Six Hundred (600) 100 candleper lights above mentioned.

In addition to the street lights to be installed as shown on Exhibit "A" the City may order additional extensions and installation of the street lighting system as follows:

(a) In case the City desires to have the Whiteway System extended it may by resolution, duly passed, and delivered to the Company, order an extension or extensions of the Whiteway System by agreeing and directing such resolution the fact that the City obligates itself to take one (1) 250 candle power light for each extension of approximately One Hundred Forty (140) feet, provided, however, that the Company shall not be required to construct any type of Standard other than that installed under the terms of this contract, except by special agreement of the parties hereto.

(b) The City may, by resolution duly passed, and delivered to the Company, order an extension or extensions of the bracket type lights by agreeing and reciting in such resolution the fact that the City obligates itself to take One (1) 100 candle power light for each block of such extension, provided, however, that the Company shall not be required to construct any type of bracket light other than that installed under the terms of this contract, except by
248 special agreement of the parties.

(c) In case the City desires to have the bracket type street lighting system extended more than one block without installing additional lights, as aforesaid, then in that case the City shall have the right to order such extension by paying for the actual cost of construction; and in event of such construction at the expense of the City the Company shall repay to the City in services supplied to the City for its street lighting system on such extension One-Half (½) of the monthly bills for such service on such extension until the City has been fully reimbursed for all money paid out by it on account of any such extension.

5. Payments—From the date of the execution of this

contract the City shall pay for all lights now in operation and all lights to be hereafter installed at the new rates above provided for.

If the Company shall fail to keep any light burning for as many as three consecutive nights in any one month then the proportionate part of the remuneration to be paid for such light or lights which may be kept burning, shall be deducted from the amount to be paid to the Company by the City for that month.

The Company agrees to furnish continuous service as hereinabove provided for except in cases where the Company may be prevented by strikes, fires, accidents to plant or machinery, poles or lines, beyond its control, and acts of God, provided, however, in cases where the Company may be prevented by strikes, fires, accidents to plants or machinery, poles or lines, beyond its control, acts of God, the Company will use all diligence in repairing the same so that service will not be interrupted any longer than necessary, and to make use of all facilities available to them including power from the high lines under the Company's control from other points.

Division Three of Contract

Combined Light and Power Services

1. City Hall, Auditorium, Etc.—The Company agrees to furnish electric energy for light in the City Hall,
249 City Auditorium, and at all other places owned and controlled by the City within the City, and electric energy for power for operating fans in the City Auditorium, and pumping City Sewage, and for all necessary use by the City, at the following schedule of rates and charges:

Four (4) Cents per KWH for the first Five Thousand (5,000) kilowatt hours per month.

Three and One-Half (3½) Cents per KWH for the second Five Thousand (5,000) kilowatt hours per month.

Three (3) Cents per KWH for the third Five Thousand (5,000) kilowatt hours per month.

Two and One-Half (2½) Cents per KWH for the next Twenty-Five Thousand (25,000) kilowatt hours per month.

Two (2) Cents per KWH for the balance of all kilowatt hours per month.

Provided, that an amount equal to $1.00 per each horse power of any motor of the City that was connected to the Company's line during the preceding month may be made and shall be known as the minimum charge.

Note: The schedule of rates and charges above set out is what is known as the Company's Development Rate, and it is agreed that the minimum charge of $1.00 per horse power in the above schedule is not to be applied to the motors used in the City Auditorium and the sewage.

Division Four of Contract

General Provision

1. Payments for Services—The City shall pay the Company the prices above set out for all of the services received from the Company under the terms of this Contract on the First day of each month, and at all events prior to the Tenth day of the succeeding month after the services have been rendered, and should it become necessary for the City to issue warrants for the payment of any sum or sums becoming due to the Company for any services rendered under this contract, then such warrants shall provide for and bear interest, from their date until paid, at the rate
250 of Six (6) per cent per annum.

2. Term of Contract—Unless terminated by the City, at its election, at the end of the first Ten (10) year period hereunder, in the manner and upon the conditions hereinafter set out, this contract shall run for the full period of Twenty (20) years from and after the date of execution hereof.

(a) The City reserves the right to cancel, change or modify this contract at the end of Ten (10) years from date of execution hereof upon a fair, just and equitable basis to the Company and the City, with the understanding that in arriving at a fair, just and equitable basis of readjustment or settlement the fact that the schedules of rates and charges, herein set out, are based upon a Twenty (20) year contract, shall be taken into consideration. (Rider "A" hereto attached) Provided, however, the Company will not be given any benefit in such readjustment or settlement of any prospective profit which might accrue to the Company during the remainder of such twenty year period

because of any reduced cost or prospective reduction of cost in the production of electrical energy or in the pumping of such water because of any decrease in fuel cost, it being intended that the fact that "the schedule of the rates and charges herein set out are based upon a twenty year contract shall be taken into consideration" for the purpose of protecting the Company only against loss or damage on account of property installed and cost of installation.

(b) City to Elect, When—The City shall elect to cancel, change, modify or readjust this contract by resolution of the Council adopted not more than 18 months nor less than Sixty (60) days prior to the expiration of the first Ten (10) year period, and cause a copy of such resolution to be delivered to the Company Thirty (30) days prior to the expiration of said first Ten (10) year period, setting forth in such resolution the changes, modifications or re-
251 adjustments desired, or setting forth the fact that the City desires to cancel this contract, fixing a date for a conference with the Company for the purpose of arriving at a fair, just and equitable basis of cancellation, change, modification or readjustment by agreement of the parties.

(c) If the City and Company should fail to reach an agreement at said conference, then and in that event all matters subject to arbitration hereunder and specified in such resolution of the City as aforesaid shall be submitted to arbitration. In case the City desires to arbitrate any matters not agreed upon at said conference it shall adopt a resolution within Sixty (60) days after the date set for such conference, asking for such arbitration unless the time be extended by agreement of the parties, it being expressly understood that all property installed by the Company during the life of this contract shall remain the property of the Company unless acquired by the City by agreement of the parties or by the decision of the Board of Arbitration.

(d) Board of Arbitration Selected, When and How—In case it shall be necessary to submit any matter or matters to arbitration, as herein agreed upon, then and in that event, an Arbitrator or Board of Arbitrators shall be selected as follows:

The City Council shall find and declare by resolution that the City and the Company have been unable to agree on the

terms of readjustment and-or terms, conditions and compensation of cancellation and authorize the Mayor to act for the City in the selection of a Board of Arbitration in all matters which may be submitted to arbitration at the end of the First Ten (10) year period under the terms of this contract. The Mayor shall select and name one (1) arbitrator, and notify the Company of his selection in writing, giving the name of the arbitrator selected by the City. If the selection made by the Mayor is satisfactory to the Company then the person so selected by the Mayor
252 shall act as Arbitrator and all matters hereinabove referred to as being subject to arbitration by a Board of Arbitrators shall be submitted to the person so selected as sole Arbitrator of all matters submitted to him for arbitration, it being understood that any person selected as an Arbitrator shall not act as the advocate or representative of either the City or the Company, but shall act as an impartial referee and hear the testimony or evidence offered by the parties hereto and base his decision, findings and report thereon.

If the Company fails to approve the person so selected by the Mayor then the Company shall select an Arbitrator and the two so selected shall select a third Arbitrator, and the three so selected shall constitute the Board of Arbitration.

No person shall be selected as an Arbitrator who is a resident of the City of Plainview, or who is in the employ of a municipality or private company as an operating or supervising engineer of water or electric utilities at the time of his selection under this contract.

One-Half (½) of the cost of said arbitration shall be paid by the City and One-Half (½) by the Company.

(e) Matters Submitted to Arbitration, How—If the City and the Company are unable to agree as to what would be a fair, just and equitable basis of settlement of matters subject to arbitration hereunder at the end of the first Ten (10) year period, then and in that event, the Board of Arbitration to be selected as hereinabove set out, shall proceed to set a time and place for a public hearing at the City Hall in the City of Plainview after not less than Thirty (30) days notice to the City and the Company, upon the matters submitted for arbitration for the purpose of arriving at

and fixing the just compensation to be paid by the City and
received by the Company upon cancellation of this
253 contract by the City as above set out, and-or to be
paid by the City and received by the Company as
just compensation in case the City should elect to change or modify the terms and provisions of this contract in respect to facilities or services herein agreed upon.

Within a reasonable time the Board of Arbitration shall by order, fix and certify to the Clerk of the City and to the Company the just Compensation to cover the changes and damages sustained by the Company on account of cancellation of contract, or on account of changes, modifications or readjustments desired by the City at the end of the said first Ten (10) year period. (Rider attached E. 1. Fuel Clause.)

10. Fuel Clause—It is agreed that the price for pumping water under this contract has been arbitrarily fixed by agreement of the parties. It is further agreed that boiler room fuel costs, as set out in this clause, is based upon the present operating conditions, and any readjustment of the schedules of rates and charges for water pumping based upon this fuel clause, shall be made on the basis of the comparative costs as herein agreed upon, to-wit:

The present average cost of fuel to Texas Utilities Company per K. W. H. delivered to its consumers is three-quarters of a cent (¾c) per K. W. H., and on this basis the Company will apply the following adjustments to the water pumping rates at the times and in the manner herein agreed upon, provided always that there is any such substantial or material change or changes in fuel costs to the Company to justify such readjustment, to-wit:

For every One (1) Mill reduction in the average fuel cost to Texas Utilities Company per K.W.H. delivered to its consumers the Company will reduce the water pumping rates set out in this contract One and One-Half (1½) Mills per One Thousand (1,000) Gallons of water pumped.

For every One (1) Mill increase in the average cost of
fuel to Texas Utilities Company per K. W. H. de-
254 livered to its consumers the Company will increase
the water pumping rates set out in this contract
One and One-Half (1½) Mills per One Thousand (1,000) Gallons of water pumped.

This City may, at its option, call for readjustment of rates under this clause at and when it may see fit.

(f) Notices—All notices, orders and resolutions herein provided for shall be considered as having been duly given to the Company when any such may be given to the person at the time in charge of either the Company's office or the Company's Plant in the City of Plainview, Texas.

This contract is executed in triplicate originals at Plainview, Texas, where this contract is performable in all its terms, this the day and year herein first written, and it is agreed that this contract contains all the covenants and agreements made by and between the parties hereto on the subject matter hereof, and that no part of this contract shall be in any manner amended or abrogated, superceded or altered, unless done in writing and signed by the parties hereto acting by and through their duly authorized agents.

One copy of this contract is delivered to the City Secretary of Plainview, Texas, for the use and as the property of the City, and one copy hereof is delivered to the President of Texas Utilities Company, and one copy to the Secretary of Texas Utilities Company, for the use and as the property of said Company, and each of the parties hereto hereby acknowledge receipt of a copy hereof.

In Testimony Whereof the said City of Plainview has caused these presents to be executed in its corporate name by its said Mayor and City Council and its corporate seal to be hereto affixed by its City Secretary in the City of Plainview, this the day and year herein first written.

In Testimony Whereof the said Texas Utilities Company has caused these presents to be executed in its corporate name by its president and its corporate seal to be hereto affixed at its office in the City of Plainview, this the day and year in this contract first written.

255 CITY OF PLAINVIEW, TEXAS,
By W. E. RISSER, *Mayor.*
ATTEST: G. H. SAIGLING,
City Secretary.

(Seal)

TEXAS UTILITIES COMPANY,
By I. R. KELSO, *President.*
ATTEST: J. B. SCOTT, *Secretary.*

(Seal)

THE STATE OF TEXAS,
County of Hale:

I, George H. Saigling, City Secretary of the City of Plainview, Texas, do hereby certify that the above and foregoing instrument of writing consisting of 20 pages, is a true and correct copy of the proceedings of the City Council of the City of Plainview, Texas, for the purpose of considering and acting upon a certain contract between said City and the Texas Utilities Company, a corporation, and authorizing the execution of said contract by and through its Mayor, W. E. Risser, and its City Secretary George H. Saigling.

I further certify that the above and foregoing contract set out as a part of the minutes of the Regular Meeting of the City Council convened and called in special session, at the call of the Mayor of the City, at the City Hall in said town, for the purpose of considering and authorizing the execution of said contract, on the 7th day of March, A. D. 1927, is true and correct copy of said contract as executed in final form by the City of Plainview and Texas Utilities Company.

I further certify that I am the duly elected and qualified and acting Secretary of said City of Plainview, and the following named persons were officers of said City, to-wit: W. E. Risser, Mayor. J. C. Hooper, J. L. Guest, D. M. Thompson, W. E. Boyd and J. B. Cardwell, being all of the Councilmen of said City.

256 I further certify that the Mayor and all of the members of said council were present at said meeting and voted in favor of accepting said contract, and in favor of authorizing the Mayor and City Secretary to execute said contract in the name and on behalf of said City of Plainview.

Done at my office in Plainview, Texas, this the 7th day of March, A. D., 1927.

G. H. SAIGLING, *City Secretary.*

(Seal)

257 *Exhibit D.*

P. W. A. Docket No. 8021

1. Purpose of Agreement. Subject to the terms and conditions of this Agreement, the United States of America (herein called the "Government") will, by loan and grant not exceeding in the aggregate the sum of $423,346 (herein called the "Allotment") aid the City of Plainview, Hale County, Texas (herein called the "Borrower") in financing a project (herein called the "Project") consisting substantially of a Diesel electric generating plant and distribution system, including street lighting (the Project together with all improvements and extensions thereto and replacements thereof subsequently constructed or acquired being herein called the "System"); all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 8021, Title II, of the National Industrial Recovery Act (herein called the "Act") and the Constitution and Statutes of the State of Texas (herein called the "State").

2. Amount and Method of Making Loan. The Borrower will sell and the Government will buy, at the principal amount thereof plus accrued interest, $328,000 aggregate principal amount of coupon bonds (herein called the "Bonds") of the description outlined below or such other description as may be satisfactory to the Borrower and to the Federal Emergency Administrator of Public Works (herein called the "Administrator"), bearing interest at the rate of 4 percent per annum, payable semiannually from date until maturity and bearing covenants as to transferability satisfactory to the Administrator, less such amount of the Bonds, if any, as the Borrower may sell to purchasers other than the Government.

(a) Date.—June 1, 1935.

(b) Denomination.—$1,000.

(c) Place of Payment.—At the office of the City Treasurer in the City of Plainview, Hale County, Texas; or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York.

258 (d) Registration Privileges. At the option of the holder as to principal only.

(e) Maturities. Payable, without option of prior redemption, on June 1, in years and amounts as follows:

1937	$10,000
1938	15,000
1939 to 1942, inclusive	20,000
1943 to 1946, inclusive	25,000
1947 to 1949, inclusive	30,000
1950	33,000

(f) Security. Special obligations of the Borrower payable as to both principal and interest from and secured by an exclusive first lien on and pledge of the entire revenues of the System, after deduction only of reasonable operation and maintenance expenses, and additionally secured by a first-lien mortgage on the real estate and chattel property described in said mortgage constituting said System.

3. Amount and Method of Making Grant. The Government will make and the Borrower will accept, whether or not any or all of the Bonds are sold to purchasers other than the Government, a grant (herein called the "Grant") in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The determination by the Administrator of the cost of the labor and materials employed upon the Project shall be conclusive. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds or interest coupons, or both. If all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money. In no event shall the Grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $114,000.

4. Bond Proceedings. When the Agreement has been executed the Borrower (unless it has already done so) shall promptly take all proceedings necessary for the authorization and issuance of the Bonds.

5. Bond and Grant Requisitions. From time to time after the execution of this Agreement the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by

the Administrator (a requisition together with such documents being herein collectively called a "Requisi-
259 tion").

6. Bond Payments. If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at a Federal Reserve Bank to be designated by the Administrator, or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, having all unmatured interest coupons attached thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which, in the judgment of the Administrator, is needed by the Borrower to complete the Project.

7. Grant by Payment of Money. If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator the Government will pay to the Borrower at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) 25 per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) 30 per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined.

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between the Allotment and the amount paid (not including the amount paid as accrued interest) for the Bonds taken up by the Government. The Government re-

serves the right to make any part of the Grant by cancellation of Bonds or interest coupons or both rather than by payment of money if, in the judgment of the Administrator, the Borrower does not need the money to pay costs incurred in connection with the construction of the
260 Project.

8. Grant by Cancellation of Bonds. If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

9. Grant Advances. At any time after the execution of this Agreement the Government may, upon request of the Borrower, if in the judgment of the Administrator the circumstances so warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of 30 per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

10. Deposit of Bond Proceeds and Grant; Bond Fund; Construction Accounts. The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 8 hereof into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 7 hereof promptly upon the receipt of such proceeds or payments in a separate ac-

count or accounts (each of such separate accounts herein called a "Construction Account") in a bank or banks which are members of the Federal Reserve System and of
261 the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator.

11. Disbursement of Monies in Construction Accounts and in Bond Fund.—The Borrower shall expend the monies in a Construction Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and as shall have been approved by the Administrator. Any monies remaining unexpended in any Construction Account after the completion of the Project which are not required to meet obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be canceled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

12. Other Financial Aid from the Government. If the Borrower shall receive any funds (other than those received under this Agreement) directly or indirectly from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

13. Construction of Project. Not later than upon the receipt by it of the first Bond payment, the Borrower will commence, or cause to be commenced, the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, plans, drawings, specifications, and construction contracts which shall be satisfactory to the

Administrator, and under such engineering supervision and inspection as the Administrator may require. Ex-
262 cept with the written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage, or any conditional sale or title retention agreement.

14. Construction Work. All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. By the act of executing this Agreement the Borrower acknowledges receipt of a copy of the rules and regulations set out in Bulletin No. 2, Non-Federal Projects revised March 1, 1935, entitled "P. W. A. Requirements as to Bids, Contractors' Bonds, and Contract, Wage and Labor Provisions and General Instructions as to Applications and Loans and Grants," and covenants that said rules and regulations, with all blank spaces filled in as provided in said Bulletin, will be incorporated verbatim in all construction contracts for work on the Project.[1]

15. Force Account. All construction work on the Project shall be done under contract, provided, however, that if prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement to the contrary notwithstanding, to apply to the Administrator for permission to do all or any part of the Project on a force-account basis.

16. Restriction as to Contractors. The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

17. Bonds and Insurance. Construction contracts shall be supported by adequate surety or other bonds or
263 security satisfactory to the Administrator for the protection of the Borrower, or materialmen, and of labor employed on the Project, or any part thereof. The contractor under any construction contract shall be required to provide public-liability insurance in an amount satisfactory to the Administrator.

[1] Particular care should be taken by the Borrower that in all construction contracts the following words are inserted in the blank space in Paragraph 3 (a) (1) of the rules and regulations: CITY OF PLAINVIEW and/or COUNTY OF HALE and the following words are inserted in the blank space in Paragraph 3 (a) (2) of the rules and regulations: State of Texas.

18. Information. During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost, and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds such financial statements and other information and data relating to the Borrower as the Administrator or any such purchaser may at any time reasonably require.

19. Representations and Warranties. The Borrower represents and warrants as follows:

(a) Litigation. No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the security therefor, the construction of the Project, or the financial condition of the Borrower;

(b) Financial Condition. The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of such assets or in such financial condition except such changes as are necessary and incidental to the ordinary and and usual conduct of the Borrower's affairs;

(c) Fees and Commissions.—It has not and does not intend to pay any bonus, fee, or commission in order to secure the loan or grant hereunder;

(d) Affirmation. Every statement contained in this Agreement, in the Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government is correct and complete, and no relevant fact materially affecting the Bonds, the security therefor, the Grant or the Project, or the obligations of the Borrower under this Agreement has been omitted therefrom.

20. Bond Circular. The Borrower will furnish all such information in proper form for the preparation of a Bond Circular and will take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per centum of the Bonds may reasonably request to aid in the sale by the Government or such purchaser or purchasers of any or all of the Bonds.

21. Expenses. The Government shall be under no obliga-

tion to pay any costs, charges, or expenses incident to
264 compliance with any of the duties or obligations of the Borrower under this Agreement, including, without limiting the generality of the foregoing, the cost of preparing, executing, and delivering the Bonds, and any legal, engineering, and accounting costs, charges, or expenses incurred by the Borrower.

22. Waiver. Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement.

23. Interest of Member of Congress. No Member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise thereupon.

24. Validation. The Borrower hereby covenants that it will institute, prosecute, and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such proceedings, judicial or otherwise, as may be necessary, appropriate, or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities and irregularities in the proceedings of the Borrower relative to the issues of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate, or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder a letter from the Governor of the State stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

25. Naming of Project. The Project shall never be
265 named except with the written consent of the Administrator.

26. Insurance on Project. The Borrower shall, during the life of the Project, maintain proper and adequate insurance thereon.

27. Undue Delay by the Borrower. If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties or obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

28. Conditions Precedent to the Government's Obligations. The Government shall be under no obligation to pay for any of the Bonds or to make any part of the Grant:

(a) Financial Condition and Budget. If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) Cost of Project. If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $423,346, or that the Borrower will be able to obtain, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the Project;

(c) Compliance. If the Administrator shall not be satisfied that the Borrower has complied with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) Legal Matters. If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the construction of the Project;

(e) Representations. If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower, shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) Maturity of Bonds Sold to Government. If, in the event that some of the Bonds are sold to purchasers other than the Government, the maturities of the remaining Bonds are not satisfactory to the Administrator;

(g) Bond Ordinance. If the ordinance authorizing the issuance and sale of the Bonds shall not be satisfactory to the Administrator;

(h) Rate Ordinance. If the Borrower shall not adopt an ordinance or ordinances setting forth an initial rate schedule satisfactory to the Administrator and providing that the Borrower will use the revenues of the electric generating and distribution system for no purposes other than for debt service on the Bonds, operating expenses and maintenance, a reserve which shall not exceed three years' debt service next due, and, to the extent that revenues are available after such uses, for necessary extension; and if such ordinance or ordinances shall not provide that the Borrower will make reasonable charges for all current used for street-lighting and other municipal purposes, and that said charges will not be less than the cost of producing and distributing said current;

(i) Mortgage. If the mortgage, referred to in
266 Paragraph 2(f), herein, and the deed of trust shall not be satisfactory to the Administrator as to form, sufficiency, and substance;

(j) If the borrower shall not furnish evidence satisfactory to the Administrator that the Texas Utilities Company can be legally required to furnish electrical service on a day-to-day basis to present customers until the borrower shall have completed the project.

29. Accounts and Statements. So long as any of the Bonds are held by the Government, the Borrower will furnish to the Government, not later than 30 days after the close of each six months' fiscal period, complete operating and income statements of the System in reasonable detail covering such six months' period, and, not more than 60 days after the close of each fiscal year, complete financial statements of the System and the Borrower covering such fiscal year, certified by independent auditors.

This Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed by and be construed in accordance with the laws of the State. If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity

and effectiveness of any other provision of this Agreement or the rights or obligations of the parties hereto; provided, however, that in the opinion of the Administrator, the Agreement does not then violate the terms of the Act.

In Witness Whereof, the Borrower and the Government have respectively caused this Agreement to be duly executed as of August 17, 1935.

CITY OF PLAINVIEW,
HALE COUNTY, TEXAS,
By TOM SHELTON, Mayor.

(Seal.)
Attest:
J. L. GALLOWAY,
City Secretary.

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS,

By E. W. CLARK,
For the Assistant Administrator.

267 EXHIBIT E

P. W. A. Docket No. 8021

Agreement Dated as of Nov. 18, 1935, Terminating the Loan and Grant Agreement Dated as of August 17, 1935, Between the City of Plainview, Hale County, Texas (Herein Called the "City") and the United States of America, (Herein Called the "Government")

Whereas a Loan and Grant Agreement was entered into by and between the City and the Government dated as of August 17, 1935; and

Whereas it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement.

Now, Therefore, it is Hereby Agreed by and between the City and the Government that said Loan and Grant Agreement, dated as of August 17, 1935, be, and the same hereby is, terminated.

CITY OF PLAINVIEW, (HALE COUNTY, TEXAS)
By TOM SHELTON, Mayor.
(SEAL)

(Seal.)
Attest:
J. L. GALLOWAY,
Secretary.

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS,

By H. B. HACKETT,
Assistant Administrator.

268 EXHIBIT F.

Federal Emergency Administration of
Public Works,

Washington, D. C., December 4, 1935.

CITY OF PLAINVIEW,
Hale County, Texas.

1. Offer. The United States of America (herein called the "Government") hereby offers to aid in financing the construction of a Diesel electric generating plant and distribution system, including street lighting (herein called the "Project"), by making a loan and grant to the City of Plainview (herein called the "Applicant") not exceeding in the aggregate the sum of $423,346.

2. Method of Making Loan. The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $328,000, less such amount of such obligations, if any, as the Applicant may sell to purchacers other than the Government:

(a) Obligor. City of Plainview;

(b) Type. Special obligation electric revenue coupon bond;

(c) Denomination. $1,000;

(d) Date. June 1, 1935;

(e) Interest Rate and Interest Payment Dates.—4 per cent per annum, payable semiannually on June 1 and December 1;

(f) Place of Payment.—At the office of the City Treasurer in the City of Plainview, Texas; or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration Privileges.—Registerable at the option of the holder as to principal only;

(h) Maturities. Payable, without option of prior redemption, on June 1 in years and amounts as follows:

Year:	Amount
1937	$10,000
1938	15,000
1939-1942 (both inclusive)	20,000
1943-1946 (both inclusive)	25,000
1947-1949 (both inclusive)	30,000
1950	33,000

(i) Security. Payable as to both principal and interest from and secured by an exclusive first lien on and pledge of the entire revenues of the System (which "System" includes the "Project", together with all improvements and extensions thereto and replacements thereof subsequently constructed or acquired), after deduction only of reasonable operation and maintenance expenses, and additionally secured by a first-lien mortgage on the real estate and chattel property described in said mortgage constituting said System.

3. Amount of Grant.—The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Gov-
269 ernment will make the grant either wholly by the payment of money or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $114,000.

4. Conditions Precedent. The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant;

(a) Financial Condition. If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) Cost of Project. If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) Plans and Specifications and Certificate of Purposes. If the Applicant shall not have filed with the Government plans and specifications for the Project, accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. Interest of Member of Congress. No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. Bonus or Commission. The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. Information. The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. Bond Circular. The Applicant shall furnish all
270 such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Gov-

ernment of not less than 25 per cent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. Insurance.—The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. Name of Project. The Applicant shall not name the Project for any living person.

11. Grant and Bond Payments.—

(a) Advance Grant. Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used;

(b) Payment for Bonds. A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete;

(c) Intermediate Grant Requisitions. Simultaneously with the delivery and of payment for the bonds by the Government, or when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference

between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 percent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto;

(d) Final Grant Payment. At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all
271 previous payments on account of such grant, shall be an amount not in excess of 30 percent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto;

(e) Construction Account.—A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account;

(f) Disbursement of Moneys in Construction Account.—Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund;

(g) Use of Moneys in Bond Fund. Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. Construction of Project. The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder, pursuant to public advertisement, and that every opportunity be given for free, open, and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment;

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open, and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function the term "or equal" is to be literally construed so that any material or article which will perform adequatey the duties imposed by the general design will be considered satisfactory;

(c) That in determining the lowest bidder for the supplying of materials and equipment in the interest of standardization or ultimate economy the contract may be awarded to other than the actual lowest bidder;

(d) That, in order to insure completion of a project with-

in the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk, and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which it
272 is required by the laws of Texas that protection for labor and material-men be provided by a bond separate from the performance bond. In such latter case a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate;

(e) That if the work on any proposed construction contract is hazardous, the contractor will be required to provide public-liability insurance and property-damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor;

(f) That minimum or other wage rates required to be predetermined by the law of Texas or local ordinance shall be predetermined by the applicant in accordance therewith and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance the applicant shall predetermine minimum-wage rates in accordance with customary local rates for all the trades and occupations to be employed on the project and incorporate them in the appropriate contract documents;

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner;

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A, which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof may if the applicant so desires, be inserted verbatim in such construction contract or contracts.)

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Texas and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

By HORATIO B. HACKETT,
Assistant Administrator.

273 *Exhibit F-2*

PW-L-56
11-26-35

P. W. 45561

Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below

not less than the hourly wage rate set opposite the same, namely:

Trade Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: *Provided, however,* That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employee, in these cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deduction therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked

by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'" 274

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) ....*Provided,* That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor, similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less
275 than $..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

. . . . . .

. . . . . .

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials or supplies:

On purchases where the foreign bid is $100 or
276 less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly report is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payment.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar

month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs.*—The contractor shall furnish signs bearing the legend:

277 *"Federal Public Works Project No....."*

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease, and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately

serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director, P.W.A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirements shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for
278 housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof,

the following proviso shall be added at the end of paragraph 1(b):

And provided further. It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1 (b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment,

by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor or subcontractor
279 shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....

County of....., ss:

I, ... (name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of).....(name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of .....(project), for the weekly pay roll period from the ..... day of ....., 193.... to the ..... day of ....., 193..., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates

in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ..... 193....

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement
280 under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

Penalty

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

Whereupon there was received in evidence as
281 Plaintiff's Exhibit 25-A the application of the City of Plainview, Texas, to the Federal Emergency Administrator of Public Works for a loan and grant.

Plaintiff's Exhibit 25-A

The City of Plainview,

of Plainview, Hale County, Texas, hereby makes application to the Federal Emergency Administrator of Public Works, National recovery Act of 1933, for a loan of Two Hundred Ninety-Six Thousand Three Hundred Forty-Six Dollars and Four Cents ($296,346.04).

And grant of One Hundred Twenty-Seven Thousand Dollars ($127,000.00) for the construction of a Municipal Light and Power Plant, and Complete Distribution System for the City of Plainview.

* * * * * * * *

The applicant understands and agrees that in case a loan is granted, suitable contracts will be awarded, subject to the approval of the Administrator for the project involved.

The applicant further agrees that the purposes and policies of the Act and the rules and regulations adopted in respect thereto will be observed and complied with and that such contracts, obligations and encumbrances as may be required to secure the loan in compliance with law will be duly prepared and executed, and that such corporate proceedings as may be required to authorize such execution will be passed and adopted according to law.

* * * * * * * *

CITY OF PLAINVIEW TEXAS *Applicant.*

By R. P. SMYTH,
Mayor.

Extract of Minutes of Proceedings City Council Plainview, Texas.

At a regular meeting of the City Council of the City of Plainview held in the City Hall of said City on the 7th day of August A. D. 1933.

282 Mayor R. P. Smyth presiding and all the Aldermen of said, city being present: to-wit: Aldermen H. Dysart; E. M. Osborne; F. J. Hurlbut; J. B. Long and J. B. Wallace. Among the proceedings acted upon, it was moved by Alderman Hurlbut and seconded by Alderman Osborne that Colonel R. P. Smyth, Mayor of the

City of Plainview, is authorized to make application to the Federal Emergency Administrator of Public Works under the National Industrial Recovery Act of Congress of 1933 for a loan not to exceed Four Hundred and Fifty Thousand Dollars, ($450,000.00) or as much as may be necessary less whatever amount or grant may be allowed by said Administrator of Public Works, and said loan to be secured by an issue of electric light revenue bonds authorized by a vote of the people April 4th, 1933. The moneys so borrowed and granted to be used in the constructing and completion of an electric light and power system for the City of Plainview. Said system to consist of a generating plant and distribution system sufficient for needs of the City; and to do all things necessary, required or proper to be done for the purpose of procuring such loan and grant and to make all representations and all promises necessary, required or proper to be made for such purposes. Said system to be contracted under forms of contractual documents meeting the approval of the said Administrator as to labor, wages, working hours and all other matters as administrated by the Federal Administrator and his agents.

Said motion carried by a unanimous vote of all Aldermen present.

R. P. SMYTH,
Mayor.

Attest
J. L. GALLAWAY,
Secretary.

* * * * * * * *

III. *The Loan Requested.*

(a) Amount, Four Hundred Twenty-Three Thousand Three Hundred Forty-Six Dollars and Four Cents,
283 ($423,346.04).

(b) The security offered is Revenue Bonds of the Light and Power Plant.

(c) *Period of Loan.*

Twenty (20) years, we will pay the interest annually and the principal semi-annually as follows, in forty equal payments with the right to retire any part or all of the debt after five years.

(d) The applicant prefers to sell to the United States its bonds for the entire amount of Four Hundred Twenty-Three Thousand Three Hundred Forty-Six Dollars and Four Cents ($423,346.04). We wish to apply for 30% grant under the following conditions. The applicant sell to the United States its bonds for 100% of the cost of the job and defer payments of interest and principal until such deferred payments total the amount of the grant.

* * * * * * * * *

IV. *The Project.*

(a) The Municipality desires to erect an Electric Light and Power Plant sufficiently large to take care of the needs of the City and also to build a complete distribution system within the City.

(b) Consulting Engineers' plans and specifications are attached hereto, "Exhibit IV.A".

(c) Engineers' Report.

New Electric Light & Power System

Power Plant Site: It is desirable to have the power generating units located as closely to the center of the load as circumstances will permit. The City's water tower lot in Block 17, original townsite is an ideal location. It is near the center of load and is already served by a switch track. Engines of the type contemplated will be provided with suitable mufflers and will not be objectionable to surrounding establishments.

Power Equipment

284 It is realized, that with two electric service systems, the total capacity of power equipment needed to serve all of the City of Plainview will not be required for either one of the plants, but will be divided between the two. The writers have assumed, as a basis for this estimate, that the City's system will be called upon within a reasonable period to supply from one-half to three-fourths of the power needed. Accordingly it is proposed to install three 750 HP Diesel engine generator units with necessary auxiliaries. This will provide two units for carrying the peak load with a third in reserve. It will be noted that the three units are

all of the same size. Spare parts will be interchangable resulting in a minimum investment in spare parts.

* * * * * * * *

A design of the layout of the distribution system must of necessity take into consideration the location of the present system. Wherever the lines of the present system or of the telephone company must be crossed the proper clearance must be provided. Insofar as practical, the lines have been placed in the alleys.

It should be kept in mind, that the present system and the telephone company have preempted the best locations for poles and wires and the designer of a new system is compelled to take what is left. This occasionally results in the choice of an inferior location which cannot be avoided. However, at all points of interference ample clearance for safety of operation of all three systems is provided.

* * * * * * * *

Relation Between Privately Owned and Municipal Systems:

Should the City of Plainview build a new electric service system, it must then operate in competition to the present system. Under such circumstances, as pointed out heretofore, the total demand for electric service would be divided between the two, calling for a little more than one-half of the power equipment needed if only one system were to serve the City.

At the same time the distribution system must
285 practically cover the entire city, so as to furnish electric service for domestic or industrial use as desired.

These facts were kept in mind in the design of the new system.

The average annual gross return for residential lighting is some $28.00 per connection. For combined residential lighting or range service the average annual gross return is $80.00 to $100.00.

For mercantile lighting the average annual gross return is $45.00 to $50.00.

For small power consumption the average gross annual return is some $25.00 per horse power.

These are average figures and will vary somewhat for each particular City.

It is reasonable to assume under the present depressed conditions the following connections and total annual gross income for both systems:

1448 HP in Small Motors @ $25.00 per year	$ 36,200.00
787 Small Residences @ $25.00 per year	44,675.00
185 Large Residences @ $60.00 per year	11,100.00
63 Combined Light & Ranges @ $90.00 per year	5,670.00
164 Small Commercial Connections @ $45.00 per year	7,380.00
111 Large Commercial Connections @ $120.00 per year	13,200.00
Flour Mill	17,288.00
Hotel	3,600.00
Total Gross Revenue for Both Plants	$139,113.00

It is estimated that the City should, at the very beginning, receive an average of 60% of this amounting to
286 $83,467.00.

Under normal business conditions, and without any growth to the City, the annual gross revenue should be increased from 20% to 30%. Five years hence the annual gross revenue should exceed $170,000.00. Located as Plainview is, in the heart of the fast growing and progressive West Texas, a normal growth may be excepted. Accordingly ten years hence, the annual gross income should approach $200,000.00 and later it should exceed that sum.

On a 60% basis the City should receive the following gross annual revenue from the light plant:

At the beginning	$ 83,000.00
The 6th year	100,000.00
The 11th year	112,000.00
The 17th year	120,000.00

There is no reason why the operation of both the water and light plants cannot be under one management. As a matter of fact where such utilities are owned by the same concern it has been found most efficient and practical to

have one manager for both of them. Under such assumptions the cost of operation of the two utilities should be less than if they were independently managed. For instance, it is contemplated that the present City Hall facilities can handle the manager's office, meter readings, collections, etc., without any particular increase in cost. It is true that a rearrangement may be necessary, and perhaps the adoption of more efficient methods and devices, and the discarding of antiquated ideas and methods. If such is necessary no difficulty is anticipated in the accomplishment.

Accordingly the writers estimate that under such circumstances the annual cost of operation should not exceed $30,000.00 for the first five years, $35,000.00 for the next five years.

The following table is based upon a 17 year amortization period for an issuance of 6%, serial, bonds in the amount of $400,000.00, and includes the anticipated annual
287 gross income, operating expense, interest, principal payment, surplus and accumulated surplus.

This table is presented for the purpose of illustration to show what can be done. If and when a contract is let for the construction of a municipal electric light and power system, the exact schedule of payments will be established.

Amortization Schedule for Issuance of 6%, Serial Revenue Bonds in the Amount of $400,000.00

Year	Gross Income	Operation Expenses	Interest	Principal Payment	Surplus	Accumulated Surplus
1st.	$83,000	$30,000	$24,000	None	$29,000	$29,000
2nd.	83,000	30,000	24,000	None	29,000	58,000
3rd.	90,000	30,000	24,000	$15,000	21,000	79,000
4th.	95,000	30,000	23,100	17,000	25,000	104,000
5th.	97,000	30,000	22,080	18,000	26,920	130,920
6th.	100,000	35,000	21,000	20,000	24,000	154,000
7th.	104,000	35,000	19,800	20,000	29,200	184,120
8th.	106,000	35,000	18,600	22,000	30,400	214,520
9th.	108,000	35,000	17,280	23,000	32,720	247,240
10th.	110,000	35,000	15,900	27,000	32,100	279,340
11th.	112,000	40,000	14,280	28,000	29,720	309,060
12th.	112,000	40,000	12,600	29,000	30,400	339,460
13th.	113,000	40,000	10,860	32,000	30,140	369,600
14th.	115,000	40,000	8,960	34,000	32,060	401,660
15th.	116,000	40,000	6,900	36,000	33,100	434,760
16th.	118,000	45,000	4,740	39,000	29,260	464,020
17th.	120,000	45,000	2,400	40,000	32,600	496,620

In order to be conservative the writers based the gross annual income for the City on the assumption that the City would receive only 60% of the business. It is seen from the above table that even on such an assumption the City would accumulate a surplus of some $500,000.00 during the 17 year amortization period. Interest on the surplus was not considered for the reason that the City would and should use at least a portion of such money to reduce ad valorem taxes.

288

Rate Schedule:

The writer feels that the citizens as a whole would profit more were the rates kept sufficiently high to enable the plant to earn a profit, which profit could be utilized in reducing ad valorem taxes. The present rates should permit a reasonable reduction of from 15% to 20%, and continue to produce an income sufficient to provide a surplus over operating expenses and fixed charges.

With this in mind the following tentative rate schedule is suggested:

1. *Residential Lighting And/Or Heating And/Or Cooking And/Or Refrigeration:*

First 10 KWH @.....10¢ per KWH.
Next 10 KWH @.....8½¢ per KWH.
Next 15 KWH @.....7½¢ per KWH.
Next 15 KWH @.....7¢ per KWH.
Over 50 KWH @.....3¢ per KWH.
Minimum—$1.50 per month. (Lighting Only)
Minimum—$2.50 per month. (Combination)

2. *Business Lighting And/Or Cooking And/Or Heating And/Or Refrigeration:*

First 50 KWH @.....10¢ per KWH.
Next 100 KWH @.....8¢ per KWH.
Next 100 KWH @.....7¢ per KWH.
Next 200 KWH @.....5¢ per KWH.
Next 300 KWH @.....4½¢ per KWH.
Next 750 KWH @.....4¢ per KWH.
Over 1500 KWH @.....2½¢ per KWH.
Minimum—$1.50 per month (Lighting Only)
Minimum—$2.50 per month (Combination)

289 3. *Heating And/Or Cooking (No Lighting)*

First 750 KWH @.....4¢ per KWH.
Over 750 KWH @.....3¢ per KWH.
Minimum—$2.50 per month.

4. *Sign And/Or Window Lighting:*

First 100 KWH @.....6¢ per KWH.
Next 400 KWH @.....5¢ per KWH.
Over 500 KWH @.....4¢ per KWH.
Minimum—$1.50 per month.

5. *Power.*

Demand charge $1.00 per month per KW connected. This demand charge to entitle customers to 10 KWH use of energy per month per KW connected. Additional energy to be at following rates:

Next 60 KWH used per KW Connected @..4½ per KWH.
Next 100 KWH used per KW connected @.3½¢ per KWH.
Next 100 KWH used per KW connected @..2¢ per KWH.
Excess KWH used per KW connected @....1¢ per KWH.
Minimum—$1.25 per KW connected.

Street Light and Other Electric Service:

The City now pays the Company about $4,600.00 per year for electric service. If the City owned the street lights and White Way System a saving would be effected amounting to approximately $3,000.00 per year. This saving would pay for the White Way System within the 17 year amortization period.

Water Supply:

In the event that the City should build its own electric service system it would be desirable to own its water supply. Money for the necessary wells, pumping equipment and mains could be secured from the Reconstruction
290 Finance Corporation. The City is now paying some $9,000.00 per year for water. The savings on this item would amount to about $5,000.00 per year. This amount, capitalized at 6%, would justify the City in spending some $80,000.00 for such purpose if needed. A proper

amortization of such capital investment would enable it to be paid entirely from the savings to the city.

Estimate of Cost of New Electric Service System.

Power Plant Site, City Water Tower Lot	No Cost
Power Plant Building	$ 17,647.00
Power Equipment Complete in Place, Including Starting and Water Circulating Equipment	152,260.00
Station Piping	1,765.00
Station Wiring	1,412.00
Switchboard	6,470.00
Crane and Hoist	2,823.00
Cooling Tower and Water Softener	5,295.00
Oil Storage	1,412.00
Store room and Garage	1,765.00
Transportation Equipment	1,529.00
Office Equipment	1,176.00
Distribution System	159,520.00
Purchase of White Way System	23,529.00
SUB-TOTAL	376,603.00
Engineering & Contingencies	23,397.00
TOTAL ESTIMATED COST	$400,000.00

NOTE: The above estimate is based on paying the contractor with revenue bonds at par.

The above estimate includes the amount of $23,529.00 for the purchase of the White Way System. On the other hand the yearly saving to the City in the present cost of lights, amounting to some $3,000.00 was not taken into con-
291 sideration in working up the amortization table, and accordingly was not included in the 17-year "Accumulated Surplus".

As matter of fact, the writers feel, that since all of the operating expenses and fixed charges are to be paid from the plant revenues and "Accumulated Surplus" could be increased by such yearly saving of $3,000.00. This would give an additional amount of $51,000.00 for the 17-year period. Added to the "Accumulated Surplus" of $496,620.00 shown in the amortization table, a resulting total "Accumulated Surplus" of $547,620.00 is obtained.

(d) 1. Preliminary expenses? None
2. Cost of land? None, as the City owns the land.

3. Cost of construction?	$395,423.15
Labor	$110,721.29
Materials	$205,625.26
Contractors profits	$ 79,086.60
	$395,433.15
4. Engineering charges	$ 19,086.60
5. Legal & other overhead	$ 1,085.02
6. Interest during construction	$ 7,741.27
7. Miscellaneous	
8. Total	$423,346.04

(e) The convenience of this project is evidenced by the demand for continuous adequate service twenty-four hours in the day every day in the year. When this project is built, it will afford such convenience for every citizen within the corporation limits of the City of Plainview; also the outlying districts adjacent to the city limits. This outlying district will include 700 shallow water irrigation wells that are used for agricultural purposes. It will also provide adequate service for some of our largest industries that are being forced to supply their own electric current
292 at a cost that places their manufactured products out of line with competing plants in this section.

The necessity for such a plant is expressed in two ways. First purpose is to lower the price of electric current to the consumer in this immediate territory. The second purpose is to lower the ad valorem tax levy as now levied and collected by the City Council of the City of Plainview on the taxable valuations within the said corporate city limits.

The necessity for reduced rates may be expressed as follows:

A commercial lighting bill of 250 KWH in Plainview costs	$23.50
A commercial lighting bill of 250 KWH in Tulia costs	10.50
A commercial lighting bill of 250 KWH in Vernon costs	9.00
A commercial lighting bill of 250 KWH in Spur costs	6.60
A commercial lighting rate of 250 KWH in Greenville costs	12.00
A commercial lighting bill of 250 KWH in Lubbock costs	8.00

A firm has stores in both Plainview & Lubbock
Their bills for April, 1932:

PLAINVIEW, 192 KWH, $15.07—Av. 8.8¢ per KWH
LUBBOCK, 449 KWH, $15.22—Av. 3.2¢ per KWH

Why the difference?

Both bills are Texas Utilities Company bills

We propose a reduction of rates of an average of 20% from the present rate.

As further evidence for the necessity of reduced rates, the City of Plainview paid the Texas Utilities Company in 1931 for water pumping and street lighting $20,802.65. From these figures it is evident that the electric rates necessitate the construction and operation of a municipally owned plant as provided for in this application.

By taking the present number of electric users and
293 applying the general average consumption, as information revealed from the records of the Texas Utilities Company, it will be found that the investment in the proposed municipal plant will be returned after a period of eight or ten years. After this time the net proceeds received from the plant will be used to pay the running expenses of the city government, thus reducing the ad valorem tax levy to a very low minimum and most assuredly not more than 50% on the $100 valuation.

Remarks:

It is proposed to install a complete generating and distribution electric system covering the City of Plainview. The generating system to consist of three 750 horse-power Diesel engine and generator units with all the necessary auxiliaries, the engine to be attached directly to electric generators, excitors and other necessary equipment.

The plant will also be equipped with the necessary switch boards and panel boards of the latest type. The distribution system will consist of 110,220,440, and 2,300 volt services. The system will be constructed from the best cedar creosoted poles, copper insulated wires, thus giving one of the latest and most modern distribution systems possible to build.

The necessary transformers, meters, etc., for efficient service will be installed. The plant will be supplied with an

ample supply of pure water which will be used in a modern cooling tower to insure proper and efficient operation of engines.

Also there will be approximately 30% of the moneys spent locally for labor.

(f) Is the project a part of a larger plan or program? Yes, the City intends to do some paving and also to enlarge their sewerage disposal plant.

(g) The City does not have a Planning Board.

(h) The City is not a part of a Metropolitan dis-
294 trict.

(i) Has the project been endorsed by civic group or other similar bodies? Yes, by a special Election, the voters of the City voted to buy the present plant or build a new one by a vote about 4½ to 1.

(j) No objections have been made to this project, except by the Public Utilities Company or their employers.

(k) Will the project compete with existing enterprises? Yes.

(l) Construction plans are now ready.

(m) Construction can be started within two weeks after approval of the application.

(n) It will take nine months to complete the project.

(o) Estimated average number of men given employment is 180 men monthly, for nine months.

V. (a) The project is not an extension of any system but is entirely new.

* * * * * * * * *

(d) Present rate schedule.

Residential Lighting and/or Heating and/or Cooking and/or Refrigeration.

First	25 KWH	used per month @.....	11c per KWH
Next	25 KWH	used per month @.....	8c per KWH
Excess	KWH	used per month @.....	3c per KWH

MINIMUM—$1.50 per month (Lighting Only)
MINIMUM—$2.50 per month (Combination)

Above rate NET. 5% Penalty added if bill is not paid by 10th of month.

Business Lighting and/or Cooking and/or Heating and/or Refrigeration

First 50 KWH used per month @..... 11c per KWH
Next 200 KWH used per month @..... 9c per KWH
Next 750 KWH used per month @..... 5c per KWH
Next 1000 KWH used per month @.. 4c per KWH
295 Excess KWH used per month @.. 3c per KWH
MINIMUM—$1.50 per month (Lighting Only)
MINIMUM—$2.50 per month (Combination)

Above rate NET. 5% penalty added if bill is not paid by 10th of month.

Heating and/or Cooking and/or Refrigeration (No Lighting)

All current used per month @..... 4c per KWH
MINIMUM—$2.50 per month.

Above rate NET. 5% Penalty added if bill is not paid by 10th of month.

Sign and/or Window Lighting.

All current used per month @..... 6c per KWH
MINIMUM—$1.50 per month

Above rate NET. 5% penalty added if bill is not paid by 10th of month.

Power Rate.

Demand Charge $1.00 per month per each KW connected (figured from manufacturer's name plate rating of all motors installed

This demand charge entitles customer to 10 KWHrs. use of energy per month per each KW connected, additional energy at following charges:

Energy Charge

Next 60 KWH used per month per KW connected @ 5c per KWH
Next 120 KWH used per month per KW connected @ 3c per KWH
Next 180 KWH used per month per KW connected @ 2½c per KWH

Excess KWH used per month per KW connected @ 1c per KWH

MINIMUM—$1.25 for each KW connected, as figured from manufacturer's name plate rating.

Above rate NET. 5% Penalty added if bill is not paid by 10th of month.

(e) Proposed Rate Schedule. See Engineer's report pages 10 & 11 of this application for tentative sched-
296 ule.

(f) Proposed rates are set by order of the City Council.

VI. *Financial Data.*

(a) Assessed valuation of taxable property:

Fiscal Year

Item	1930	1931	1932	1933
Real Property	$6979020	$6833565	$5510386	$.....
Personal Property	$1697169	$1475457	$1036746	$.....
Total	$8676189	$8309022	$6547132	$.....
Basis of assessments:				
Real	75%	75%	75%	75%
Personal	75%	75%	75%	75%

(b) Bonded debt of the City of Plainview.

Kind of bond	Date	Amt. Issued	Inst. Due	Paid	Balance
Sewer Extension	1909	20,000	5% 40 yrs.	x	20,000
City Hall	1910	10,000	5% " "	x	10,000
Sewer & Water	1912	10,000	5% " "	x	10,000
Street Imp.	1912	12,000	5% " "	x	12,000
Street Imp.	1917	40,000	5% " "	x	40,000
Sewer	1921	75,000	5% Serial	24,000	51,000
Water Works	1921	25,000	5% "	8,000	17,000
Auditorium	1921	60,000	5% "	16,000	44,000
Refunding	1926	216,000	5% "	7,000	209,000
Street	1927	30,000	5% "	3,000	27,000
Water	1927	25,000	5% "	3,000	22,000

Kind of bond	Date	Amt. Issued	Inst. Due		Paid	Balance
Sewer	1927	20,000	5%	"	2,000	18,000
Refunding	1929	51,000	5%	"	3,000	48,000
Refunding	1931	80,000	5%	"	2,000	78,000
				-Outstanding		606,000
Held by Interest & Sinking Fund					5,000	
" " Water Fund					10,000	15,000
Net Bonded debt on August 1st, 1933						591,000

(c) Condition of Interest and Sinking Fund Au-
297 gust 1st, 1933.

Cash in hand	11,100
Plainview Bonds	5,000

The City lost $86,000 in failed bank in 1931. We expect to replenish our Interest and Sinking Fund out of our $129,000 delinquent taxes.

(d) Floating debt at date of application: None.

(e) Debt of overlapping taxing bodies:

Taxing Body	Total Indebtedness
County	$715,000.00
Independent School	$410,000.00
Irrigation District	None
Road District	"

(f) I, R. P. Smyth, Mayor of the City of Plainview, hereby certify that all financial obligations of the City of Plainview, Texas and of overlapping districts have been included in the foregoing financial data, (b), (c), (d) and (e).

R. P. SMYTH
Mayor City of Plainview.

(g) Give below particulars with reference to defalcations of applicant on any outstanding obligation past or present.

The City of Plainview has never defaulted on any of its obligations.

(h) Give below present tax rate per $1000 assessed valuation, separate as follows:

State tax rate	7.70
County tax rate	7.50
City tax rate	15.00
School tax rate	10.00
Total tax rate	40.20

(i) Statement of taxes levied by applicant only:

298

Year	Taxes Levied	Uncollected at Delinquent Date	Uncollected at Date of Application
1930	141985.02		28,397.04
1931	122289.41		39,840.92
1932	124635.53		62,317.76
1933	98206.35		49,103.18

(j) On what date are taxes levied? September 20th
On what date do they become payable? October 1st.
On what date do they become delinquent? January 31st. and June 30th succeeding due date.

(k) What are the penalties on delinquent taxes? 1% for each month succeeding due date until 10% accrues.

(l) Financial Statement City of Plainview August 1st, 1933.

Assets

Sanitary Sewer System	$250,000.00
Water System	350,790.00
Real Estate	63,500.00
Parks	77,000.00
Street Improvements Permanent	287,036.00
Fire Equipment	30,000.00
Furniture & Fixtures	3,000.00
Cash on hand	28,529.62
School Warrants	774.71
Delinquent taxes	129,000.00
Bills Receivable	3,000.00
	1,222,630.33

Liabilities, Aug. 1st, 1933.

Bonded Debt as per Schedule	$591,000.00

Receipts and Disbursements of City of Plainview, from Auditors Reports.

Fiscal Year 1928-1929		
Total Receipts	186,256.20	
Total Disbursements		199,387.89
Fiscal 1929-1930		
299 Total Receipts	205,538.12	
Total Disbursements		191,455.13
Fiscal Year 1930-1931		
Total Receipts	173,018.83	
Total Disbursements		175,887.54
Fiscal Year 1931-1932		
Total Receipts	145,359.24	
Total Disbursements		156,684.24
Fiscal Year 1932-1933		
Total Receipts	123,306.83	
Total Disbursements		129,237.37
Less Bonds Purchased		8,440.00
		120,797.37

• • • • • • • •

About seven thousand acres of land in Hale County is irrigated. Plainview's water supply is underground, and is found at a depth of 50 feet in inexhaustible quantities. Most of the large wells at Plainview are drilled to a depth of from 50 to 275 feet in order to take advantage of from two to three strates of water.

• • • • • • • •

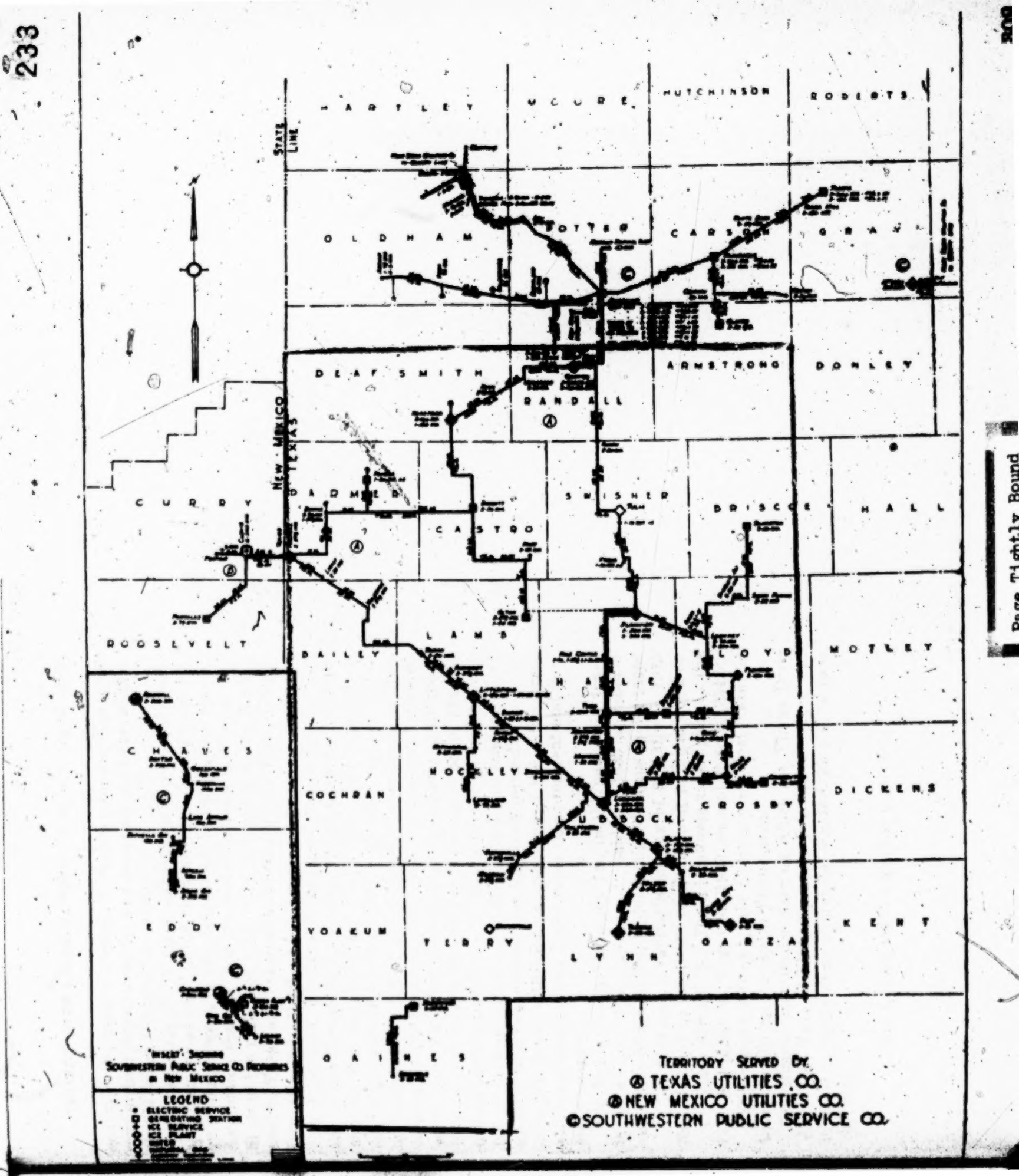
VII Legal Data

[An exhaustive legal memorandum in support of the authority of the City to undertake the project and issue bonds therefor followed.]

Hubert L. Allen, called as a witness on behalf of
300 the plaintiffs, after being duly sworn, testified in substance as follows:—

Direct Examination

I live at Lubbock, Texas. My experience in the construction and operation of electric utilities began in the early part of 1913, when I built an electric plant and distribution


HARTLEY
MOORE
HUTCHINSON
ROBERTS
STATE LINE
OLDHAM
POTTER
CARSON
GRAY
DEAF SMITH
RANDALL
ARMSTRONG
DONLEY
NEW MEXICO
TEXAS
CURRY
PARMER
CASTRO
SWISHER
BRISCOE
HALL
ROOSEVELT
DAILEY
LAMB
FLOYD
MOTLEY
HALE
CHAVES
HOCKLEY
COCHRAN
CROSBY
DICKENS
LUBBOCK
EDDY
YOAKUM
TERRY
LYNN
GARZA
KENT
GAINES
"INSERT" SHOWING
SOUTHWESTERN PUBLIC SERVICE CO. PROPERTIES
IN NEW MEXICO
LEGEND
ELECTRIC SERVICE
GENERATING STATION
ICE SERVICE
ICE PLANT
WATER
TERRITORY SERVED BY
Ⓐ TEXAS UTILITIES CO.
Ⓑ NEW MEXICO UTILITIES CO.
Ⓒ SOUTHWESTERN PUBLIC SERVICE CO.

system in the town of Senath, Missouri, and operated it as combination superintendent and manager until the middle of 1917, when I entered the Army.

After entering the Army, I was sent to France, and there as a member of the United States Army Engineers did a great deal of work in the construction of the electric plants, distribution systems, and transmission lines in France until about the middle of 1919, when I returned to the States, went to Texas and entered the service of the Texas Utility Company at Lubbock as local manager.

In July, 1919, I became manager of the Lubbock property of the Texas Utility Company, and continued as such until the first part of 1921. I was then made superintendent of production and distribution for what we then called the southern district of the division. I continued in that capacity, in the construction of lines and the installation of power plant facilities and distribution systems until about 1925, when I was made general superintendent of the entire division. And from that I was promoted to the position of division manager; and in 1929 I was made general manager of a new district that had been formed.

In 1934 I was made general manager of the entire area, and a few months later I was made vice-president and general manager.

The Texas Utility Company has in the past paid taxes to the Federal Government. It paid for 1935 a Federal energy tax of $25,262.04, Federal miscellaneous excise taxes
of $744 and a capital stock tax of $1,400. In 1935
301 it paid to the State of Texas and political subdivisions $88,326.31. The ad valorem taxes paid to the City of Plainview, Texas, in 1935 amounted to $3,254.50.

The territory served by the Company in West Texas is known locally as the South Plains area.

The witness identified a map on which the Plains Division of the Texas Utility Company is outlined. This was received in evidence as Plaintiffs' Exhibit 26, and is here reprinted.

(Here follows exhibit marked page 302.)

The Plains Division comprises an area of appro
303 mately 17,000 square miles and 17 counties. The
pography of that section is flat, level, and high plai
very sparsely settled. And the principal agricultural pr
uct is wheat in the northern half, and the diversity of c
ton and sorghum grains in the southern half. There
no industries in that area outside of the processing of
raw materials, such as flour mills, cotton gins, cotton
mills, and things of that sort. The Texas Utility Compa
was organized in the latter part of 1915. At that time t
country was practically all cattle ranches. Since then
has gradually and steadily developed into farming.

In 1930 the population of the rural part of the area w
about 2.4 people to a square mile. The total populatio
rural and urban, was 10.7 people per square mile. In 191
the only towns or villages served by the Company we
Plainview, Lockney and Lubbock. Today in the same are
the Company serves 52 towns, which have sprung up a
the country was settled. The Company has developed wit
the country.

The witness identified a tabulation showing the town
now served by the Company, their population and the num
ber of urban and rural customers. This was received i
evidence as Plaintiffs' Exhibit 27 and is as follows:—

CUSTOMERS SERVED

City or Community	County	Co. Serving Started	1930 Census	1935 Est. Pop.	Not Incorporated	Out Side Limits	Inside Limits	Total Served
Abernathy	Hale	1917	858	975		27	187	214
Aiken	Floyd	1926	110	125	14			14
Amherst	Lamb	1926	964	700		23	155	178
Anton	Hockley	1926	400	425		8	111	119
Bainer	Lamb	1926	Est 12	Est. 15	2			2
Bovina	Parmer	1928	200	175	114			114
Canyon	Randall	1924	2,821	3,275		15	807	822
Close City	Garza	1930	10	10	16			16
Cone	Crosby	1928	30	40	18			18
Crosbyton	Crosby	1925	1,250	1,350		13	323	336
Dawn	Deaf Smith	1931	10	10	11			11
Dimmitt	Castro	1927	829	1,000		6	247	253
Farwell	Parmer	1926	600	675	124			124
Floydada	Floyd	1916	2,637	3,250		18	680	698
Friona	Parmer	1928	731	735		8	184	192
Hale Center	Hale	1917	1,007	900		14	205	219
Happy	Swisher	1926	724	815		5	202	207
Hart	Castro	1929	20	35	58			58
Hereford	Deaf Smith	1925	2,458	2,500		76	684	760
Idalou	Lubbock	1923	538	350		3	96	99
Kress	Swisher	1926	200	200	81			81
Lariat	Parmer	1928	25	35	11			11
Levelland	Hockley	1926	1,661	1,750		7	428	435
Littlefield	Lamb	1925	3,218	3,650		29	661	690
Lockney	Floyd	1916	1,466	1,250		13	332	345
Lorenzo	Crosby	1923	739	640		3	144	147
Lubbock	Lubbock	1915	20,520	27,650		139	1,724	1,963
Meadow	Terry	1927	324	400			91	91
Muleshoe	Bailey	1926	779	975		11	229	240
Monroe	Lubbock	1926	25	60	23			23
Olton	Lamb	1928	687	800		6	195	201
Petersburg	Hale	1929	548	600		6	173	179
Plainview	Hale	1915	8,834	9,000		92	2,077	2,169
Post	Garza	1927	1,668	1,725		27	407	434
Ropesville	Hockley	1926	600	600	79			79
Ralls	Crosby	1923	1,365	1,375		5	302	307
Roundup	Hockley	1932	Est. 15	21	4			4
Seagraves	Gaines	1928	505	800		3	125	128
Seminole	Gaines	1928	300	500	130			130
Shallowater	Lubbock	1926	200	200	72			72
Silverton	Briscoe	1925	873	900		14	222	236
Slaton	Lubbock	1923	3,876	3,500		40	721	761
Southland	Garza	1926	500	435		5	60	65
South Plains	Floyd	1926	126	135	35			35
Sterley	Floyd	1926	89	105	35			35
Sudan	Lamb	1926	1,014	1,350		4	295	299
Tahoka	Lynn	1928	1,620	1,835		25	433	458
Umbarger	Randall	1926	18	30	18			18
Whitharral	Hockley	1930	12	40	27			27
Wilson	Lynn	1928	250	275	60			60
Wolfforth	Lubbock	1928	20	65	32			32
			68,286	78,261	964	745	12,500	14,209

* Typographical error. Should be 40.

PRINCIPAL COUNTIES SERVED

County	Population	Area	Population Square Mile
Bailey	5,186	1,030	5
Castro	4,720	896	5.3
Crosby	11,023	870	12.7
Deaf Smith	5,979	1,549	3.9
Floyd	12,409	1,011	12.3
Gaines	2,800	1,540	1.8
Garza	5,586	870	6.4
Hale	20,189	1,036	19.5
Hockley	9,298	867	10.7
Lamb	17,452	1,028	17.1
Lubbock	39,104	868	45.1
Parmer	5,869	902	6.5
Randall	7,071	937	7.5
Swisher	7,343	898	8.2
Briscoe	5,590	903	6.2
Lynn	12,372	864	14.3
Terry	8,833	870	10.2
	181,924	16,933	10.7

The Company has another system in Texas known
305 as the Central Texas group. That is centered about Marlin and Mexia, Texas, and Falls, Freestone, and Limestone Counties. There is no physical connection between the two groups. The approximate distance between those two groups, by air line, is 400 miles. There are 19 towns, all small, serviced by the Central Division. The network of the transmission system of the Plains Division consists of about 750 miles of transmission lines. We have one main generating station located in the approximate load center of that territory, and supplemented by stand-by plants at strategically located points, to guarantee continuity of service and take care of any emergencies that might arise, and an inter-connection with neighboring transmission networks, to augment the service of our plants. We have installed a total generating capacity in the Plains Division of about 14,000 kilowatts. We have at this time about 14,000 customers in that area:

The plants and lines are modern, having all been built practically since—the transmission system, particularly—since 1928. And the main generating station was completed in 1930, placed in service January 1, 1931—a modern, gas-fired steam plant.

The distribution systems in the various towns would vary in age from the oldest constructed originally about 1913, on down to the youngest, finished in the year 1929. The older systems have been properly maintained to the point that the entire distribution and transmission and power plant facilities of the Plains Division can be considered modern and right up to the minute. The latest engineering practices have been used all the way through, in construction and maintenance. The average distance between the towns served throughout the Plains Division is approximately 14 miles. Due to the sparcity of population in rural areas, it is not practicable to obtain many
306 customers from the farms and places of that kind. On the average, the size of farm out there is a little better than 400 acres. Consequently there are relatively few people per mile of line. The city of Plainview has about 9,000 population. The other large towns on the system are Lubbock, Floydada, Slaton, Littlefield, Canyon,

Hereford. Excepting Lubbock and Plainview, there are no towns on the system which will run above 3,500 population. There is a municipal plant at Lubbock. The only town of more than 5,000 population in which we have no competition is the town of Plainview. The historical cost of the company's distribution system and property in the town of Plainview is $807,593.91. That figure embraces only the actual cost of the physical properties within Plainview alone. Plainview is served from the main generating plant located at Tuco, about 32 transmission-line miles, or 28 highway miles from Plainview. The allocated portion of the Tuco plant properly chargeable to Plainview as necessary to Plainview service is $173,751.36. A portion of the transmission system is devoted to the service of Plainview.

The witness identified a tabulation showing the gross revenues of the Companies from both Plains and Central Divisions for the years 1934 and 1935, which was received in evidence as Plaintiffs' Exhibit 28, and reads as follows:

307 *Exhibit 28.*

Texas Utilities Company

Income Statement

Twelve Months Ended December 31

	1935	*1934*
Gross Operating Revenues	$1,285,139.03	$1,364,878.2
Operating Expenses and Taxes	805,103.64	826,854.2
Net Operating Revenues	480,035.39	538,024.0
Non Operating Income—Net	3,097.79	2,376.3
Balance	483,133.18	540,400.3
Retirement Accruals	95,657.86	119,152.6
Gross Income	387,475.32	421,247.6
Deductions from Gross Income—		
Interest on Funded Debt	336,595.76	351,445.5
Interest on Unfunded Debt	9,436.60	24,228.9
Amortization of Debt Discount and Expense	169.20	
Total Deductions	346,201.56	375,674.5
Balance—Net Income	41,273.76	45,573.1

During the years preceding 1934 the Company op-
308 erated at a loss. The gross revenue derived by the company from its electric business in Plainview during the years 1934 and 1935 was $151,695.10, and $145,718.05, respectively. I have examined the plans and specifications for the proposed municipal plant in Plainview, obtaining them from Montgomery and Ward, engineers, Wichita Falls, Texas, engineers for the city of Plainview. I have also examined the rates proposed to be put into effect by the city of Plainview as set out in their PWA application. On the present average consumption our rate now in effect in Plainview is from 12 to 15 per cent under the proposed rates in the application. I do not believe that the municipal authorities in the Town of Plainview circulated a petition seeking to have customers agree to take the municipal plant's current. The Texas Utilities Company has a contract with the city of Plainview for street lighting and water pumping. The wells are owned by the Texas Utilities Company.

For the year 1934 the Company's revenue from the municipal street lighting and other municipal use, exclusive of water pumping, was $4,366.34. For 1935, $4,389. An analysis of the city's rates as proposed in their PWA application compared with our present rates, show that there are certain brackets where they are equal with our rates. I do not think there are any brackets within which the city's proposed rates in their application are lower than our present base rate in Plainview but I am not positive until I make a more detailed comparison of that. I have now a graph which shows the comparison between the rates.

Whereupon the following occurred:

Q. Have you now a graph which shows that comparison?
A. Yes.

Q. Will you examine that and state what the facts are with reference to whether the city's rates are equal to or as low as or lower or higher than our rates in the
309 various brackets?

Mr. Scott. This witness has testified, if your Honor please, that the rates will be 15 per cent higher—the positive testimony of this witness. Now they are trying to circumvent the testimony of their own witness and

show by a comparison of some graph or chart, apparently not prepared by this witness, that there is going to be loss and damage suffered by this company because the rates are going to be lower. They are contradicting their own witness, and we submit that it is not proper examination and should not be permitted here.

Mr. Crenshaw. If counsel will pardon me: he said generally the rates were 12 or 15 per cent under the proposed rates, and he also testified that in certain brackets his recollection was that they were as low or lower.

The Court. I will sustain the objection. I think you are going too far afield.

Mr. Crenshaw. We note our exception.

There was no cross-examination.

Whereupon **George H. Carter** was called as a witness for the plaintiffs and, being first duly sworn, testified as follows:

Direct Examination.

I live at Marlin, Texas. I am a lawyer. I am attorney for the plaintiff, Texas Utilities Company, in the Central Texas Division; also a director of the Texas Utilities Company and a vice-president. The town of Marlin and the town of Plainview in the autumn of 1933 filed applications with the Public Works Administration for loans and grants to build municipal electric plants. I attended a conference in Washington on the first of March, 1934, at which a protest of the company to the Public Works Administration in regard to both of those projects was considered.

310 I arranged that conference by letter. The conference was arranged with the Electric Power Board of Review of the PWA. My first contact with that board was about the 22d day of August, 1934. As I have stated, the town of Marlin put in an application for a loan and grant to erect a municipal plant in the fall of 1933. That first, of course, went to the advisory board for Texas, and I was informed later that the application had been forwarded to Washington. I had filed a protest and I was informed that that protest accompanied the file to Washington. I heard nothing from it for a number of months, and I did not know what was happening until about the 18th day of

August I received a telegram from Colonel Henry T. Hunt, Chairman of the Electric Power Board of Review, in Washington.

The witness then identified a telegram, which was received in evidence as Plaintiff's Exhibit 29 over objection by counsel for defendants that it was irrelevant, incompetent, not binding on any of the defendants and that there was no evidence of the authority of the sender, and exception noted.

Plaintiffs' Exhibit 29

"Bartlett, Carter & Rice, Attorneys, Marlin, Texas, August 18th

"Reference project Marlin electric system I suggest you inform client this board wishes to ascertain whether company will place in effect rates less than those offered by municipality. Possibly its representative will call on me here promptly in order that this matter may be determined.

"H. T. Hunt, Chairman, Electric Power
Board of Review, for the Administrator."

In response to this telegram I came to Washington to confer with Mr. Hunt. At that time I discussed the question of what rates the company might put into effect with Colonel Henry T. Hunt and with Mr. Otto Rau to whom Mr. Hunt referred me as being the rate expert for
311 the Electric Power Board of Review, for the Administrator. I saw them here in Washington in the Interior Building. Colonel Hunt was the chairman of the Electric Power Board of Review.

Q. What did Colonel Hunt say to you as to why he was interested in the question of the company's rates?

Mr. Holtzoff. May this be subject to our objection and exception, please?

The Court. Yes.

Whereupon the witness resumed his testimony as follows:

Colonel Hunt stated that the city of Marlin had proposed to furnish electric service to its citizens at rates 15 per cent lower than those of the Texas Utilities Company, and that unless the Texas Utilities Company would lower its rates equal to or below the rates proposed in the city's ap-

plication, the application would be granted. He then referred me to Mr. Otto Rau and told me that Mr. Otto Rau was a member of the Electric Power Board of Review for the Administrator and was the rate member of that board. I then talked with Mr. Otto Rau on the same date and attempted to go into the matter with Mr. Rau, of the economic feature. When I attempted to go into that matter, and did go into it, Mr. Rau said, "We are only concerned with the matter of rates, and unless your company can meet these rates the application will be granted." And Mr. Hunt and Mr. Rau both suggested that the matter would be deferred for a limited time until I could tell them what the company would do with reference to rates. I then returned to Texas for the immediate purpose of getting in touch with the operating authorities of the company to the end that we might endeavor to lower our rates to preserve our property. Over the next few months we worked at it diligently. During that time Colonel Hunt telegraphed me further with regard to this matter of rates on the 28th of August, 1934, and I received a further telegram dated October 2, 1934. The one of August 28th
312 is signed "Henry T. Hunt, Washington." The one of October 2d, I believe it is, is signed by H. T. Hunt, Chairman, Electric Power Board of Review for the Administrator.

The witness then identified two telegrams, which were received in evidence as Plaintiffs' Exhibits 30 and 31, over objection by counsel for defendants that the telegrams were incompetent, not binding on the defendants and that the sender's authority did not appear, and exception noted.

Plaintiffs' Exhibit 30

WESTERN UNION

6D D 11 GOVT NM 1 EXTRA

WUX FORSAMHOUSTON TEX AUG 28 1934

GEORGE H. CARTER

ATTORNEY AT LAW MARLIN TEX

313 RE MARLIN PROJECT CANNOT CONSIDER REVISED RATES UNLESS SUBMITTED PROMPTLY

HENRY T HUNT WASHINGTON 820A 29

Plaintiffs' Exhibit 31

POSTAL TELEGRAPH

D131 32 GOVT 7 EXTRA XU-G WASHINGTON DC 2 623P
1934 OCT 2 PM 6 14

GEORGE H CARTER—
MARLIN TEX—

WHEN WILL WE RECEIVE RATE SCHEDULES FOR MARLIN STOP NECESSARY SAME BE SUBMITTED PROMPTLY OTHERWISE MUST PROCEED WITH ACTION ON DOCKET SIXTY EIGHT EIGHTY FIVE—
H T HUNT CHAIRMAN ELECTRIC POWER BOARD OF REVIEW FOR THE ADMINISTRATOR

In the meantime the City of Plainview had filed an application, which was submitted to the State Board in Texas. The company filed a protest which was forwarded to Washington to the Electric Power Board of Review. I asked for a hearing before the Electric Power Board of Review, in Washington. On January 16 I saw Major Fleming, whom I found in an office in the corner of the Interior Building. He assured me he would arrange a joint hearing for these two projects on March 1. I understood him, to use the statement, to be "very close to the Administrator," and could arrange a hearing if he would. He was some sort of assistant in charge of certain things. And I received a telegram from Colonel Hunt, shortly thereafter, assuring me the conference was arranged for March 1. A number of us came to Washington for that conference. Mr. Crenshaw was here. Mr. Hubert L. Allen, who has testified, and Mr. Bradley who is connected with the Stone & Webster Service Corporation of New York, which company has an operating contract or management contract with Texas Utility. Mr. Don A. Henry was present. Mr.
314 Boshel and Mr. Veitch were present. Mr. Veitch, a member of the firm of Black and Veitch, consulting engineers of Kansas City, had been employed by Texas Utility Company and had made surveys of the towns of Marlin and Plainview, and made a report for the purpose of this hearing, so that we could show the situation to this Board. The conference was held in the Interior Building, in the office of Mr. Otto Rau. Mr. Rau was present. There was another gentleman present, who purported to be an

employee of the Public Works Administration, whom I had seen in Mr. Rau's office previously, but he took no part in the hearing, but did apparently pay attention to what was going on. I was introduced to him. I have an idea that his name was Wilson.

Q. Will you tell us briefly what occurred at that conference?

Mr. Holtzoff. We object on the same grounds as not binding on the defendants.

The Court. I overrule the objection.

Mr. Holtzoff. May we have an exception please?

Whereupon the witness resumed his testimony as follows:

Mr. Veitch, at Mr. Crenshaw's suggestion, went into the economic features of the Plainview situation and the damage that would result to the company, how it would affect the ability of the company to serve small towns in given communities at the rates they had in force at that time, or possibly at any rates at all. And Mr. Crenshaw made a statement along those lines.

Mr. Rau said: "Gnetlemen, as I told you this morning, and with reference to the Marlin application, the Board is not interested in the economic features. Unfortunately the regulations are so framed that we must consider alone the application of the town presenting it and its effect on the rates of that town, and not the effect that it would have
on other smaller towns and country communities,
315 even though the effect might be adverse. We are
confined simply to the question of rates in the town putting in the application."

Mr. H. L. Allen, the general manager of the Plains group, in which Plainview is situated, then presented a rate schedule—I think, at Mr. Crenshaw's suggestion. We jumped rather rapidly to a proposed rate that had been just previously proposed to the City Commissioner of
Plainview. That rate was prepared as a result of
316 our earlier conference with Mr. Hunt. It was pre-
pared in an effort to preserve our property. Mr. Rau, while he had been entirely courteous all the way through and had followed everything we had said—I interrupted him at one time and asked him if he was inter-

ested in the facts I was presenting. That was during the morning. And he said, "I am not interested particularly, because of what I have already said; that is, the rates are the only matter we can consider."

Now, when Mr. Allen presented the rates, that afternoon; and what we called the "ultimate rate", Mr. Rau sat up in his chair, gave every evidence of being interested, and said, "That is the sort of rate we are looking for," and appeared to be enthusiastic about it, and asked Mr. Allen a number of questions with reference to it, among which he said, "What provision have you made in this rate schedule for preserving your revenue between the time that you institute this rate and the time that the people, your customers, build up their use of electric current under it? There will be a sag there."

Mr. Allen said, "That is true, Mr. Rau. And we have taken care of that by freezing the revenues"—and proceeded to explain the method. Mr. Rau remarked that we were perfectly right in doing it, and had a right to do so.

Mr. Rau then said, "I want to be sure this rate is installed I don't want you to come here and say, 'We are going to install it,' and then not install it. But if this rate is installed, then I would say that the municipal plants at Marlin and Plainview cannot pay out their loan, they cannot meet their debt requirements. And I will write to the mayors of those two towns and suggest to them that they withdraw their applications."

We did prepare letters to the Electric Power Board of Review, in which we said that the rates were being installed in the towns of Marlin and Plainview, and filed those with the Board.

Mr. Rau said that if the two towns did not with-
317 draw their applications, the applications would be denied. That was all that took place at the conference, in regard to the proposed rate. I saw Major Fleming immediately following the conference with Mr. Rau. I went to Major Fleming's office in the Interior Building. (At this point the defendants objected to any testimony about the conference with Major Fleming. The objection was overruled and an exception noted.) I told Major Fleming the result of the conference with Mr. Rau, and

that Mr. Rau had stated that these applications would be denied.

We saw Mr. Rau again while we were in Washington on that visit. We felt pretty good over the result of this rate; we had felt pretty badly on having to make this cut. But it had resulted in the accomplishment of our purpose; that was to preserve our properties.

And it was suggested that we go back to Mr. Rau and say to him—make this proposition: We will install this same rate in all of the towns served by the Plains group and the Central group of Texas Utility Company—

We went to Mr. Rau a few days later. It may have been Friday following March 1; and we told Mr. Rau that the Texas Utility Company would immediately install the same rate that he had approved in all of the towns served by the Plains group and the Central group of Texas Utility, if the Electric Power Board of Review would agree to refuse to receive any further applications from any towns served by our company in those two areas, or any towns served by that company, you might say.

Mr. Rau said it would be impossible to make that agreement, "because we are bound to accept and consider every application filed before the Board, but I am assuming that at no time none of your towns or none of the towns served by you can make a better showing than that made by Marlin or Plainview, in which case, while the applica-
318 tions will be considered, they would take the same course and would likewise be rejected for the same
319 reason—that they cannot pay out." The assumption was that they would not pay out if we put the same rate all over Texas.

With that assurance, soon afterwards we installed the same rate in all towns served by our company. We put it into Marlin and Plainview and all other towns served by the company.

There was no cross examination.

Whereupon **Otto M. Rau** was called as a witness on behalf of the plaintiffs and, being first duly sworn, testified as follows:

Direct Examination

I live in Philadelphia. I am a consulting engineer. My original experience was with the Edison-General Electric Company in the drafting department, engineering work. I went from there to Milwaukee as a resident engineer in the electrification of the railway system and also the installation of the lighting system. I remained as a resident engineer until the work was more or less completed, and I was then appointed as chief electrician for the company. I was then appointed as general superintendent of the lighting department, in which position I was for twenty years, about.

Then I became the manager of the Commonwealth Power Company, which is a competing company in Milwaukee. I was with that company six years, and the Milwaukee Electric Company finally bought that out.

Then the war started and I was appointed as director of power in the Philadelphia District for the Emergency Fleet Corporation. After that I went with Day and Zimmerman as assistant to Mr. Zimmerman. That is an engineering and management firm for electric utilities. I left them to join the Stotesbury management which was supposed to manage the railway systems in Philadelphia, New York, Chicago, Buffalo, and so forth, the consum-
320 mation of which never materialized. In other words, I was about three years in that connection and the deal as originally outlined did not go through. After that I was with the Giant Power Board of Pennsylvania for about three years, and after that with the St. Lawrence Power Development in New York State. After that General Consulting business.

I came to Washington to be in the PWA, as consultant to the Administrator, Mr. Harold L. Ickes. My principal work was confined to studying the projects for municipal power plants, to arrive at a conclusion as to their advisability for final action.

There were in the Public Works Administration three different divisions, one was the Examining Division for Engineering; another, Examining Division for Legal, and the third was the Examining Division for Finance.

When an application arrived in Washington from the field for a municipal electric power plant, there were three copies. One copy was submitted to each of the divisions, the Legal Division, the Financial and the Engineering Divisions. Those divisions considered them simultaneously. After these three divisions had considered and made their recommendations, at the early stages the only ones that were referred to me were where there was a wide divergency as to the decisions of the three divisions.

That seemed to be the general situation. A number of them were submitted to me. I do not assume that all of them were submitted to me, but quite a number were submitted to me under those conditions. One of them would approve and another one would reject it, and where there was any difference of opinion between the three divisions that project would be referred to me. My function was to investigate it and see what could be done about it. The impression that I obtained from the results of the decisions by those divisions was that there was not a general policy.

Very few electric power projects were being finally
321 approved at that time. I cannot say how many, but comparatively few. No doubt the creation of my position there was due to the fact that all the other classes of projects, such things as bridges, sewers and water works, buildings and such things, would go through with reasonable promptness, while the municipal electric projects were lagging. There were very few of them moving along the way they had anticipated they should.

I discussed the situation as I found it first with Mr. Harry Slattery. I came in contact with him more than anyone else when I first came into that department. I don't know his title. He was secretary to the Administrator, I believe. The discussions on these projects with Mr. Slattery apparently indicated that there should be a more formal way of approaching the projects on these muncipal plants, and then Mr. Hunt came into the picture in connection with the Electric Power Board of Review.

There was at that time, that is, February, 1934, a general board of review in PWA. They reviewed unfavorable decisions as to all projects. I was appointed on May

9, 1934, on an organization in the Public Works Administration known as the Electric Power Board of Review.

Whereupon there was received in evidence, as Plaintiffs' Exhibit 32, Order No. 73 of the Federal Emergency Administration of Public Works, reading as follows:—

322 *Plaintiffs' Exhibit 32*

P. W. 11561

Federal Emergency Administration
of Public Works

May 9, 1934 Washington, D. C.

Order No. 73

Establishment Electric Power Board of Review

Effctive May 9, 1934, the "Electric Power Board of Review" is established, membership, Henry T. Hunt, Morris L. Cooke, and Otto M. Rau.

It will be the duty of this Board to review disapprovals, and special conditions imposed, by any division of P. W. A. and to make recommendations to the Deputy Administrator with regard to applications of public bodies to finance the construction, repair, improvement or extension of electric power plant facilities.

The Technical Board of Review is instructed to refer to said Board, Henry T. Hunt, Chairman, Room 5139, all such projects now pending before it on which it has not given notice of hearing.

The Projects Division is instructed to refer to Mr. Hunt summary report folders for such applications as have heretofore been and may hereafter be disapproved by any division or approved with any special conditions appearing on any divisional report.

The Electric Power Board of Review is directed to formulate and submit to the Administrator instructions for the guidance of the several divisions with regard to competitive situations and other controversial questions affecting this class of projects.

(s) HAROLD L. ICKES
Administrator.

Upon the organization of the board it proceeded
323 to consider and reconsider municipal electric power
projects which had theretofore been disapproved by
any of the three divisions. Practically all projects which at
that time were not approved were referred to the board
if there was a difference of opinion between the examining
engineers. And projects coming along after the formation
of the board were referred to us also whenever that situ-
ation existed.

After the organization of this board it considered the
situation arising from the lack of a common policy in re-
gard to municipal electric projects by the Examining Divi-
sions. There was considerable discussion among the mem-
bers of the board to arrive at a definite policy. During
those discussions the criterion called "social desirability"
was discussed. That, broadly stated, as applied to a muni-
cipal electric project consisted of three elements. One was
popular approval; there had to be evidence of popular ap-
proval for the project. The second was that it had to be
self-liquidating, and the third one was that it had to be
socially desirable. Those were the three elements on which
the final decisions as to a project were arrived at. The
greatest weight on social desirability was, Would it bene-
fit the greater number of people? The benefit was usually
decided on what the difference would be if the conditions
existed as they were or if they existed under the plants of
the project. We did not place a great deal of importance
on employment as bearing on social desirability. Primar-
rily, the employment was more or less limited on municipal
projects as compared with a great many of the others, and
the class of employment was too technical to become se-
lected from the local unemployment situation. The people
who had to be employed on a municipal electric project
were such skilled labor that they could not be found in most
communities. The number of people employed on those
projects as a type was considerably less than on other
projects. The board found the principal element of
324 social desirability in municipal electric projects in
the difference in the cost of service to the consumers.
If the cost of service to the consumers was lower from the
project than they were obtaining under the existing condi-

tions, it was considered very desirable from a social standpoint. That means, if the rates suggested in the application were lower than the existing rates.

Soon after its organization, the board considered the problem which might arise if the private utility reduced its rates below those suggested in the application of the city. Mr. Hunt, a member of that board, prepared a memorandum to Mr. Ickes pointing out the existence of this problem. Sometime after that Mr. Ickes sent to the board copies of a letter which he had written to the President stating that problem, and a copy of the reply which the President had sent Mr. Ickes giving his answer on the problem.

Q. Did that exchange of correspondence furnish to the Board the policy upon which it acted thereafter? A. To a great extent it did.

Mr. Frank. I would like to make the same objection there, your Honor.

The Court. I think I will sustain that objection. The question called for the contents of the communications.

Mr. Acheson. If I may be permitted to say so, that question does not call for the contents.

Extended discussion occurred between counsel and the Court. The objection was sustained and exception noted.

The witness resumed his testimony as follows:

I am familiar with PWA Press Release No. 989, which was put out some time after these various discussions with reference to these letters. The date was September 27, 1934. The Electric Power Board of Review followed
325 in its actions the policy contained in Release No. 989 in quotations marks attributed to Mr. Ickes.

Whereupon there was received in evidence as Plaintiffs' Exhibit 33, PWA Press Release No. 989, reading as follows:

Plaintiffs' Exhibit 33

PWA Press Section
Immediate Release — Release No. 989

Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

Municipal or local publicly owned power projects will be aided by PWA only when, in addition to meeting
326 those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

The statement of Administrator Ickes followed action by some privately owned utilities, which, on re-examination of their condition, found it possible to reduce rates to a point below those proposed by municipal project plants.

In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

Since the Public Works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cognizant of the greater use of power resulting from lower rates.

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable
327 where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect

rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

"Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

"PWA will co-operate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

"State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project
328 is self-liquidating at rates lower than those which the existing utility is willing to put into effect."

The witness resumed his testimony as follows:

Applications by municipalities for electric generating and distributing projects came before the Electric Power Board of Review.

Whereupon the following occurred:

Q. When those applications came before the Board, did the Board examine the rates, in the first instance?

Mr. Frank. I object, your Honor. This is now going into the activities of the Board, the intradepartmental activities of the Board.

The Court. I do not think that is in the same category as the other. It is what they did—and then reported, I suppose, to the Director.

After argument of counsel, the following occurred:

The Court. I cannot see why there should be an inquiry into the things this Board considered. I am going to sustain the objection. I cannot rule contrary to my own judgment. I think the question has nothing to do with what is before us.

The question here is, What was done by the Administrator.

Of course, if the question here was whether he acted in an arbitrary way without any advice or without any careful consideration, then that would be different. However, I have no doubt that the fact is that wherever an application came in, these people in this office probably gave very careful consideration to the town where the project was, the population of the town, the evaluation of the property in the town, the character of the work done there, the labor situation there, whether the town was adequately supplied with electrical conveniences or was not—all those

329 things I shall take for granted.

But I cannot see how that has anything to do with the question of whether the Secretary himself violated the terms of this statute, or if you know.

The Court. Gentlemen, I want to understand and to see the questions that will be brought before a higher Court. But I cannot see how everything that this Board considered and thought during the time it was in existence, has anything to do with the question of whether this loan was valid or invalid.

I have to take some position on it, and I shall sustain the objection.

Mr. Acheson. I note an exception, if your Honor please.

By Mr. Acheson:

Mr. Rau, was it the practice of the Board, if it concluded that the rates contained in any application of a city would not reduce the rates charged for electric current, to notify the city that in the opinion of the Board the application lacked social desirability?

Mr. Scott. The same objection.
The Court. The same ruling.
Mr. Acheson. I note an exception.
The Court. Yes.
Mr. Acheson. And we offer to prove that the Board itself directly notified the cities that their applications had no social desirability unless they would reduce rates.
Mr. Rau, were private utility companies given an opportunity to appear before the Board and offer to reduce their rates below the rates which a city proposed in its application?
Mr. Scott. The same objection.
Mr. Frank. We object to the form and the substance.
The Court. The same ruling.
Mr. Acheson. We note an exception, and offer to
330 show that the practice of the Board was to permit private utility companies to appear and offer to discuss rates which were to be put in effect, lower than the rates in application, and deprive the application of social desirability.

By Mr. Acheson:
Mr. Rau, was it the practice of the Board to inform private utility companies that proposed reductions in rates by them would not be considered until they were actually put in effect?
Mr. Scott. The same objection.
The Court. The same ruling.
Mr. Acheson. We note an exception. And we offer to prove that the Board followed the practice of notifying private utilities that they must actually put in effect a reduction in rate before the Board would actually consider the bearing of that reduction on the social desirability of the city's application.

By Mr. Acheson:
Was it the practice of the Board to permit a city, after a utility had actually put into effect a lower rate, to appear and, if it could, amend its application and offer a still lower rate than the utility?
Mr. Scott. The same objection.
The Court. The same ruling.
Mr. Acheson. We note an exception and offer to prove

that it was the practice of the Board that, after a city had put in an application, the city was given an opportunity to amend its application and so attempt to charge a still lower rate than the utility.

By Mr. Acheson:

Mr. Rau, was it the practice of the Board to disapprove an application, on the ground of social undesirability, where the utility actually put in a lower rate and
331 the city was unable to meet that rate?

Mr. Scott. The same objection.

The Court. The same ruling.

Mr. Acheson. We note an exception, and offer to prove that the Board was in the practice of disapproving an application where the utility offered to put in a lower rate and the city was not able to meet that lower rate.

The witness resumed his testimony as follows:

I recall a conference with a group protesting against applications of the cities of Marlin and Plainview, Texas, for electric generating and distributing systems. My recollection is that they discussed a rate which they proposed to put into effect in Marlin and Plainview, Texas. My recollection of the conversation in this conference was that if a lower rate were proposed by the utility, which would affect the earnings of the proposed plant, so that it would not be self-liquidating, the project would not be approved.

I could not say how many instances there were in which I had similar conversations with representatives of private utilities. There were a considerable number.

Whereupon there was received in evidence as Plaintiffs' Exhibit 34, Order No. 141 of the Federal Emergency Administration of Public Works dated March 16, 1935, as follows:

P. W. 30986

Federal Emergency Administration
of Public Works

March 16, 1935.

Order No. 141.

The Electric Power Board of Review is hereby dissolved and the dockets will be returned to the Public Works Administration.

The services of Mr. Henry T. Hunt, General Counsel, will be required for special assignments by the Ad-
332 ministrator of Public Works in view of the pending new program; he will also have referred to him all questions relating to public works requiring legal interpretation. The Chief Counsel's opinions will be coordinated with the administrative procedure by routing through the office of the Director, Legal Division, Public Works Administration, before being presented for the signature of the Administrator.

HAROLD L. ICKES
Administrator.

Whereupon the witness was temporarily withdrawn.

On May 11, 1936, the witness resumed the stand and testified as follows:

Earlier in my testimony I was asked this question:

"Q. Did Mr. Hunt prepare for the Board a memorandum to Mr. Ickes pointing out the existence of this problem?"

My answer was, "Yes; he did."

I did not see Mr. Hunt give such a memorandum to Mr. Ickes. Mr. Hunt drafted and submitted to me for my comments a memorandum on that question. It was discussed between us that this memorandum was prepared to bring the matter under discussion before the Administrator. That is what the memoranda were for. I worked on a number of such memoranda. I was also asked whether Mr. Ickes sent to the Board copies of a letter which he wrote to the President and the reply which the President sent to him, and the court directed me to answer that question yes or no, and I answered it, Yes. Now I did not see Mr. Ickes give Mr. Hunt that memorandum. But Mr. Hunt did bring the correspondence between Mr. Ickes and the President to my attention; yes, he brought it to my attention. I believe I saw the original. I am not sure of that. But I do recollect that one of the memorandums was signed with the President's initials in lead pencil. Of course I
333 was in the conference at the time it was done and I just glanced it over and laid it back. So I have that kind of a recollection because it was quite evident to me it was signed in lead pencil as if somebody did it in a hurry.

There was no cross examination.

334 Whereupon **N. T. Veatch, Jr.**, was called as a witness on behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct examination

I live in Kansas City, Missouri. I am an engineer, a member of the firm of engineers, Black & Veatch. I am a graduate of the engineering shcool of the University of Kansas, 1909. Between the date of graduation and the formation of the firm of Black & Veatch, I spent one year as instructor at the University of Kansas in the engineering school; two years on construction of electric light and water plants, and a little over a year as superintendent of the water system at Keokuk, Iowa. In 1914 I became a member of the firm of Black & Veatch, and have since been connected with it. Our practice has covered the field of municipal improvements, such as water supply, electric lighting and power, sewage and sewage disposal, valuation work, and special reports. I have designed 25 or 30 electric power and light plants. I have valued electric light and power plants having a total value which would exceed $500,000,000. I am familiar with all the factors of cost which go into the construction of an electric light and power plant. I was employed by the Texas Utilities Corporation to make an estimate as to the cost of constructing the proposed municipal plant in Plainview, Texas. In connection with doing that, I went to Plainview and studied the actual situation and familiarized myself with the city's application to the Public Works Administration. I also studied the plans and specifications of the engineers employed by the city of Plainview. As the result of that study and investigation, I have prepared an estimate of cost of constructing the municipal light and distribution system proposed by the city of Plainview in its application to the Public Works Administration, showing, among other things, the labor cost and other costs.

Whereupon the witness identified as the estimate
335 prepared by him a document which was marked plaintiffs' Exhibit 61 for identification offered in evidence and, upon objection by defendants on the ground of irrelevancy, excluded. An exception was allowed. In

the course of defendants' reply testimony, the objection was withdrawn and the document received in evidence. Plaintiffs' Exhibit 61 is as follows:

Plaintiffs' Exhibit 61.

Subject: Plainview, Texas.

Work: Estimate of Cost of Project proposed by City and outlined in specification filed by it.

	Material Plus General Direct Costs	Labor Plus General Direct Costs	Total
Building	$13,711	$7,400	$21,111
Engines and Auxiliaries	150,380	13,970	164,350
Distribution System			
Poles, Towers and Fixtures	22,355	13,219	35,574
Conductors	18,325	8,056	26,381
Transformers	22,091	1,581	23,672
Services	6,691	6,675	13,366
Meters	22,062	3,559	25,621
Street Lighting (overhead)	4,466	1,734	6,200
	$260,081	$56,194	$316,275
Plus Contractors' Profit at 10%	26,008	5,619	31,627
	$286,089	$61,813	$347,902
Plus Engineering at 5%			17,395
			$365,297
Plus Interest during construction			6,642
			$371,939
Plus White Way (to be purchased)			23,529
			$395,468
Plus Storeroom and Garage at City figure			1,765
Plus transportation Equipment figure			1,529
Plus Office Equipment figure			1,176
Total			$399,938

336 Whereupon the witness was asked to state the percentage which the cost of labor at the site would bear to the total cost of the Plainview municipal electric project. An objection made by counsel for defendants was sustained. Counsel for plaintiffs offered proof that the cost of labor at the site would be 14% of the total cost of the project. The offer of proof was rejected and an exception of it was noted and allowed. Whereupon the witness resumed his testimony as follows: I have made a study of the various factors which enter into the division of business between a

municipal electric plant and a competing private utility. I have also made a study of the consumer accounts of the Texas Utility Company in Plainview, Texas, as well as a study of the rates of the Texas Utility Company now in effect in Plainview, and the rates proposed to be put into effect by the City. Based upon these factors, I have an opinion as to the percentage of business which the municipal plant would obtain if built and operated as proposed.

Whereupon the witness was asked to state his opinion. An objection by counsel for defendants was sustained on the ground that the matter was purely speculative. Counsel for plaintiffs offered to prove that the proposed municipal system, it built, would obtain fifty per centum of the existing business from Plainview, Texas. The offer of proof was rejected and an exception was noted and allowed.

Whereupon the witness resumed his testimony as follows: I have prepared a schedule, which, in my opinion, is correct, showing the dollar revenue, based on 1935 operating figures of the Texas Utilities Company, which the Company would lose and the City plant would gain in the event that it is built and operated as proposed.

337 The witness identified as his schedule a document which was marked plaintiffs' Exhibit 62 for identification. This was offered in evidence and, upon objection by defendants on the ground that it was speculative, was excluded. An exception was noted and allowed. Subsequently, in the course of defendants' testimony, the objection was withdrawn and plaintiffs' Exhibit 62 was received in evidence. The Exhibit is as follows:

Plainview, Texas
Estimate of Probable Revenue of
City Plant

This estimate is based upon assumption that City will receive an average of 50% of the revenue now enjoyed by the Company, after deducting revenue from water and street lighting, and adding street lighting to the 50% figure, as follows:

Total Revenue to Company 1935	$145,718
Total for water	$11,364
Total for street lighting	4,389
Total water and street lighting	$ 15,753
Total less water and street lighting	129,965
50% of $129,965	64,983
Plus street lighting	4,389
Total revenue	$ 69,372

Whereupon the witness resumed his testimony as follows: I have prepared an estimate of the expense of operating the proposed City plant, if that plant is to obtain the gross revenue which is shown in plaintiffs' Exhibit 62. In my opinion the estimate is correct.

Whereupon the witness identified as the estimate prepared by him a document which was marked plaintiffs' Exhibit 63 for identification, offered in evidence and, upon objection by defendants on the ground that it was speculative, excluded. An exception was noted and allowed. In
338 course of defendants' testimony, the objection was withdrawn and the document received in evidence. Plaintiffs' Exhibit 63 is as follows:

Plainview, Texas

Statement of Estimated Annual Expense Including Proper Depreciation Charge.

Estimated Expense

Salaries:

General Superintendent (part time)	$1,500
Clerical help in office	2,400
Solicitor for new business	1,200
Line foreman	1,500
Line assistants (2)	2,400
Chief engineer at plant	1,800
Plant operators (3)	3,600
Plant maintenance labor	2,400
Total salaries	$16,800

Maintenance Expense:		
Plant maintenance materials	$2,700	
Line maintenance materials	1,500	
Total Maintenance Expense		4,200
Service Truck Operation and Maintenance		1,000
Commercial Expense:		
Printing, postage and office supplies	300	
Publicity and advertising	750	
Miscellaneous expense	1,500	
Total Commercial Expense		2,550
Fuel and Lubricating Oil:		
Fuel Oil (9.K.W.H. per gal.) 238,000 gal. @ 4½¢	10,710	
Lubricating Oil (1000 K.W.H. per gal.) 2140 gal. @ 50¢	1,070	
Misc. water, charts, etc.	500	
Total Fuel and Lubricating Oil		12,280
Insurance Expense:		
Premiums on fire, tornado and employees compensation and public liability	2,080	
		2,080
Total Operating Expense		38,910
Proper Depreciation		19,000
Uncollectible Accounts		4,850
Total Annual Expense Exclusive of Debt Service		62,760

339 Whereupon the witness resumed his testimony as follows: I have prepared a schedule showing the proper annual depreciation charge which should be made upon the proposed City plant in Plainview, Texas.

Whereupon the witness identified and there was offered and received in evidence as plaintiffs' Exhibit 64 a schedule reading as follows:

Plainview, Texas
Life Expectancies, Wearing Values,
Annual Depreciation
Sinking Fund Basis
Interest 2½%

Account	Assumed life in years	Assumed wearing value %	Annual Depreciation rate %	Annual depreciation rate corrected for salvage %	Investment $	Annual depreciation charge $
Structures	50	100	1.03	1.03	24,813	256
Oil engines and Auxiliaries	15	100	5.58	5.58	177,403	9,890
Electric plant equipment	20	90	3.91	3.52	15,882	560
Poles and fixtures	18	100	4.47	4.47	41,835	1,830
Overhead conductors	20	95	3.91	3.71	31,026	1,150
Transformers	20	98	3.91	3.83	27,839	1,060
Services	20	100	3.91	3.91	15,719	453
Meters, electric	15	98	5.58	5.46	30,131	1,640
Street lighting system overhead	15	100	5.58	5.58	7,290	405
Whiteway Street Lts.	15	100	5.58	5.58	23,529	1,320
Store room and garage	20	100	3.91	3.91	1,765	69
Office equipment	10	75	8.90	6.69	1,176	78
Autos and trucks	4	80	24.08	19.1	1,529	290
Total				4.76	399,937	19,001

340 Whereupon the witness resumed his testimony as follows: A property, such as the one in question, is composed of many units. Each one of those units starts out in a 100 per cent condition, and during its useful life the condition goes from a hundred percent down either to salvage or to nothing. The wiping out of the property and replacement of those units may start a week after the plant is built. For example, an automobile may run into a telegraph pole, or a fire may burn a meter. Any number of casualties may occur. A plant has to go on and operate in 100 percent operating condition in order to give service. In order to keep that plant in a 100 percent operating condition, money has to be ploughed back from source in order to maintain service. Plaintiffs' Exhibit 64, shows my opinion of the proper depreciation charged. It means that this sum of money is required to assure replacing units that have to be replaced, either from casualty or other causes, and to keep the integrity of the plant so that it can continue giving 100 percent operating service.

Direct examination—Resumed

Yesterday I testified that I had prepared estimates on prospective earnings for the proposed city plant, and prospective expenses. In the course of my professional practice, I am retained by clients to make such estimates for them—that is, estimates of future earnings and future expenses. There are very few projects that involve expenditures of money that do not also involve studies as to probable earnings and economic soundness. These estimates which I make for my clients are for the purpose of being used in the exercise of business judgment, and they are used in that way. In the application of the City of Plainview to the Public Works Administration, which is in evidence and is numbered Plaintiffs' Exhibit 25-A, on the bottom of page 7 and the top of page 8 is an estimate of the probable division of business between the proposed plant and the
341 company plant, also on pages 8 and 9 of the proposed gross dollar earnings and proposed operating expenses. The estimates which I testified yesterday that I had prepared, are of the same general character as the estimates contained in the application, and refer to the same items.

I have also computed the average annual cost over a period of 15 years for renewals and replacements of plant equipment upon the proposed Plainview project. My calculation on the requirements for proper depreciation and also renewals and replacements has been predicated upon the exact plant at Plainview, the type of plant involved, the character of its business, which will be a competing one with an existing company, and recognizing the fact that it must be maintained in a condition that will give competing service. The item of renewals and replacements represents the cost that would be necessary to keep the property in a condition that would give service.

Distinguishing between the renewals and replacements and the proper depreciation, the renewal and replacement figure would keep the plant in an operating condition but in a less efficient condition through its life and would not make possible additions and betterments that would keep the plant in step with advance in the art.

For instance, the engines might be quite obsolete before the end of their useful life, in which case if they were com-

peting with the private company, the private company no doubt would have the most efficient equipment throughout, and be able to render better and cheaper service. In my figure for renewals and replacements, I have nothing for the replacement of that engine by a more modern engine when it becomes obsolete. But I do have a figure in there which would replace a broken part of the engine or a cracked cylinder head. Perhaps my point would be plainer by this explanation: It would be possible to take a Model T.
342 Ford, for instance, and by renewing gaskets and boring cylinders out, once in a while, and putting on new fenders, and so forth, keep it so it would operate with practically the same service factor as that car did new. But it would not compare at all with a more improved unit, and would not have the same value at any time as a newer and more improved unit. My renewal and replacement figure is the amount necessary to keep that Model T. Ford operating as well as a Model T. Ford can operate. And the depreciation figure is the amount which would enable you, at the time the Model T. Ford became obsolete, to buy a new car. The annual cost over a period of 15 years, of renewals and replacements is $10,000 a year average.

I have prepared a statement of the annual expense which this proposed city plant would incur, including as one of the items, instead of a proper depreciation charge, a $10,000-a-year charge for replacements and renewals.

Whereupon the witness identified as his statement and there was received in evidence as Plaintiffs' Exhibit 65, a document reading as follows:

343 *Plaintiffs' Exhibit 65*

Plainview, Texas

Statement of Estimated Annual Expense Including Actual Replacements and Renewals Instead of Proper Depreciation Charge.

Estimated Expense:

Salaries:

General Superintendent (part time)	$1,500
Clerical help in office	2,400
Solicitor for new business	1,200
Line foreman	1,500

Estimated Expenses:		
Salaries:		
Line assistants (2)	$2,400	
Chief engineer at plant	1,800	
Plant operators (3)	3,600	
Plant maintenance labor	2,400	
Total salaries		16,80
Maintenance Expense:		
Plant maintenance materials	2,700	
Line maintenance materials	1,500	
Total Maintenance Expense		4,20
Service Truck Operation and Maintenance		1,00
Commercial Expense:		
Printing, postage and office supplies	300	
Publicity and advertising	750	
Miscellaneous expense	1,500	
Total Commercial Expense		2,55
Fuel and Lubricating Oil:		
Fuel oil (9 K.W.H. per gal.) 238,000 gal. @ 4½¢	10,710	
Lubricating oil (1000 K.W.H. per gal.) 2140 gal. @ 50¢	1,070	
Misc. water, charts, etc.	500	
Total Fuel and Lubricating Oil		12,28
Insurance Expense:		
Premiums on fire, tornado and employees compensation and public liability	2,080	
Total Insurance Expense		2,08
Total Operating Expense		38,91
Replacements and Renewals*		10,00
Uncollectible Accounts		4,85
Total Annual Expense Exclusive of Debt Service		53,76

*Minimum amount required to provide service to consumers.

344 I have a statement of the annual expense which this proposed city plant would incur, including as one of the items, instead of a proper depreciation charge, a $10,000-a-year charge for replacements and renewals.

Whereupon the witness resumed his testimony as follows: I am familiar with the terms of the contract dated December 4, 1935, between the Federal Emergency Administration of Public Works and the City of Plainview, and have prepared a table based upon the terms of that contract, showing accurately the annual requirements necessary for principal retirements and interest payments upon the amount of bonds contemplated by it.

Whereupon the witness identified as his table and there was received in evidence as Plaintiffs' Exhibit 66, a document reading as follows:

Plainview, Texas
Bond and Interest Table

Based on terms of contract between PWA and City, and assuming plant to be completed January 1st, 1937. Interest at 4% per annum

Year	Principal unpaid at June 1st	Principal payment June 1st	Amount of annual interest	Total annual payment
1937	$328,000	$10,000	$12,920	$22,920
38	318,000	15,000	12,420	27,420
39	303,000	20,000	11,720	31,720
40	283,000	20,000	10,920	30,920
41	263,000	20,000	10,120	30,120
42	243,000	20,000	9,320	29,320
43	223,000	25,000	8,420	33,420
44	198,000	25,000	7,420	32,420
45	173,000	25,000	6,420	31,420
46	148,000	25,000	5,420	30,420
47	123,000	30,000	4,320	34,320
48	93,000	30,000	3,120	33,120
49	63,000	30,000	1,920	31,920
50	33,000	33,000	660	33,660

345 Plaintiffs' Exhibits 62-66, inclusive, show quite conclusively that the project would not be economically sound or self-liquidating. The probable revenue

would fall considerably below the operating expenses plus debt service and proper depreciation. They even fall below the figures based on simply replacements and renewals required to keep the plant operating. The proposed plant could not even pay the interest charge on the proposed bonds after paying operating expenses, including therein renewals and replacements.

Cross Examination

Plaintiffs' Exhibit 66 for identification, which is the Bond and Interest Table prepared by me, shows that I start out with a loan of $328,000; and Plaintiffs' Exhibit 61, which is the estimate of the cost of the project proposed by the City, shows my estimate of the cost of building that plant as $399,938. I have not always had the opinion that that would be the cost. On January 19, 1935, I indicated that the cost would only be $339,462. The earlier estimate was made in connection with an investigation at the time of the company's protest, a year or more ago. It was made on rather meager information. Since that time we have had complete specifications, and also prices have changed some—and, therefore, I have now a different estimate. I do not mean that the cost of materials and labor necessary to go into this plant has increased from January 19, 1935, to the present date in the amount of $60,000. There is a decided difference in the quantities involved in the two estimates. One item, I remember, alone, the meters, was almost doubled—$15,000 for additional meters that the specifications called for, that we did not have included in the units in the first estimate. Both estimates were based on the P. W. A. requirement as to wages, which I understand at present to be the same as in January of 1935. If that understanding is incorrect to a material extent, my
346 present figures would be incorrect to a material extent. For the reasons stated, I prepared a report as an expert in January, 1935, to be used in a protest made to the Administrator, in which I named a figure of $339,462 as indicating to the Administrator that he was making too large a loan and grant to the company; but since then, and since this litigation has begun, I have revised my figures so as to increase that by $60,000. I was willing to have someone rely on the figures prepared in January, 1935.

We made estimates based on the best figures we had; and I had made it clear at the time—that it was based on such figures. When I was preparing a report in January, 1935, I discussed the matter with Mr. H. L. Allen, vice-president of the Texas Utilities Company, who has testified in this case. I do not know whether he made an estimate or had referred to an estimate of the cost of the property, in a communication addressed to the Administrator. I do not recall whether he discussed with me an estimate by him of the cost of constructing this plant. I do not remember his using a figure of the cost of this plant as being not to exceed $270,000. I did not talk to him frequently about this matter. I had a conference with him, I think, one afternoon, the purpose of which was to obtain operating data and other physical data at Plainview. It was not suggested to me by anybody that the figure I used in January, 1935, should be revised. I found that the quantities on which the estimate in 1935 had been based, differed from those actually called for in the specifications prepared for the City. Those specifications were not attached to the application of the City, which I saw before. I did not see specifications at the time the estimate of 1935 was made. I had the application itself, but not the specifications. I estimated the cost without knowing what the specifications were. We were asked to prepare an estimate of what the probable cost of a municipal plant would be in Plainview. And we made an
347 estimate based on our general information as to what a plant of that type would cost.

Since that time we have had access to the detailed specifications. The quantities that we used and the type of material we used differed from the ones in the specifications. And this present estimate is based on the exact quantities, as near as we have been able to tell from the present specifications and the present prices, as based on the plant proposed by the City.

Assuming your hypothetical case regarding depreciation, if a company built a plant, with $200,000 of its own funds and $800,000 of borrowed money, and thereafter kept its maintenance up, and out of the earnings, repaid the entire $800,000 and interest, and also built up a fund of $200,000, I do not propose that it should also have built up a fund equal to the $800,000.

The ordinary maintenance charge includes simply maintenance. Now, the minimum amount of money that would have to be used to keep that property in operating condition would be the cost of the maintenance items plus these renewals and replacements required to keep the property in condition so that it can give service.

You do not have, with this depreciation fund, the two funds at the end of the life of the property. And without this depreciation, it is impossible to keep it in an operating condition. Depreciation should take care of the maintenance and the renewals and replacements plus obsolescence and inadequacy and so forth—the entire thing. That is one fund. The alternative fund is the strictly renewals and replacements, which is a sum above the ordinary maintenance charge which is actually required to keep the property operating. The property made up of a lot of composite units reaches a point, so far as physical condition is concerned, below which it cannot go and still give service. It is maintained at that approximately level line of physical
348 condition by plowing back money for renewals and replacements and other things that cause deterioration of the property and diminution in value. And that is the depreciation fund I am talking about. You would not have a fund of dollars. Most of that money would be plowed back into the property, to keep it up and keep it operating. You ought to have enough money to equal the amount of accrued depreciation of that property. I would say the proper depreciation fund would probably have on hand at that time approximately $150,000. And the plant would be worth $850,000 at that time. You would have a paid-for plant.

If I suppose two companies, one of which invests of its own money a million dollars in constructing a plant, and the other of which borrows $800,000 and invests of its own funds $200,000; and if the second company pays out of the earnings of the property the $800,000 and interest thereon, I would not say that the two companies, at the end of that period, should have on hand identically the same amount of money and property. The one would have to put out a good deal more money during that period, to keep the plant operating, than the other one would, on account of the fact that it is paying off its security obligation, plus actual re-

quired expenditures without which the plant could not operate. The depreciation funds should be the same.

Redirect Examination

The estimate of the cost of the proposed plant which was submitted in January, 1935, was prepared on the basis of the application of the City, which is Plaintiffs' Exhibit 25-A, I believe, and the amended application, which is Plaintiffs' Exhibit 25-B. Those two documents describe in some detail the plant which the City wishes to build. We obtained some local information in addition to that application. But the application and the information obtained locally were the background of our study. I have since seen a
349 document prepared by the city engineers giving the full plans and specifications. That document was in existence at the time I made this estimate. I asked for the specifications, but they were non-available to me. The description of the plant in the application and the amended application might be fulfilled by one of several plans or specifications. I prepared the first estimate on the basis of the minimum plant which the City would require to do the business. When I saw the plans of the city engineers, I found that they were in excess of the minimum requirements. The present estimate is based on a little better type of pole than we first figured on; more equipment in the plant than we had figured on. The City has designed a better and more elaborate plant than the one on which I made my first estimate. There have been price changes. I included some things in the second one which I did not include in the first. The difference between my present estimate and that made a year ago, is that the present one is made on the City's specifications, which call for a more elaborate plant; it is due to price changes; and it is due to additional items' being put in.

In determining labor costs in both estimates, I used a document signed by Julian Montgomery, State Engineer, Public Works Administration. The caption is "Article IV, Federal Emergency Administration of Public Works, Fort Worth Division, Labor Classification and Minimum Wage Scale." The prices we used are taken from that wage scale. Whereupon a document entitled Article IV, Federal

Emergency Administration of Public Works, Fort Worth Division, Labor Classification and Minimum Wage Scale, was identified by the witness and received in evidence as Plaintiffs' Exhibit 67.

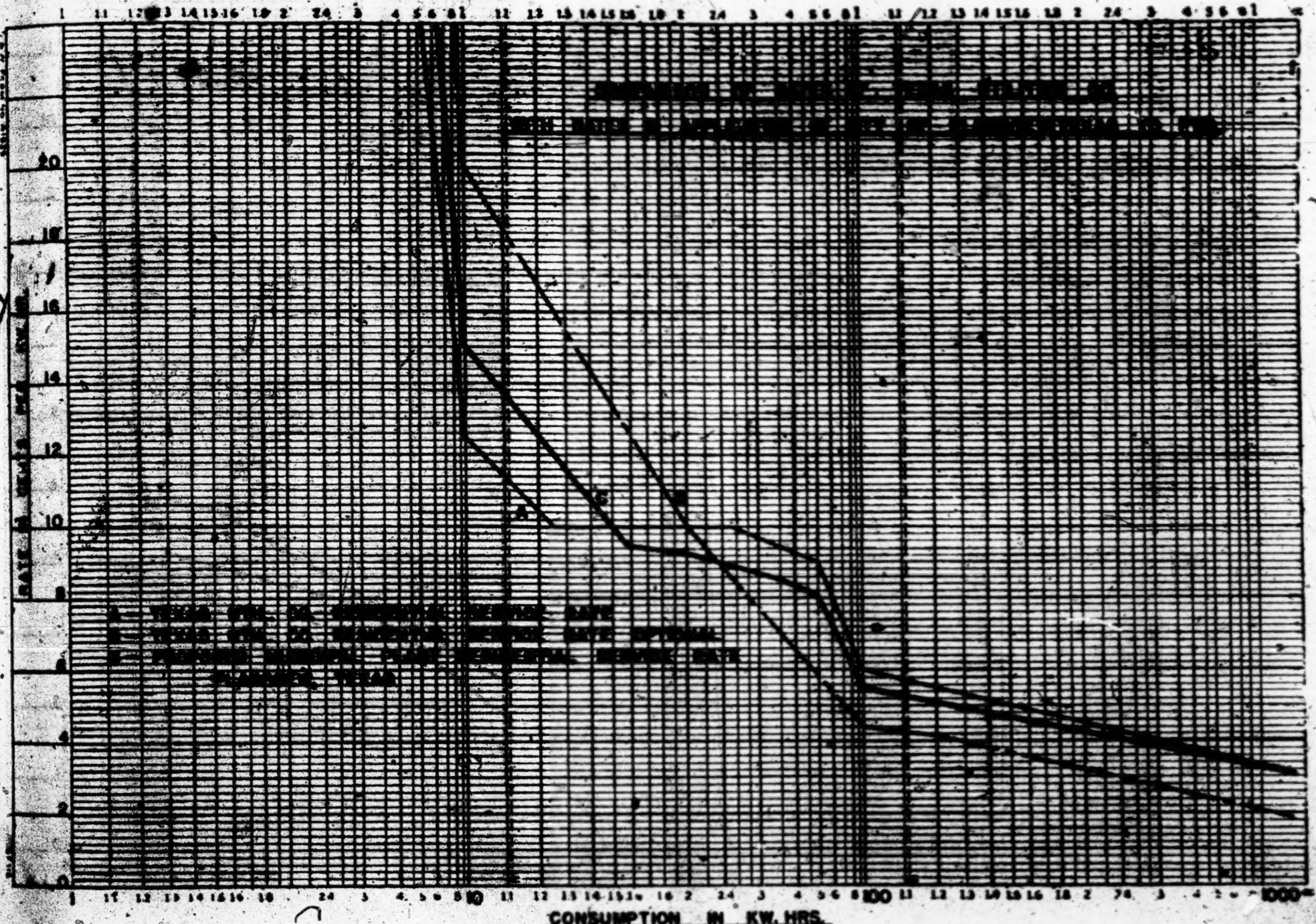
My estimate of renewals and replacements was my estimate of that sum necessary to keep the plant operating—not taking into account items for obsolescence or falling
350 off in efficiency. Now, the second figure of depreciation is to keep the plant running as efficiently as an electric light plant can run. A depreciation charge is not for the purpose of building up a sum of money to have at the end, but for the purpose of keeping the plant continually modern and efficient.

Donald A. Henry was called as a witness for and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

I live in New York City. I am rate and valuation engineer for Stone & Webster Service Corporation, of New York City, which has a contract for management with Texas Utilities Company—no other interest than that. I am an engineer. I was graduated in the year 1909 from the University of Illinois, College of Electrical Engineering. I spent one year in the shops of the Westinghouse Company, on design and construction of electrical machinery; then taught at the Electrical Engineering College of the University of Illinois; then worked for the Sanitary District of Chicago, in the operation of electric substations and its 40,000-horsepower power station, at Lockwood, Illinois. I then took charge for the Illinois Traction System of power sales, contracts, meter testing, meter reading, and customer relations. This was wholesale business conducted mostly with municipalities and small distribution companies. Following this I spent 12 years with the now Illinois Commerce Commission, the latter half as chief engineer, engaged in inventory and appraisal work, rate studies, service investigations, the drafting of orders, and general advisory work for the Commission. For the last 8 years I have been rate and valuation engineer with the Utilities Power and Light Corporation

PLAINTIFFS' EXHIBIT 68



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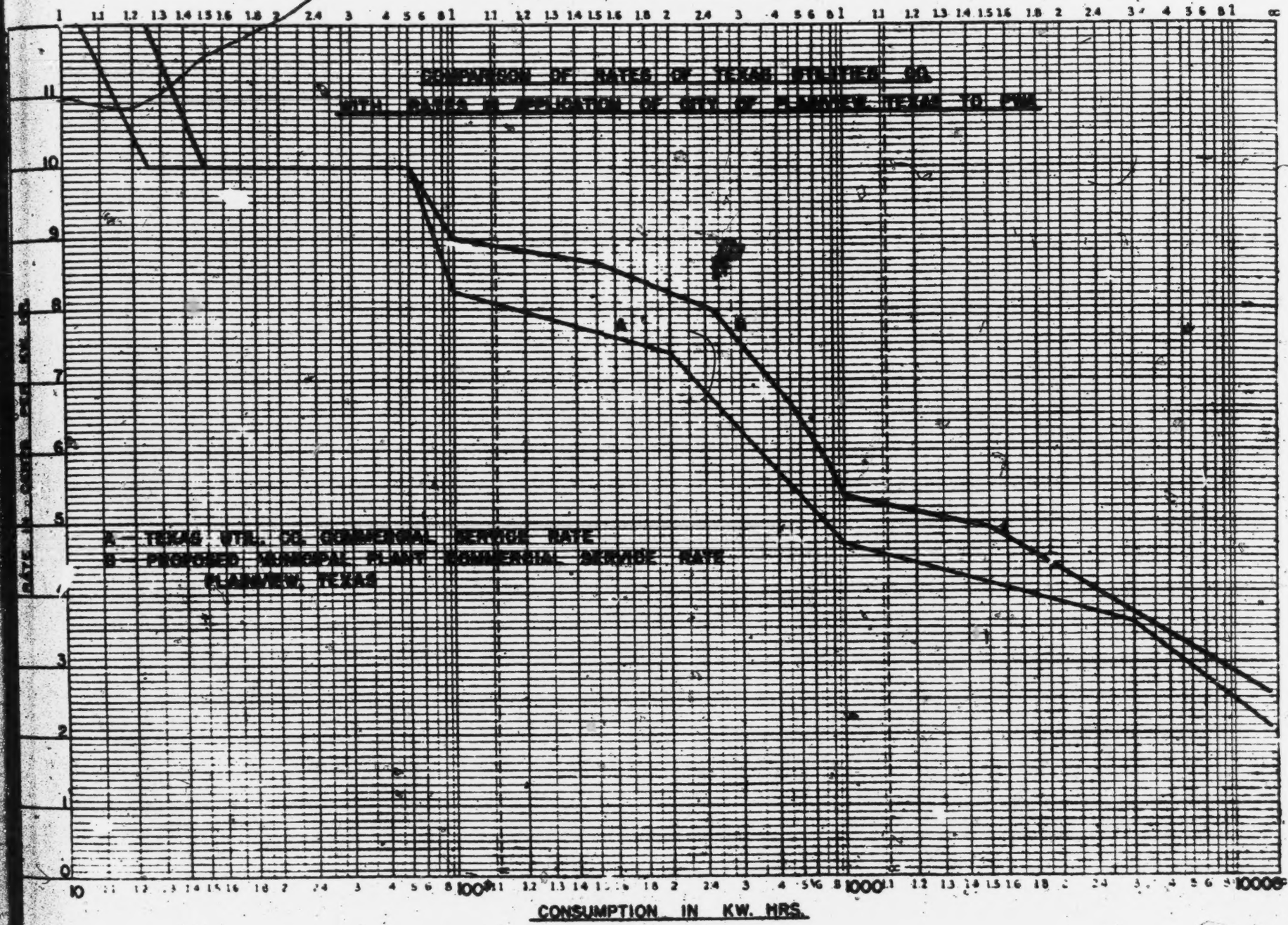
PLAINTIFFS' EXHIBIT 69



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of Chicago, Consolidated Electric and Gas Company
351 of New York, and Stone & Webster Service Corporation of New York, doing supervisory work in rate cases, inventories, valuation, rate studies, and consultative work for some 250 operating companies. I am familiar with the rates which are now in effect in Plainview, Texas, by the Texas Utilities Company, and with those proposed in the application of the City of Plainview for a loan and grant. I have prepared two graphs showing the exact relation of the two residential rates and the two commercial rates in all brackets. Whereupon the two graphs were received in evidence as Plaintiffs' Exhibit 68 and Plaintiffs' Exhibit 69.

(Here follows exhibits marked pages 351 and 352.)

353 I have made several studies over the last two or three years of the local consumption of electricity in Plainview, Texas, including consumer accounts of the Texas Utilities Company. I paid considerable attention in the last 10 years to the factors entering into the division of business, where a municipal plant competes with a private utility. I believe that under the conditions as reflected on the graphs I have shown to you there, and other operating conditions which I have taken into account, that the city plant will, over the average of a number of years get all of the street-lighting revenue and half of the remaining revenue, exclusive of the water pumping, which I think the company would continue to get under present conditions down there. Based upon the actual amount of business which Texas Utilities did in Plainview in 1935, the amount of gross revenue accruing to a municipal plant under the conditions we have outlined here, would be $69,372. I am very familiar with the factors which go into the operating expenditures of an electric utility, and have made a study of the conditions past and present in Plainview, Texas, bearing on the possible growth of electric use over the next 15 years. I have prepared an estimate showing, for the first, fourth, ninth, and fourteenth years, over the next 15-year period, the estimated gross revenue of the proposed municipal system and the estimated operating expenses, one such estimate includes as an item of cost a proper depreciation charge and another

such estimate includes instead a charge for replacements and renewals.

Whereupon these documents were marked as Plaintiffs' Exhibit 70 and 71 for identification, respectively.

I had available Mr. Veatch's estimate of the operating expenses of this plant and the specifications of the plant, showing what type of plant it was and its condition in operation. And I studied those independently of Mr.
354 Veatch, to assure myself that I thought the quantities used there are reasonable. And I believe they are.

So I adopted Mr. Veatch's estimate of cost of operation for the first year, in this tabulation. For the subsequent years I have made changes because I think the business in Plainview will increase over a period of years, and necessarily the operating cost of the city plant will increase. In estimating the possible increase in business, I have taken into consideration increase in population, increased use of electricity per customer, reductions in rates.. I think the estimates are correct.

Whereupon the estimates referred to were received in evidence as Plaintiffs' Exhibits 70 and 71, respectively, reading as follows:

355 *Plaintiffs' Exhibit 70*

Plainview, Texas

Estimate of Operating Results—Proposed Municipal Plant

	Operating Year			
	Base	Fourth	Ninth	Fourteenth
Gross Revenue	$69,372	$75,940	$81,000	$84,590
Expense				
General Superintendence	1,500	1,600	1,800	2,000
Clerical Help	2,400	2,500	2,700	3,000
Solicitors of New Business	1,200	1,500	1,800	2,400
Line Foreman	1,500	1,600	1,800	2,000
Linemen	2,400	2,700	3,000	3,300
Chief Engineer	1,800	2,000	2,200	2,400
Watch Engineers	3,600	3,900	4,500	4,800
Plant Mtce. Materials and Labor	5,100	5,740	6,230	6,620
Line Mtce. Material	1,500	1,700	1,840	1,960
Commercial Expense	2,550	2,610	2,645	2,680
Service Truck Oper. and Mtce.	1,000	1,100	1,200	1,300
Lubricating Oil	1,070	1,280	1,510	1,790
Fuel Oil	10,710	12,600	14,750	16,680
Miscellaneous Plant Expense	500	600	800	1,000
Insurance	2,080	2,100	2,150	2,200
Proper Depreciation	19,000	19,000	19,000	19,000
Uncollectible Accounts	4,850	5,320	5,675	5,920
Total	$62,760	$67,850	$73,600	$79,100
Debt Service Requirement		30,920	31,420	33,660
Total Expense		98,770	105,020	112,760
Deficit		*22,830	*24,020	*28,170

*Red

356 *Plaintiffs' Exhibit 71*

Plainview, Texas

Estimate of Operating Results—Proposed Municipal Plant

	Operating Year			
	Base	Fourth	Ninth	Fourteenth
Gross Revenue	$69,372	$75,940	$81,000	$84,5[illegible]
Expense				
General Superintendence	1,500	1,600	1,800	2,0[illegible]
Clerical Help	2,400	2,500	2,700	3,0[illegible]
Solicitors of New Business	1,200	1,500	1,800	2,4[illegible]
Line Foreman	1,500	1,600	1,800	2,0[illegible]
Linemen	2,400	2,700	3,000	3,3[illegible]
Chief Engineer	1,800	2,000	2,200	2,4[illegible]
Watch Engineer	3,600	3,900	4,500	4,8[illegible]
Plant Mtce. Materials and Labor	5,100	5,740	6,230	6,6[illegible]
Line Mtce. Material	1,500	1,700	1,840	1,9[illegible]
Commercial Expense	2,550	2,610	2,645	2,6[illegible]
Service Truck Oper. and Mtce.	1,000	1,100	1,200	1,3[illegible]
Fuel Oil	10,710	12,600	14,750	16,8[illegible]
Lubricating Oil	1,070	1,280	1,510	1,7[illegible]
Miscellaneous Plant Expense	500	600	800	1,0[illegible]
Insurance	2,080	2,100	2,150	2,2[illegible]
Replacement & Renewals	10,000	10,000	10,000	10,0[illegible]
Uncollectible Accounts	4,850	5,320	5,675	5,9[illegible]
Total	$53,760	$58,850	$64,600	$70,1[illegible]
Debt Service Requirement		30,920	31,420	33,6[illegible]
Total Expense		$89,770	$96,020	$103,7[illegible]
Deficit		*$13,830	*$14,960	*$19,1[illegible]

*Red

357 Whereupon the witness resumed his testimony as follows:

I have prepared two statements showing for each year of the 15 years of operation of the proposed plant the estimated gross revenue and the estimated total expense, including the debt charge of the company, the first table based on a proper depreciation charge, and the second table based on a charge for replacements and renewals.

Whereupon two statements were identified by the witness and received in evidence as Plaintiffs' Exhibits 72 and 73, respectively, reading as follows:

Plainview, Texas

Plaintiffs' Exhibit 72

Summary of Operating Results—Proposed Municipal Plant.

Proper Depreciation Basis.

Operating Year	Gross Revenue	Total Expense	Deficit
1st	$72,220	$87,520	$15,300
2nd	73,520	93,020	19,500
3rd	74,720	98,420	23,700
4th	75,940	98,770	22,830
5th	77,140	99,170	22,030
6th	78,240	99,570	21,330
7th	79,240	104,820	25,580
8th	80,190	104,950	24,760
9th	81,060	105,020	23,960
10th	81,860	105,120	23,260
11th	82,610	110,120	27,510
12th	83,330	110,020	26,690
13th	83,940	109,920	25,980
14th	84,590	112,760	28,170
		Accumulated Deficit	$330,600

*Red Figures.

358 *Plaintiffs' Exhibit 73*

Plainview, Texas

Summary Operating Results—Proposed Municipal Plant.

Replacement & Renewal Basis

Operating Year	Gross Revenue	Total Expense	Deficit
1st	$72,220	$78,520	$6,300
2nd	73,520	84,020	10,500
3rd	74,720	89,420	14,700
4th	75,940	89,770	13,830
5th	77,140	90,170	13,030
6th	78,240	90,570	12,330
7th	79,240	95,820	16,580
8th	80,190	95,950	15,760
9th	81,060	96,020	14,960
10th	81,860	96,120	14,260
11th	82,610	101,120	18,510*
12th	83,330	101,020	17,690
13th	83,940	100,920	16,980
14th	84,590	103,760	19,170
		Accumulated Deficit	$204,600

*Red Figures.

The witness resumed his testimony as follows:

Plaintiffs' Exhibits 70 and 71 show my estimates for the fourth, ninth, and fourteenth years of a 14-year period. The Plaintiffs' Exhibits 72 and 73 show each year of a 14-year period. The fourth, ninth, and fourteenth years on the last exhibits are identical with the two previous exhibits, but they give only total gross revenue and total expense. I have estimated the intervening years in these later tables by drawing a smooth curve between the points indicated as the fourth, ninth and fourteenth years, those three years having been estimated in detail. I have not made a detailed estimate for each year.

Plaintiffs' Exhibits 72 and 73 set up over a 14-year period gross revenue, total expenditures, including all the

interest and amortization as required by the contract between the City of Plainview and the Government, and then show a deficit for each year, and the accumulated deficit over a 14-year period.

Whereupon, instead of prolonging the examination
359. of this witness, counsel for the defendants and counsel for the plaintiff agreed that the plaintiff Texas Utilities Company would suffer substantial financial loss through the establishment and operation of this municipal plant, and also that the plaintiff Texas Utilities Company has exhausted its administrative remedies.

Cross Examination

My estimate is based on the maintenance of approximately equal rates by the two plants, which is the case that you have, on an average, over a number of years, in almost every municipal venture. It would not affect my estimate to assume that the City of Plainview, after the establishment of its own plant, were able to fix a minimum rate so as to prevent the power company from charging less than the city plant would charge.

Whereupon the following documents were received
360 in evidence.

Plaintiffs' Exhibit 75

November 22, 1934.

Judge C. S. Williams
City Attorney
Plainview, Texas

My dear Judge Williams:

This will acknowledge receipt of four copies of an amortization table, four copies of additional financial data, and list of proposed consumers for the light and power system which you propose to construct under our Docket No. 8021 should an allocation be made for this purpose.

We have issued the necessary instructions to have this additional information forwarded to our examining divisions for appropriate consideration.

Sincerely yours,

A. M. FEREBEE
For the Administrator

Plaintiffs' Exhibit 76

Wichita Falls, Texas
November 15, 1934
Judge C. S. Williams, City Attorney

Plainview, Texas
Docket No. 8021
Plainview Light and Power System
Engineer's Reference No. 417

Dear Judge Williams:

Pursuant to your request we are submitting schedules of estimated income, amortization, operating expenses and maintenance and depreciation based on your latest information obtained by signing up of users of electric
361 energy in your city.

Very respectfully yours,

JOE E. WARD
successor to
MONTGOMERY & WARD
CONSULTING ENGINEERS
(signed) BY John B. Upchurch

Plaintiffs' Exhibit 77

Washington, D. C.
November 27, 1934.

Mr. Henry T. Hunt,
Chairman, Electric Power Board,
Washington, D. C.

My dear Mr. Hunt:

Re: Docket No. 8021
Engineers Reference No. 417
City of Plainview, Texas.

In conversation with some of the examiners concerning the above matter, it appeared that we should submit something definite in regard to how the City of Plainview would provide its water supply—wells, pumps, etc.—in the event the city cancelled the contract it now has with the Texas Utilities Company for pumping its water.

The City of Plainview will have no difficulty in providing its own water supply and the machinery for operating

same; but since we are filing a short supplement amongst the papers of the docket, we are dealing with that matter under subdivision 3 of this supplemental brief, which is attached to this letter, and respectfully ask that you refer to such subdivision 3 for the full details as to how the city will finance and provide for its water supply.

362 Yours very truly,

(signed) C. S. Williams
C. S. Williams,
City Attorney of the City of
Plainview, Texas.

Plaintiffs' Exhibit 78

Mr. Henry M. Hunt, Chairman,
Electric Power Board, PWA.,
Washington, D. C.

Re: Docket No. 8021 Engineering Reference No. 417, Application of City of Plainview, Texas, for loan and grant for electric power plant.

Dear Mr. Hunt:

I, with other representatives of the City of Plainview, was in Washington some two weeks ago in regard to the above docket matter. We had a conversation with Mr. Rau in regard to same and he suggested that it might be well to file a further and more detailed statement of the expected cost of the distribution system.

After some delay we have just received from Mr. Ward, successor to Montgomery & Ward, who as engineers prepared the plans and specifications for the power plant and distribution system for the City of Plainview, a detailed estimate of the cost of the distribution system, and four copies of same are handed to you herewith which please file amongst the papers referring to the matter.

The suggestion for this additional information was made by Mr. Rau because we, while in Washington, filed evidence showing that the city would receive a much larger proportion of the electric business in Plainview than had been claimed the city would receive in the original applica-

tion so that the cost of the distribution system
363 might be larger than set out in the original application. The estimate of cost which we herewith hand you aggregates the same amount as set out in the original application, that is, $159,520.00

Yours truly,

WILLIAMS & DAY
(signed) BY C. S. Williams

Plaintiffs' Exhibit 79

January 7, 1935

Mr. Grady Shipp
Plainview, Texas

Retel December 17 and December 21 Re-Docket Eighty Twenty One. Favorable Reports from Examining Divisions. Allocation Dependent on Availability of Funds.

PHILIP B. FLEMING

Plaintiffs' Exhibit 80

January 17, 1935

Honorable Herbert Dysart,
Mayor pro tem.,
Mr. C. S. Williams,
City Attorney,
Plainview, Texas.

Dear Sirs:

In reply to your letter of January 1 relative to the application of Plainview, Texas, for a loan and grant to finance construction of an electric generating plant and distribution system, Docket No. 8021:

The Electric Power Board of Review and the several examining divisions of the Public Works Administration have recommended that the application be approved.
364 However there are at present no funds available for an allotment. If and when funds become available the project will be put on the agenda for favorable action.

Very truly yours,

HENRY T. HUNT
Chairman
For the Administrator

Plaintiffs' Exhibit 81

Plainview, Texas,
February 11, 1935.

Mr. O. M. Rau, Examiner,
Electric Power Review Board,
c/o Public Works Administration,
Washington, D. C.

Re: Docket No. 8021,
Engineer's Reference No. 417,
City of Plainview, Texas.

Dear Mr. Rau:

You will doubtless recall the writer as one of the three Plainview representatives who called on you during the latter part of November in connection with the above pending application. And inasmuch as it was our understanding that the Texas Utilities Company would be given an opportunity to reduce rates to a point acceptable to the Power Board and failing so to do the application would in all probability be favorably disposed of in accordance with the approval of the Legal, the Engineering and the Finance Divisions of the PWA. And since we have something like fifteen hundred persons on the relief rolls here in Plainview and we have hoped all along that the construction and installation of the municipal power and light plant would, to a very large extent, take care of our unemployment
365 problems, we are taking the liberty of addressing you on the subject at this time.

The entire Plainview delegation was deeply impressed with the frank and courteous consideration shown us by everyone with whom we came in contact, and knowing the problems with which you and your board are confronted we have hesitated to make inquiry concerning the reasons for the delay and the present status of the application but, for the reasons stated, we are really facing a serious problem that cannot well be disposed of in an intelligent manner until we are advised as to when we may expect information along the lines indicated.

We wish to make it clear that we are not asking for information to which we are not entitled but at the same time

our situation is so serious that we will deeply appreciate anything that will enable us to know how to proceed.

Yours very truly,

(signed) Herbert Dysart
Alderman and Mayor Pro Tem

Plaintiffs' Exhibit 82

November 12, 1935

The Mayor,
City of Plainview,
Hale County, Texas.

Re: Docket No. 8021
Applicant: City of Plainview
Project: Power Plant

Dear Sir:

There are enclosed herewith the following:

1. Five unexecuted counterparts of an Agreement terminating the Loan and Grant Agreement between the City of Plainview and the United States of America, dated as of August 17, 1935.

2. A Contract Record Memorandum containing
366 suggested forms of the proceedings required for the approval and execution of the Agreement. Such forms must, of course, be adapted to the facts and the law of this case.

3. An executed original and two conformed copies of an Offer made by the United States of America to aid in financing the construction of the above mentioned project, by making a loan and grant to the City. The United States of America will purchase bonds and make a grant in the amounts therein specified upon a showing that the City has complied with the provisions of PWA Circular A.

4. Two copies of said PWA Circular A (PWA Form No. 191, September 18, 1936).

5. Three copies of Form PW-L-42 (10-28-35). Form PW-L-42 should be completed in duplicate by a duly authorized officer as soon as the facts warrant, and should be returned in duplicate to the Public Works Administration, Washington, D. C., marked for attention of the Legal Division.

Three counterparts of the enclosed Agreement should be executed under seal by the proper officers and sent to the office of the State Director (PWA) together with the Contract Record in triplicate. The officers should not date the enclosed Agreement. Two copies of the enclosed Agreement need not be executed or returned. The three executed counterparts of the enclosed Agreement, together with the Contract Record in triplicate, will be forwarded by the State Director to the Administrator. The Agreement will be executed on behalf of the United States if the Contract Record is complete. The three executed counterparts of the Agreement will be dated and one executed counterpart will be returned to you.

As for the Offer, there should be no formal acceptance by resolution or ordinance. The Offer is conditioned upon performance rather than upon a promise to perform.
367 Briefly, the Offer, plus performance according to its terms, will constitute an unilateral contract.

We advise you, however, that our ability to perform pursuant to the terms of the Offer is limited by the litigation now pending in the District of Columbia, and that we must govern ourselves in accordance with the preliminary injunction granted by the Supreme Court of the District of Columbia until the issues in such litigation are determined, and thereafter in accordance with such final order as may be entered.

Prompt acknowledgment of this letter and enclosures should be made to the State Director. If anything is not clear or if any difficulties arise, please communicate with the office of the State Director "Attention Legal Section" at once.

Sincerely yours,

DAN H. WHEELER,
Assistant to the Director,
Legal Division.
For the Administrator

Enclosures

Plaintiffs' Exhibit 83

Washington, D. C.
December 5, 1935.

The City Clerk,
City of Plainview, Texas.

Re: Docket Number: PWA 8021
Applicant: City of Plainview, Texas.
Project: Power Plant.

Dear Sir:

Enclosed herewith are an executed original and two conformed copies of an Offer made by the United States of America to aid in financing the construction of the
368 above captioned project by making a loan and grant to the Applicant, and an Acceptance Record Memorandum containing suggested forms to be followed by applicants in accepting an offer of the Government to aid, by way of loan and grant, in financing the construction of a Public Works project. Such forms must, of course, be adapted to the facts and the law of this case.

Three certified copies of the resolution or ordinance accepting the Government's offer and three certified copies of the minutes of the meeting at which such resolution or ordinance was passed should be forwarded promptly to the office of the State Director (PWA) plainly marked "Attention: Legal Section".

This Offer supersedes the Offer dated November 9, 1935, which was previously forwarded to you. Please return the Offer of November 9 along with the acceptance proceedings of the enclosed superseding Offer.

Prompt acknowledgment of this letter and enclosures should be made to the State Director. If anything is not clear or if any difficulties arise please communicate with the office of the State Director "Attention: Legal Section" at once.

Sincerely yours,

DAN H. WHEELER,
Assistant to the Director,
Legal Division.
For the Administrator

Enclosures

Plaintiffs' Exhibit 84

December 7, 1935

City Clerk
City of Plainview Texas

Re Docket Fighty. Twentyone Power Plant Stop Please Execute Terminating Agreement Forwarded to
369 You November Twelve If You Have Not Already Done so Prior to Accepting New Offer Dated December Four Stop Prompt Action Necessary and Names of Officials Executing Documents

CLARK FOREMAN
Director Power Division
For the Administrator

370 **R. B. Mac Donald** called as a witness on behalf of the plaintiffs and being duly sworn testified as follows:

I am the President of the Iowa City Light and Power Company and have been such for approximately nine years.

My experience in the operation and management of electric utilities dates from 1899 and has been continuous since that time in various capacities. At the present time I am President and General Manager of the Peoples Power Company operating in Rock Island, Moline and East Moline, Illinois, and contiguous territory, and am President of the Peoples Light Company operating in Davenport (Iowa) and contiguous territory. I am also President of the Iowa City Light and Power Company, which operates in the City of Iowa City, Iowa, and a few other smaller towns.

Rock Island and Moline, Illinois, and Davenport, Iowa, are separated by the Mississippi River and are distant about sixty miles from Iowa City. There is no physical connection between the plants and distribution systems in the tri-city area and Iowa City. There is a connection by way of stock ownership between the several independent companies that operate in those different territories. My connection is as President of the Iowa City Company and as President and General Manager of the Peoples Power Company at Moline.

I have been familiar with the situation in Iowa
371 City with reference to the Iowa City Light and Power Company properties in a general way since 1912. I was more definitely familiar with it from 1920 on and I have been President since 1927.

Iowa City has a population of substantially 16,000. It is the seat of the University of Iowa. There are very few industries—practically no industries located in Iowa City or nearby.

Iowa City is in Johnson County which is entirely inland and away from the borders of the state. The business of the Iowa City Light and Power Company is entirely confined to Johnson County. It renders gas and electric service in Iowa City, gas and electric service in Coralville, and gas and electric service in University Heights, comparatively small towns immediately contiguous to Iowa City, and, in addition, it renders rural service in territory immediately contiguous to Iowa City in Johnson County. Roughly speaking, the rural distribution lines of the Iowa City Light and Power Company extend about seven miles into rural territory. The other municipalities, University Heights and Coralville, are very much smaller than Iowa City, Coralville having a population of about 250 and University Heights about 150 or 200. The Iowa City Light and Power Company is the only electric company operating in Johnson County. It has power generating stations lo-
cated in Coralville on the Iowa River. It has a small
372 hydro plant and a steam power plant and it has a connection for purchased energy. It has a gas plant located in Iowa City and there are distribution systems in connection with both the electric and gas plants.

The company has approximately 150 miles of wire line in Iowa City and approximately 50 miles outside of Iowa City, including the towns of Coralville and University Heights and the rural areas. It has approximately 5,500 electric customers and approximately 300 of these are in the towns of Coralville and University Heights and the rural area.

In the electric department the company has a capacity in Iowa City of 6,760 kilowatts. That is its generating capacity. The maximum load that has been created on the sys-

tem is 2880 kilowatts, and we have capacity altogether for more than double the maximum load that has occurred up to this time. That maximum load occurred on October 27, 1934.

Of the total sales to residential customers of the company for the first three months of 1936, 95.4 per cent were sales to residents in Iowa City and 4.6 per cent were sales to customers outside Iowa City. In the commercial classification 99.6 per cent were sales to customers in Iowa City and 0.4 per cent were sales to customers outside Iowa City.

The total gross revenue of the electric department for the year 1935 was $321,963.04. For that same year the operating expenses of that department were $230,803.22.

373 The net revenue after deduction of operating expenses was the difference, which amounts to $91,159.82.

The company possesses franchises granted by the Board of Supervisors and approved by the Board of Railroad Commissioners for its service in the county outside of Iowa City. It has existing franchises in the towns of Coralville and University Heights.

Its franchise in the City of Iowa City expired on the 13th of January, 1934. There has been no notification to the company to cease rendering service or to remove its property from the streets and public places of the city since January 13, 1934, and the company is still serving the community. It renders service to the municipality itself as distinguished from the inhabitants which consists of street lighting, among other things. It also has a contract with the city for furnishing the electric power for use in connection with the municipality owned sewage disposal plant.

The company has approximately 75 employees in its two departments. Some employees' work is common to both departments, and I would say that 45 employees might be allocated to the electric department and 30 to the gas department. This does not include employees on construction work or anything other than the normal, ordinary and continuous operation.

For the year 1933 (payable in 1934) the company's Federal income tax was $15,865.35, and for the year 1934, paid in 1935, $6,774.56. I do not have the exact figures on the

income tax for the year 1935 payable in 1936 but the first quarter was approximately $5,000.

The company paid a Federal capital stock tax for
374 1934 amounting to $840 and in 1935 to $824.

The company pays the 3 per cent energy tax on electricity sold by it and has done so since the law requires it to be borne by the company rather than the consumer. The amount of tax in 1933 paid by the company was $2,868.23; for 1934 it was $7,286.40; and for 1935 $7,591.18.

The local taxes for state, county and city purposes, which in Iowa are collected together through the County Treasurer, were for 1933 $27,042.30; for 1934 $26,785.21; and for 1935 $23,580.19. These figures do not include any amount for the state sales tax which is paid by the company but which is actually a tax upon the consumer.

The Iowa City Light and Power Company has been in continuous operation of its plant and system in Iowa City since 1912. The approximate investment of the company in its electric plant and electric distribution system at Iowa City is $1,700,000. That means the approximate investment in the physical plant of the electric department. That is the reproduction cost new. The present value depreciated is approximately $1,500,000.

The effect of the company's being deprived of the right to operate the electric department on the cost of rendering service in the gas department would be to increase the cost in general and in commercial and new business expenses particularly. Take for example the matter of reading meters. The same men read both the gas and electric
375 meters when they call at the customers' homes. Part of that expense, of course, is allocated to the electric department. If a man is obliged to make the trip around to read just the gas meter, the cost per unit for reading just the gas meters would be more. In the matter of preparing bills we use combination bills that show the consumption for both gas and electricity. The same personnel handles that entire work. Of course, if the electric were dropped out, it would cost more per unit or thousand feet. The same thing is true with reference to management, supervision, insurance, and items of that kind, where either the facility or the work is devoted to the two departments and the cost

is split or divided between the two departments proportionately.

The local body which has jurisdiction of the fixing of rates for electrical service and utilities in Iowa is the City Council. The last time it regulated the rates of this company was in July of 1934. There had never been a rate ordinance in Iowa City prior to that that I know of.

Question: Can you tell us briefly the history of the rates for electricity in Iowa City from, say, 1920 to date, with respect to the trend and the percentage that they are today of what they were in, say, 1920 or 1926?

Mr. Holtzoff: We object to that as irrelevant.

The Court: I think that I sustained that objection
376 before. To my mind the important thing is that this company is a company whose rates are regulated by some public authority. So far as I can see, that is the material thing. Whether they have been going up or down depends upon a great many really collateral matters, but it is a company whose rates are fixed and regulated by some public authority.

Mr. Cook: Of course, the witness has testified that the city council has the authority to regulate rates. As
377 far as he has testified, and, I think, as far as the recognized facts are concerned, the rates have never been regulated in Iowa City except on this one occasion in July. In other words, they have usually been put into effect and acquiesced in. But we are offering this evidence, and we now offer to prove by this witness, that since 1926 the average cost of electricity in Iowa City, by reason of several reductions in rates to which he would specifically testify, made voluntarily by the company, has decreased 52 per cent. We make that as an offer of proof. I understand that your Honor sustained the objection before on this line of testimony.

The Court: It does not seem to me to have any relevancy. I will sustain the objection and allow you an exception.

I am familiar with the electric rates over the State of Iowa, and in the general portion of the State where Iowa City is located, and in cities of approximately the same population and situation.

Question: I will ask you, Mr. MacDonald, to state how

the rates in Iowa City, and the average cost of electricity there, compare with cities of similar population in the State of Iowa, and in the general vicinity of Iowa City.

Mr. Scott: To which we object, for the reason that it is collateral and irrelevant.

The Court: I will sustain the objection.

Mr. Cook: We offer to prove by the witness that the rates in effect in Iowa City are lower than the rates in any city in Iowa of comparable population, that is, in the neighborhood of 15,000 to 16,000 people.

The Court: I will sustain the objection. I do not
378 see that it has anything to do with the issues here.

Mr. Cook: For the record, we preserve our exception to the ruling.

Counsel for plaintiffs thereupon asked the witness whether there had been any complaints or any proceedings or whether he had ever been approached by the city with respect to any inadequacy of the service which the company had rendered. Counsel for defendants objected upon the ground that it was irrelevant. The court overruled the objection, to which defendants duly noted an exception.

The city has never questioned the adequacy of the service of the company. No one has ever brought any proceeding in which it was contended that the service was in any way inadequate.

I am familiar with the fact that the City of Iowa City about January 25, 1934, made an application to the Public Works Administration for a loan and grant for the purpose of building a municipal plant, and subsequently there was an application to reinstate that and later to revise it to make it call for a grant only. The company filed protests with the PWA authorities in connection with the original loan and grant application and the application to reinstate the same. In addition we protested orally to the PWA authorities or to the persons whom we were informed when we came here for that purpose would listen to our objections. That protest was made to Major Fleming and to R. V. L. Wright, who was the man we understood Major Fleming, who was the assistant director, had assigned to hear our protest. We had a letter acknowledging our protest but no other word from PWA with respect to it.

The business of the company outside of Iowa City proper is not sufficient to warrant, as a matter of cost, the continuation of service to Coralville, University Heights and the rural customers at anything like current rates if the company were not permitted to engage in the distribu-
379 tion of electricity in Iowa City proper. There are approximately 75 rural customers. We have not been able to find any other outlet for the power and electrical energy which the company's plant is capable of generating which might be available in the event that distribution in Iowa City were discontinued. In the event that we were denied the right to continue to operate in Iowa City that would reduce the value of the company's plant and distribution system to its salvage or junk value.

It was stipulated by counsel that the amendment and supplement to the Bill of Complaint of Iowa City Light and Power Company should be deemed denied without filing an answer.

Stipulated Facts

At the commencement of the trial a stipulation was entered into between the plaintiff Iowa City Light and Power Company and the defendants which was identified as plaintiff's Exhibit No. 35. In it certain ultimate facts were stipulated subject to their relevancy and materiality, certain exhibits were identified and their genuineness agreed to, and in addition it was agreed that certain witnesses if called would give certain testimony. Because of the reservation of the right to object to the relevancy and materiality separate offers were made of the various paragraphs of the stipulation. The facts thus made of record either without objection or where objection by the defendant's counsel was overruled were as follows:

The plaintiff, Iowa City Light and Power Company, is and at all times referred to in its Bill of Complaint has been qualified to do business in the State of Iowa as a for-
380 eign corporation and has, continuously since the year 1912, been engaged as a public utility in the manufacture, distribution and sale of gas and electrical energy to the inhabitants of the City of Iowa City in Johnson County, Iowa, and that it is and for some time past has been serving also the inhabitants of the incorporated towns

of Coralville and University Heights, the unincorporated village of Coralville Heights and certain rural territory in Johnson County, Iowa, adjacent to said municipalities. The population of Coralville is approximately 250; that of University Heights approximately 250; and that of Coralville Heights approximately 160.

The plants and distribution systems of the plaintiff are situated wholly within the County of Johnson, State of Iowa, and the entire business of the plaintiff as a public utility as aforesaid is conducted within said county and state and is wholly and entirely intrastate in character. Johnson County is an interior county in the State of Iowa and is approximately fifty miles from the state line between the states of Iowa and Illinois, which is the nearest other state.

It is contemplated and intended that the municipally owned electric light and power plant and distribution system for which the grant, which is the subject matter of this cause, is intended will only serve consumers in the State of Iowa and the business in which it will engage will likewise be wholly intrastate and confined to Iowa City, Johnson County, Iowa, and the immediate vicinity.

Plaintiff is the owner of real and personal property in Johnson County, Iowa, and is a taxpayer of
381 the United States, the State of Iowa, Johnson County and the City of Iowa City, and has been assessed and has paid as taxes substantial sums to said governments and governmental units.

Plaintiff is the owner of a combined steam and hydroelectric generating plant in Coralville in Johnson, County, Iowa, distant about two miles of Iowa City and of a manufactured gas plant in Iowa City and of both electricity and gas distribution systems in Iowa City and adjacent territory and is the only public utility now serving or equipped to serve either gas or electricity to the inhabitants of Iowa City.

Under contract with the City of Iowa City the engineering firm of Lucas & Luick of Chicago, Illinois, appraised and made an analysis of the operations for the year 1934 of the electric and gas properties of the plaintiff and in June, 1935, made a report to said City of such operations and of the reproduction cost new and the reproduction cost

new less depreciation of each of said properties as of January 1, 1933.

Thomas J. Lucas of said firm would qualify as an expert witness and if called would testify that such analysis and appraisal was made by him and that in his opinion the value of the plaintiff's electric plant and distribution systems above referred to as of said date and on the basis of reproduction cost less depreciation was $1,378,393.00, and the value of its gas plant and distribution system at said
382 time and on said basis was $674,237.00; that the gross revenue of the electric departments for the year 1934 was $311,158.13, its operating expenses for the electric department for the year 1934 were $212,718.52 and the operating income for said department for said year was $98,439.61 and the rate of return for said year on the valuation to which said witness would testify as above set forth was 6.77%; that in his opinion the company's electric plant and distribution system has been well maintained and efficiently and economically operated; that in his opinion if the Iowa City Light and Power Company were to be prevented from operating both the gas and electric departments as units of a combined system, the elimination of the electric department would substantially increase the operating expenses of the gas department.

Since January 13, 1934, plaintiff has continued its use of the streets of Iowa City and the service, distribution and sale of electrical energy to said City and its inhabitants without other franchise, but no notice has been given the plaintiff to cease such service or to remove its property and no action has been taken by the City Council to terminate plaintiff's service or its occupancy or use of the streets.

Plaintiff has protested to the City officials and the City Council against said municipal electric light and power plant and the City intends to proceed despite said protests and no further protests to the Council will prevent such action.

Wayne G. Cook, a member of the firm of Lane &
383 Waterman, and one of the counsel for plaintiff in these proceedings, a duly qualified and practicing attorney, formerly professor of law at the State University of Iowa, at Iowa City, and familiar with municipal records,

if called would testify that he is thoroughly familiar with the manner in which the records of the City Council of Iowa City were kept; that he has personally made an examination of all of the records of the proceedings of the City Council of Iowa City, Iowa, covering the period subsequent to October 1, 1932, and prior to April 17, 1934, and that there is no record in any such proceedings of any action by the City Council relative to the question of establishing municipally owned electric light and power plant prior to September 1, 1933.

If the City of Iowa City, Iowa, is permitted to
384 construct a municipal electric light and power plant and distribution system, it proposes forthwith upon completion of such construction to cause plaintiff to discontinue entirely the distribution of electric energy within the limits of said City and to remove from the streets, alleys and public places in said City all poles, wires and other equipment for the distribution of electric energy.

By consent of defendants and without prejudice to the right of plaintiff to have such issues determined in any appropriate proceeding, plaintiff withdrew from the issues made by the pleadings herein those issues relating to the alleged invalidity and illegality under the laws of the State of Iowa, of the establishment of a municipal electric light and power plant and distribution system in the City of Iowa City, and the issuance of revenue bonds, such issues being now subject to adjudication in an action pending in the District Court of the State of Iowa in and for Johnson County.

Exhibits Identified and Received in Evidence

By the stipulation, plaintiff's Ex. 35, exhibits marked for identification plaintiff's Ex. 36 to 57, inclusive, (including plaintiff's Ex. 49-A) were identified and their authenticity and competency, but not their relevancy, agreed to. The exhibits offered and received in evidence, either without objection or where objection of defendants was overruled, were as follows:

Plaintiff's Ex. 36—Franchise Ordinance of the City Council of Iowa City, Iowa, dated January 13, 1909, granting permission to Plaintiff's predecessor, Iowa City Electric Light Company, to furnish electric light and power to

the City of Iowa City and the inhabitants thereof, for a term of 25 years, which it was stipulated had been validly assigned to plaintiff, Iowa City Light & Power Company in 1912, and under which said plaintiff has occupied the streets of Iowa City and served electricity to the City and inhabitants from 1912 to the expiration of said franchise on January 13, 1934.

Plaintiff's Ex. 37—Ordinance of the City Council of Iowa City, dated June 18, 1934, fixing electric rates to be charged by plaintiff in the City of Iowa City. It was stipulated that those rates are the ones under which plaintiff is now operating and that said Ordinance is still in full force and effect.

Plaintiff's Ex. 38—Resolution of City Council
385 adopted February 2, 1934, requiring Iowa City Light and Power Company to report its business for 1933.

Plaintiff's Exs. 39, 40 and 41—Resolutions of the City Council, after expiration of plaintiff's franchise, directing additional service and the installation of street lights.

Plaintiff's Ex. 42—Contract of December 6, 1935, between plaintiff and the City of Iowa City, under which plaintiff agrees to furnish electric power to the City for the operation of a municipal sewage disposal plant. It was stipulated that this contract is still in effect.

Plaintiff's Ex. 43—Franchise Ordinance of the Town Council of Coralville, Iowa, dated February 14, 1934, granting plaintiff a franchise to furnish electricity to the town and its inhabitants for a period of 25 years.

Plaintiff's Ex. 44—Franchise Ordinance of the Town Council of University Heights, Iowa, dated April 11, 1936, granting plaintiff a franchise to furnish electricity to the town of University Heights and its inhabitants for a period of 15 years.

Plaintiff's Ex. 46—Resolution of the City Council of Iowa City, dated January 5, 1934, authorizing and directing the Mayor and City Clerk to file an application with the Federal Emergency Administration of Public Works for a loan and grant for the construction of a municipal light and power system and for acquiring or constructing a distribution system for electricity in Iowa City.

Plaintiff's Ex. 47—Abstract of election held April 17, 1934, to determine whether or not the City of Iowa City

should establish a municipally owned electric light and power plant and distribution system, with canvass of votes showing that project carried by a vote of 2959 to 2804—a majority of 155.

Plaintiff's Ex. 48—Minutes of Meeting of City Council of Iowa City, dated May 4, 1934, tabling an ordinance relating to the establishment of a municipally owned electric light and power plant and distribution system.

Plaintiff's Ex. 49—Resolution of City Council of Iowa City, dated October 5, 1934, to return unexecuted an agreement proffered by PWA, providing for a loan and grant in the amount of $917,000.00, for the construction of a municipally owned electric light and power plant and distribution system.

Plaintiff's Ex. 50—Ordinance of the City Council of Iowa City, dated April 5, 1935, establishing a municipally owned electric light and power plant and distribution system.

Plaintiff's Ex. 51—Resolution of City Council of Iowa City, dated April 5, 1935, resolving that the application of Iowa City for a grant and loan of $917,000.00 from PWA, for the construction of a municipally owned electric light and power plant and distribution system, be renewed and reinstated with PWA.

Plaintiff's Ex. 52—Resolution of City Council of
386 Iowa City, dated June 17, 1935, resolving that the application of Iowa City for a loan and grant of $917,000.00 from PWA, for the purpose of constructing a municipally owned electric light and power plant and distribution system, be revised so as to request a grant only of 45% of said sum.

Plaintiff's Ex. 49-A—Resolution of City Council of Iowa City, dated March 6, 1936, accepting final offer of the United States, made January 8, 1936, copy of which offer is annexed to Defendant's Answer as Exhibit "A" thereto.

Plaintiff's Ex. 53—Original Application of City of Iowa City, for PWA Loan and Grant, dated January 5, 1934, copy of which is annexed to plaintiff's bill as Exhibit "A" thereto.

Plaintiff's Ex. 57—Resolution of City Council of Iowa City, directing plaintiff to submit to the City a sales price

for its electric distribution system in Iowa City and its immediate vicinity.

Plaintiff's Ex. 56 was offered for the purpose of
387 establishing that the plant which the City proposes to erect and for which it has called for bids is a steam plant and not a hydro-electric plant, and it was thereupon agreed and stipulated by counsel that that is the type of plant which the City proposes to erect, whereupon the offer of the exhibit was withdrawn.

Proceedings in Connection with the Offer of Certain of the Exhibits Above Referred To.

Following the introduction of plaintiff's Ex. 49 which was headed "Resolution to Return Light Plant Loan and Grant Agreements" there was read into the record from said exhibit the following. Paragraph 2 of the preamble of the resolution is as follows:

"It is not contended in the City's application that better electric service would be furnished by a municipally owned plant—in fact, the present service is generally recognized to be good and adequate.

"3. Since the application for a loan and grant was made electric rates in Iowa City have been greatly reduced by the voluntary action of the privately owned company and also by ordinance unanimously passed by this Council, and we believe that lower rates for electricity in Iowa City in the long run can be had from the plant that is now established than from a municipal plant."

Said Exhibit also contained the following:

"1. The contract requires a warranty on the part of the city before any money can be obtained, that no litigation or other proceedings are now pending or threatened, while litigation is threatened and numerous legal questions involving the validity of the election and the right of the city to construct the municipal plant have been raised and will undoubtedly be litigated. The contract also contains many burdensome qualifications which under present conditions are impracticable, if not impossible, to comply with."

Immediately following the introduction of plaintiff's Ex. 53 (the application of the City for PWA loan and grant) the following occurred. Mr. Cook: The document being

too voluminous to read in full, even by way of argument, I request the privilege of reading two or three short paragraphs which I want to bring to the Court's attention. I am reading the third paragraph on page 5 of the exhibit, and quoting:

388

"The service given by the Iowa City Light & Power Company has been excellent. The quality of service being due to adequate equipment, high standards of construction and competent operation. To produce the same quality of service with a municipally owned plant can be accomplished only by the adoption of similar standards. This report proposes that the city of Iowa City will operate its light and power department as efficiently as though operated by a private corporation. It is further proposed that the use of electricity will be promoted as vigorously with municipal as well as with private ownership, and that the same high standards of construction and operation will be maintained as now exist on the property of the Iowa City Light & Power Company."

Reading from page 9, the first page following a tabulation of figures:

"Overhead Distribution System

"The distribution system of the Iowa City Light & Power Company is adequate to provide service to all electric consumers of the city. The system has been maintained in good condition and very little deferred maintenance is in evidence. It is operated at 2,300 volts, two phase, 60 cycle.

"The present street-lighting system in the residential sections of the city is owned by the company and under contract with the city have been furnishing all maintenance and renewals of lamps."

Referring to the last paragraph on page 12, under the subheading "(k) Number of Men Employed" it reads as follows:

"It is estimated that this project will employ approximately the equivalent labor of 60 men for 12 months."

From page 18, near the bottom of the page under the heading "Results of Recent Rate Reductions":

389

"The result of the rate reduction recently offered to the City, effective January 1, 1934, will be to fur-

ther reduce the total revenue from electric sales. The Company has presented certain figures showing that the annual reduction in revenue with the new schedule of rates will be approximately $49,000. as based on the revenue for 1932."

Proceedings in Connection With Exhibits Excluded From Evidence.

Plaintiff's offered in evidence Exhibit 45, the authenticity of which was stipulated, being a report of the Lights Committee of the City Council of Iowa City, submitted to the Council, September 1, 1933, in which it was recommended that the City of Iowa City acquire and operate its own electric distribution system. Counsel for defendants objected upon the ground that it was irrelevant to any of the issues in the case. Counsel for plaintiff thereupon represented to the Court that plaintiffs proposed to show by other evidence that this was the first step taken by the City Council of Iowa City looking to the establishment of a municipally owned electric light and power plant and distribution system; that it occurred after the passage of the National Industrial Recovery Act; that it referred to the Acts of the Public Works Administration as an inducing cause; that it showed a causal connection between the acts of defendants and the damage occurring to plaintiff; and plaintiffs offered to prove by the introduction of this exhibit the report that—

"Public ownership of utilities is favored by President Roosevelt. The Public Works Administration will lend money to cities to build their own plants. Large Federal power projects are being undertaken in the four corners of our country, and the Federal Power Commission is dominated by public ownership influences."

The foregoing was quoted from the Exhibit. The Court declined to permit the introduction in evidence of Exhibit 45, or to permit the offer of proof, to which rulings plaintiff duly noted an exception.

Plaintiffs offered in evidence Exhibits 54 and 55, the authenticity of which was stipulated, the documents being identical in character, and being Resistances filed by plaintiff with the Public Works Administration, the first having

been to the original application of the City of Iowa City to PWA for a loan and grant, and the second having been to the reinstatement of the application of Iowa City for a loan and grant. They were lengthy documents con-
390 taining a statement of the facts with respect to electric service in Iowa City and the reasons advanced by plaintiff why the applicatio of the City for funds for the construction of a municipally owned electric light and power plant and distribution system should not be granted. They reviewed the situation existing in Iowa City and the things which had occurred there in connection with the project. Counsel for plaintiff represented to the Court that they were offered not for the purpose of proving the truth of the facts therein stated, but to show an exhaustion of administrative remedies by plaintiff, and to show the information before the Public Works Administration when it acted upon the City's application, and made the offers referred to in the pleadings and the evidence; that they were relevant upon the issue of whether the Administrator had exceeded his authority under the Act by selecting projects which did not come within its terms; that without the evidence which the Administrator had before him at the time he acted, plaintiff's argument must be limited to the Findings of the Administrator; that plaintiffs wish to show that this project did not qualify under the terms of the Act; that the offered exhibits bore upon the eligibility of this project under the terms of the Act and upon the question of whether any discretion reposed in the Administrator with respect to such projects was properly exercised.

Upon objection by counsel for defendants, the Court ruled that said Exhibits were inadmissable, to which ruling counsel for plaintiffs duly noted an exception.

R. R. MacDonald, recalled as a witness on behalf
391 of plaintiffs testified as follows:

The document marked plaintiff's exhibit 58, dated June 20, 1935, addressed to The Honorable Mayor and City Council of Iowa City, and signed by Iowa City Light and Power Company, by its vice president, is a true copy of a letter or communication sent by the plaintiff company to the city council on or about that date pursuant to the request in the resolution plaintiff's exhibit 57.

The document marked plaintiff's exhibit 59, dated Iowa City, Iowa, June 27, 1935, addressed to Joseph F. Porter, Iowa City, Iowa, and signed by J. A. Swisher, George Bouck, H. F. Willenbrock, T. A. Foote, W. F. Boiler, J. Van der Zee, Earl W. Kurtz and Thomas E. Martin, is a true copy of the reply received from those gentlement on or about the date it bears and subsequent to our letter just identified as plaintiff's exhibit 58. The signers of that letter were at that time and are now the Mayor and members of the City Council of the City of Iowa City.

392 Exhibit number 60 dated July 5, 1935, addressed to the Honorable Mayor and City Council of the City of Iowa City, Iowa, is a true copy of a letter sent by the plaintiff company to the city, its mayor and council on or about that date in response to the letter plaintiff's exhibit 59.

It was thereupon stipulated that the defendants waived any objection to these exhibits upon the ground that they were copies rather than originals.

Plaintiffs offered the three foregoing exhibits in evidence, and they were objected to upon the ground that they were not relevant to any of the issues in the case. Counsel for plaintiffs represented to the Court that said exhibits would show that there were negotiations between the Iowa City Light & Power Company and the City of Iowa City with reference to an offer to sell to the City the electric plant and distribution system, and an offer to reduce the rates at least as low as that named in the application filed with the Public Works Administration. Exhibit 58 consisted of a letter from the Company to the Mayor and City Council of Iowa City, dated June 20, 1935, in which the Company offered to sell, free and clear of all incumbrances, for the sum of $1,125,000.00, or in the alternative, if the City would abandon its plan to build a municipal plant, to put into effect a specified schedule of electric rates. Exhibit 59 was a letter, signed by the Mayor and City Council, in reply to Exhibit 58, in which the City refused the offer of sale because it exceeded the total amount which the voters had authorized to be expended and did not include materials and supplies, office and shop equipment and furniture essential to a complete system, and refused the

proposal to abandon the municipal plant because they contended that the rate agreement would be unenforceable. Exhibit 60 is a letter from the company to the Mayor and City Council of Iowa City, in reply to their letter, Exhibit 59. The Company there offered the City a five year option to purchase the electric plant and distribution sys-
392-a tem for the sum of $900,000.00, to be exerciseable upon the Company's failure to abide by the rate schedule proposed in Exhibit 58.

The Court ruled that these exhibits were inadmissible upon the ground that they were immaterial, and counsel for plaintiffs duly noted an exception.

P. F. Hopkins, called as a witness on behalf of the
393 plaintiffs and being duly sworn testified as follows:

I am State Director for PWA for the State of Iowa. I was originally State Engineer. The State Office of PWA for Iowa was opened on August 15, 1933. I have been in charge of that office continuously since it was opened. As originally set up the State Office consisted of a State Advisory Board of three members appointed by the President and a State Engineer appointed by the Administrator of PWA who would be the Executive Officer of the Advisory Board and would be in complete charge of administrative details of the office. Applications would be filed with the State Engineer and submitted to the Advisory Board at their convenience. There was no difference in any of the applications, except that certain priorities were set up by the Public Works Administration as to the desirability of the projects. Examination of the projects were usually made in advance of the submission of the application to the Advisory Board. Action of the State Advisory Board was always obtained before the application and recommendation were sent to Washington.

I recall the application of the City of Iowa City filed about January 9, 1934. I investigated it. I made no separate investigation of the facts but based by recommendation upon the information contained in the application and my own knowledge of those matters. The application was referred to the State Advisory Board but it did not make any report in connection with the project. I made a report on this project which was forwarded to the Administrator in Washington.

The witness was thereupon asked if his report was on a form and if it consisted of one document or more than one.

The question was objected to as irrelevant and the
394 Court sustained the objection. Counsel for plaintiff noted an exception and represented to the Court that he was attempting to ascertain just what form the report took in order that he might know what to demand as a result of a subpoena which had been issued. He further represented that in exchange for the agreement of Government counsel to produce the witness and his files, the plaintiff had waived its right to take his deposition. That he had not been permitted to examine the witnesses files; that he must make his record with respect to those files by this witness and that that was the purpose of his present examination. Plaintiff duly noted an exception to the Court's ruling.

The original application of Iowa City was approved but the City returned the loan and grant agreement forwarded to it by PWA. This was the equivalent of withdrawing its application. Later another City Council asked for the reinstatement of the application. This was by way of resolution and no new application was filed. No additional information relative to the nature of the project or the facts upon which it was based was submitted. Neither was such information submitted when the application was modified by a resolution of the City Council to apply for a grant only. Specifications have been filed for certain equipment and bids taken on those items. We do not require detailed plans and specifications to be filed with the original application. We require only such information as may be necessary for us to make a reasonable check of the request.

At the time this application was examined we had only
395 the Engineering Division. About a year ago a legal and a financial section were set up in the State Office. I think the finance and legal sections existed at the time of the request to reinstate the application.

Thereupon the following occurred:

Q. Was the application referred to those divisions in your office at any time? A. No, because all we received was a copy of the resolution asking reinstatement, which was forwarded to the central office in Washington for consid-

eration. Inasmuch as the application had passed through the central office completely once before, there was no reason to re-examine it in the State Office.

By Mr. Cook.

Q. Was any investigation made of the facts in connection with the Iowa City project by your field office there, other than the one which you have testified to, that you made based upon the application of the city when the application was originally filed?

Mr. Holtzoff. If your Honor please, I do not think it is relevant or material as to what investigations were made.

The Court. He has testified that there was an original application and then it was afterwards withdrawn. Now, that application was afterwards reinstated, and the purport of the question, as I understood it, is: Was any further investigation made when the application for reinstatement was made? I do not think it is important at all, but if the witness can answer it "yes" or "no" I do not care.

Mr. Holtzoff. I will withdraw the objection.

The witness. The answer is no.

By the Court.

Q. There was not anything further done? A. No, sir.

The Court. He said that in substance. Inasmuch as it had been gone over before, all he did was to forward it to Washington.

The Witness. There were no changes in conditions which would justify us making any further study of it.

It was thereupon stipulated by counsel that Mr.
396 Acheson's request for the production of the report of the Engineering, Legal and Financial Divisions with respect to this case, and the record made in connection therewith, should be applicable to this case.

Plaintiff thereupon requested the production of an intradepartmental communication on NEC Form 3 headed "Application for Allotment of Funds Under Emergency Relief Appropriation Act of 1935, Non-Federal Project" addressed to the National Emergency Counsel, Washington, D. C., and signed by or for the Federal Emergency Administrator of Public Works, probably by an Assistant,

and referring to the grant of $413,000.00. Counsel for defendant declined to produce the documents upon the grounds theretofore advanced as to the inadmissibility of intradepartmental communications, and on the ground of their irrelevancy. The Court sustained their position to which plaintiff noted an exception. Plaintiff's counsel thereupon represented to the Court that his reason in demanding the production of the documents was that it would show that the percentage of total cost that labor bore in this project was less than 25%, to be exact 19.7%; and further in the reasons given under the heading "Justification", the report stated:

"The proposed municipal system will be able to
397 reduce the rates to all classes of customers and return substantial profits to the municipality. It will also provide permanent employment for a number of men."

The witness was thereupon asked whether in view of the situation existing in Iowa City, the establishment of the municipal plant would not throw out of permanent employment substantially the same number of people as would be employed if the new plant were constructed. This question was objected to as irrelevant. The Court sustained the objection to which the plaintiff noted an exception.

Counsel for plaintiff thereupon requested counsel for defendant to produce the report and recommendation made by the witness P. F. Hopkins as State Engineer in connection with the Iowa City project. Counsel for defendant declined on grounds heretofore stated and the Court sustained their position. Plaintiff noted an exception to the ruling.

Counsel for plaintiff thereupon requested the production of the report made by R. V. L. Wright on the remonstrance of the plaintiff in conection with the application to reinstate the original application for loan and grant. Counsel for defendant declined upon the same grounds, the Court sustained them in their position, to which plaintiff duly noted an exception.

Plaintiff thereupon asked for the production of any other memoranda or reports by the Field Office of Iowa and the
Witness Hopkins made to the Administrator or the
398 Department in connection with the Iowa City proj-

ect and before its final approval and the allotment of funds. This request was declined upon the same grounds. The Court sustained the defendant's position and the plaintiff duly noted an exception.

On *cross examination* the witness testified as follows:

Allotment of funds have been made for something over 300 PWA projects in the State of Iowa. Of these five were for municipal electric light projects.

Whereupon **Dan H. Wheeler** was called as a wit-
399 ness on behalf of the plaintiffs and, being first duly sworn, testified as follows:

Direct examination.

At the present time I am Associate Director of the Projects Division. I have been with the Public Works Administration since the 15th of July, 1933. The Projects Division is one of the divisions of the Public Works Administration. They are a coordinating division.

I am more or less familiar with the procedure through which a non-Federal application goes from its original making to the final approval. A non-Federal application broadly means an application by a State or political subdivision of a state for a loan or a loan and grant—applications from some parties other than agents of the Federal Government.

In 1933 and 1934 Colonel Waite was Deputy Administrator. The Deputy Administrator was the assistant to the Administrator. Mr. Fleming was at first Executive Officer, and later Deputy Administrator. He succeeded Colonel Waite as Deputy Administrator. The Executive Officer, generally speaking, was the administrative officer of the Administration. He handles matters of personnel and so forth. The organization of PWA which dealt with non-Federal projects was first the field organization. That consisted of a Public Works official designated as a State Engineer and staff and a—I cannot think of the exact name of the board—a regional board, the State Advisory Board. In Washington we have Examining divisions, the Legal Division, the Finance Division and Engineering Division. Above them the Projects Divi- is a coordinating agency only. The applications were received in Washington by

the Projects Division and preliminary review was made to determine if they were complete, and then a copy of each application was sent to each of the Examining divisions.

There was a technical Board of Review to which
400 some special cases were referred; not all cases. I do not know whether the Electric Board of Review took the place of the Technical Board of Review, so far as electric projects were concerned. I do not know what the functions of that board were. I am more or less familiar with the tests for eligibility of projects set forth on page 7 of Circular No. 1, Plaintiffs' Exhibit 119. When an application was filed and sent on to Washington, all of the information of a technical nature was examined by the Engineering Division. I think they considered the economic desirability in some instances. By "economic desirability" I mean the need for the project. The unemployment in the locality which applies for the loan is stated in the application, I think. I do not know whether there is any check made on that. I do not know of my own knowledge whether the Engineering Division makes any examination as to the earnings or expenses in the financial operation of the plant, or where that investigation is made. When the Engineering Division finishes its examination of the technical aspects of the problem and its economic desirability and the need for it, and anything else which it examines, it writes a report and recommendation. In the report it states the facts as it believes them to be. It sends the original of it to the Projects Division and distributes copies to the various other units of the administration.

The Finance Division, when an application comes to it, examines the application from the financial aspects, and likewise submits a report and recommendation. I do not know of my own knowledge what investigation the Finance Division makes when the project is one which is expected to be self-liquidating. The Finance Division report or finding with its conclusion goes to the Projects Division. The Legal Division does what its name implies—looks into the legal aspects of the matter, and also sends a report
401 on to the Projects Division. The Projects Division gathers all these reports and recommendations into one folder and they have a summary sheet which states the

essentials of the application, which is then signed by a representative of each of the examining divisions. Then it gathers into a file those which have been approved by the examining divisions. It keeps a list of the approved projects for the purpose of allotment of funds. It sets aside these projects that have been disapproved for such further action as may be necessary, reconsideration by the Examining Division which has made an adverse recommendation, for reference to the Technical Board of Review and such other examinations as may be made. It makes a list of those projects on which approving recommendations have been made by the various examining divisions and presents that list, through the director of the division, to the Deputy Administrator and the Administrator. It sends simply a list of projects with the statement that they have been approved. I do not know what the Administrator does with that list. These projects were presented to the Special Board for Public Works by the Administrator under the original appropriation. Each project on which the Special Board or the Administrator recommended allotment was presented to the President for his approval. The Administrator has a list showing various projects with the statement that they have been approved by the examining divisions, and he brings that before the Special Board for Public Works. The Special Board adopts a resolution recommending allotment to this project. The action which the Administrator takes is to sign the book in which the resolutions adopted by the Special Board for Public works are included. The book with a list of the projects in it goes to the President.

By the Court:

Q. Have you ever seen the book? I assume the President signs something in the book. Have you ever seen that book? A. Yes, sir.

402 Q. With the President's name in it? A. With his initials in it; yes, sir.

Q. Is there anything besides the initials? A. "O. K."

The Court. I suppose we would be justified in assuming that that means that he approves it. I do not want to ask questions that are objectionable to anybody, but I would

like to know this, and it seems to me it ought to be proved in some way.

By the Court:

Q. The President puts his initials in the book with the letters "O. K." Is that at the end, or where? A. On the last sheet of the book. I cannot say that that is the case in all cases, but those books that I have seen have his "O. K." and his initials on the last sheet of the book.

Q. Indicating approval of all the projects in the book? A. It may be one project or it may be many.

Q. But the President's "O. K.", with his initials, is approval of all the projects in that book? A. If he approves them all; yes, sir.

When a disapproving recommendation is received from one of the Examining Divisions, unless additional information is elicited which would permit the Examining Division to reverse its recommendation, the report and recommendation of that division come to the Projects Division, and when the other reports are submitted the facts of the case are written up on a cap sheet and it is presented to the Assistant Administrator and the Administrator for disapproval. For their action, I should have said.

Under the Emergency Relief Act of 1935, the Special Board for Public Works does not pass on cases. The lists are made up in much the same way as they were before and
are presented to the Assistant Administrator and the
403 Administrator for action, and those to which they recommend allotments are again put into the President's book and transmitted to the President for his action. Information relative to them was at one time transmitted to the National Emergency Council.

Cross Examination

The findings made by these various divisions were merely recommendations. And the same is true of the Special Board for Public Works, a I understand it. I do do not know what the Administrator or the President considered in each particular case in reaching a conclusion, or with whom they consulted. So far as I know they may have

consulted all the documents in the files or had numerous discussions and oral or written recommendations. Under either statute, after there has been approval, the so-called allotment is a prelude to the making of a contract with the applicant. The contract is made on behalf of the United States, through the Administrator or someone designated by him. Before any moneys are paid out, of any kind, a contract is executed between the applicant and the United States in the manner I have indicated. I do not know of my own knowledge the scope of the duties of the Deputy Administrator and the Assistant Administrator.

Upon recross examination the following questions and answers were made:

Recross Examination

By Mr. Frank:

Q. Do you know of your own knowledge the data upon which the President relies in making his approvals? A. No, sir.

Q. So far as you know, he may have had numerous conversations with numerous persons? A. So far as I know.

Q. He may have had before him various kinds of data, and you do not know of your own knowledge? A. No.

404 Q. You are not, then, testifying as to what the President relied upon in giving that approval? A. No, sir. I do not know.

Mr. Frank. That is all.

Upon further recross examination the witness stated that so far as he knew the Bureau of Investigations under Mr. Glavis might investigate these matters; that the Administrator had not confided to the witness all his sources of information.

Whereupon **Benjamin W. Thoron** was called as a

405 witness on behalf of the plaintiffs and, being first duly sworn, testified as follows:

Direct Examination.

I am finance Director of the Public Works Administration. I have held that position since approximately the first of December, 1935, prior to which I was Assistant Finance Director for about a year. Prior to that I was a

Finance Examiner from August, 1933. The Finance Division obtains the facts upon which it makes its recommendations or conclusions regarding the self-liquidating character of a proposed project primarily from the data submitted in the application, which is sworn to by authorized officials of the applicant under, I believe, a penalty clause. That information is checked against any available published source; and in cases where there appear to be discrepancies or gaps, additional information is sought ordinarily by correspondence.

The reports of Engineering Division indicate that it investigates the expected future earnings and expenses of a proposed electric plant. Their reports are submitted to us for our information and are considered in connection with the data submitted in the application. That is not peculiar to electric power plant applications. The same is the case in all applications for loans for projects which are considered to be revenue producing. I think that is necessary in any new system, any new business, to rely upon estimates of future earnings and future expenses. It is all one can rely on. I think it is not strange or unusual to predict earnings for a period in the future. I think very few of our corporations would have been financed without that.

The Finance Division does not make any inquiry to determine whether or not an applicant can go forward with its project by getting money from private sources before it makes a recommendation. I think I should qualify that a little bit. One element that is considered in pass-
406 ing upon the credit and the probability of repayment of a loan is the market appraisal of the outstanding securities of a municipality. But that is only one element in considering the whole problem. The Finance Division would recommend a loan where it was perfectly apparent that the applicant could get the money from private sources. The recommendation of approval by the Finance Division has nothing to do with whether the applicant will actually, if it goes ahead to construct the project, avail itself of the allotment for the loan. It may, subsequent to allotment, sell its securities on more favorable terms to others; but the probability of its being able to subsequently

sell its securities on more favorable terms—would not be considered. It is not the function of the Finance Division to determine whether or not the Public Works money shall be loaned to someone instead of borrowing from private sources. So far as I know, no other division or agency make inquiries as to whether the applicant can borrow from other sources.

Cross Examination.

The function of the Finance Division is purely advisory. We have no power to take action. What the other divisions do or do not do I would only know from hearsay. What the Administrator relies upon in giving an approval or in subsequently executing a contract I would not know, nor would I know what the President relied on.

I have had before me applications for loans secured by general revenue bonds of cities payable solely out of taxes, and I have also had applications which involved solely revenue bonds payable solely from the revenues of the system to be constructed or improved with the proceeds of the loan and grant, and with no right on the part of the holder of the bonds to in any way call upon the city to exercise its taxing power to pay principal earnings. It is quite possible that a city's revenue bonds might be good se-
407 curity although the city's general obligation bonds might not.

Redirect Examination.

In passing upon the self-liquidating character of the loan where there is to be competition or there may be competition between a municipal project and a private project, the Finance Division considers the question of competition as it will affect the revenues. Whereupon the following occurred:

Mr. Acheson—

If it is possible or considered wise that the competition should be eliminated, it makes that recommendation? Counsel for the defendants objected.

The Court. I do not think it is admissible on any theory. What relevancy has it to any issue involved here?

Mr. Acheson. I except to your Honor's ruling.

Whereupon **T. O. Kennedy** was called as a witness
4088 on behalf of the Plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination.

I am general manager of the Ohio Public Service Company, Cleveland, Ohio. My company did sell power wholesale to the municipal distribution system operated by the village of Hiram, Ohio in November, 1934. The village of Hiram made an application to the Federal Emergency Administration of Public Works for a loan and grant to build a generating system of their own some time prior to November, 1934. On November 5, 1934, I wrote a letter to the Honorable Harold L. Ickes, Administrator, Public Works Administration, Washington, D. C., in relation to the matter of the application of the village of Hiram for this loan and grant. I received a reply to my letter of November 5 addressed to the Administrator. I identify a letter dated November 26, 1934, addressed to me as the reply which I received.

Whereupon Letter Nov. 26, 1934, Hunt to Kennedy, heretofore marked Plaintiffs' Exhibit No. 125 for identification, was received in evidence.

Plaintiffs Exhibit 125.

Your letter of November 5 addressed to the Administrator, regarding the Hiram, Ohio, electric project, No. 3412, has been referred to me for reply.

You request that the matter be reopened and that the engineering department of the Public Works Administration determine what in its opinion would be the cost to the Village of generating its own power, and you state that you have no doubt that you could accept that opinion as a basis upon which to fix the rate for power to be purchased from your company.

If a utility company wishes to offer reduced rates
4089 to a municipality which has applied for a loan to finance a municipal electric project, the Administrator will consider its effect on the social desirability of the project, but it is not the practice of the Administrator to suggest to a company the exact rates which it would have

to put into effect in order to eliminate the desirability of the project.

Allotment has already been made for the Hiram project and a loan and grant agreement has been executed. The necessary steps preliminary to the purchase of the bonds offered by the City are now being taken. However, if, prior to the purchase of the bonds, your Company offers a new rate to the Village of Hiram and sends a copy of the offer to this Board, we will give the matter consideration.

Very truly yours,

HENRY T. HUNT, *Chairman,*
For the Administrator.

The witness resumed his testimony as follows:

My company operates in the City of Sandusky, Ohio. It had an electric distributing and generating system there in August, 1934. Prior to August 14, 1934, the city of Sandusky, Ohio, applied for a loan and grant of funds from the Federal Emergency Administration of Public Works to build a municipal electric light plant. On August 14, 1934, I wrote a letter to the Honorable Harold L. Ickes, Administrator, Public Works Administration, Washington, D. C., relative to the application of the city of Sandusky. I received a reply, and this is it. (Whereupon Letter Aug. 27, 1934, Hunt to Kennedy, was marked Plaintiffs' Exhibit No. 127 for identification.) Subsequent to August, 1934, I received two other letters from the Federal Emergency Administration of Public Works on the same subject matter, one dated September 18, 1934, and the other
410 dated October 2, 1934. These are the letters.

(Whereupon letter Sept. 18, 1934, Hunt to Kennedy, was marked Plaintiffs' Exhibit No. 128 for identification, and Letter Oct. 2, 1934, Hunt to Kennedy, was marked Plaintiffs' Exhibit No. 129 for identification.)

After the receipt of these two letters which have been marked for identification Plaintiffs' Exhibits Nos. 128 and 129, I was given by the City Manager of Sandusky, Ohio, a copy of a letter from the Federal Emergency Administration of Public Works to the City Manager dated December 5, 1934, relating to the same subject matter. This is a copy

of the letter. Whereupon copy of letter, Dec. 5, 1934, Hunt to Robt. L. J. Wager, City Manager, Sandusky, was marked Plaintiffs' Exhibit No. 130 for identification.

Mr. Acheson. Your Honor, I offer in evidence Plaintiffs' Exhibits for identification Nos. 127, 128, 129 and 130.

Mr. Holtzoff. I object to the various letters from Mr. Hunt on the ground that they relate to a subject not in litigation, and also on the ground of lack of showing of authority.

The Court. What I asked you was with respect to the letter introduced in evidence just before these.

Mr. Holtzoff. That went in subject to a motion to strike. That has been admitted.

The Court. This is in the same category, is it not? I do not think there is anything in the point about Hunt's authority. The original was directed to the Administrator and the reply recites that. I do not think there is anything in that.

Mr. Holtzoff. But this correspondence relates to a different project, and therefore I submit it is beyond the scope of the issues of this litigation. These letters from Mr. Hunt relate to the Sandusky project.

The Court. How does it differ from the one that was admitted just a minute ago?

Mr. Holtzoff. We did not object to that. It was
411 a letter addressed to the Administrator, and, of course, we did not know what it was going to evoke. I do not think that thereby we waived any rights as to these replies. The other was just an inquiry addressed by the company to Mr. Ickes.

The Court. My disposition is to sustain the objection. I do not quite see how it is different from the other one, however.

Mr. Acheson. It is not in any respect different from the other one. As I say, your Honor, if I may be permitted—

The Court. I am not going to receive evidence on every project in the United States.

Whereupon counsel argued the point.

The Court. I am going to sustain the objection, not on the ground that the papers are copies, but because they are immaterial.

Mr. Acheson. I should like to note an exception to your Honor's ruling.

The Court. Certainly.

The documents excluded from evidence were as follows:

Plaintiffs' Exhibit 127—For Identification

Washington, D. C.
August 27, 1934.

Mr. T. O. Kennedy,
Vice President and General Manager,
The Ohio Public Service Company,
Hanna Building,
Cleveland, Ohio

Dear Sir:

In reply to your letter of August 14 regarding the Sandusky, Ohio electric power project, Docket No. 7004:

You state that the offer by the Ohio Public Service Company to the City of Sandusky of a rate contract embodying exactly the rates proposed by the City for its municipal plant, is still open. It is noted also that in May,
412 1933, the Company submitted for approval by the City Commission a minimum rate of 5¢ a day including 10 kwh per month, with a rate of 3¢ per kwh for the next 290 kwh and of 2¢ per kwh for anything in excess of 300 kwh per month.

After careful study of the project, the Electric Power Board of Review inclines to the opinion that if the offer of rates identical with the proposed municipal rates is supplemented by an optional rate based upon the May, 1933, offer, said optional rate to be available to all consumers using more than 40 kwh per month, the project will be without social value and the application should be denied.

Would you be good enough to let me know whether the Company is prepared to make such an offer to the City, and to send me copies of any communications with the City relevant thereto.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

Plaintiffs' Exhibit 128—For Identification

Washington, D. C.
September 18, 1934

Mr. T. O. Kennedy,
Vice President and General Manager,
The Ohio Public Service Company,
Hanna Building,
Cleveland, Ohio.

Dear Mr. Kennedy:

In reply to your letter of September 4 with regard to the Sandusky, Ohio, electric power project, Docket No. 7004:

I attach a copy of letter I have written the City Manager on this subject. I should be glad to be informed of the progress of events from your standpoint.

One of the difficulties in this and like situations is to convince the municipality that the reduction of rates is not merely a temporary expedient whereby the opportunity to finance the municipal project through this Administration may be lost and with the intention on the part of the competing utility to raise its rates when that opportunity no longer exists. In this connection a brief from your counsel showing what action by the Public Service Commission of Ohio is necessary to enable your Company to increase its rates would be helpful. I think that such a brief should also be submitted to the city authorities of Sandusky. My own view is that your offer is an admission that the rates proposed would earn a fair return on your property used and useful in connection with the service to Sandusky consumers and that the acceptance of such rates will not only constitute a contract with the city but would amount to an estoppel in the absence of later changes in economic conditions which would justify the Commission in holding that the rates prescribed by the contract would no longer be sufficiently remunerative to enable the Company to render service to Sandusky and its other consumers. It would be highly desirable from our standpoint that the city authorities be convinced that the

413

acceptance of your offer and the withdrawal of their application here are in the interest of the city.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

(Enclosure in Exhibit 128)

September 17, 1934

Mr. Robert L. J. Wagar,
City Manager,
Sandusky, Ohio

Dear Mr. Wagar:

In reply to your letter of August 30 addressed to the Administrator with regard to Docket No. 7004, electric power project for Sandusky:

On July 30, 1934, the Ohio Public Service Company submitted to you and the members of the City Commission a schedule of domestic rates as follows:

414	10 kwh per month	$1.00
	Next 40 kwh per month	.05 per kwh
	Next 150 kwh per month	.03 per kwh
	Excess over 200 kwh per mo.	.02 per kwh

The rates proposed are the same as those proposed to be charged by the municipal plant except that the 2¢ step which while only effective for full service (electric range and hot water heating) for large dwellings is a lower rate than that effective from the proposed municipal plant.

There being no social benefit apparent which would warrant the duplication of the electric service facilities in Sandusky with rates from both systems the same, and as it is doubtful that a sufficient reduction could be made in the domestic rates by the proposed municipal plant and yet provide revenues sufficient to service expenses, interest and amortization, it is the opinion of this Board that the City should accept the Company's proposal and withdraw the application for a loan and grant. I assume that such an acceptance would constitute a contract between the City and the Company under which the said rates would be the

maximum to be charged for the said service unless and until the Public Service Commission of Ohio should set aside said rates as unreasonably low. Inasmuch as the Company itself proposed these rates I think it most improbable that the Commission would take such action in the absence of substantial change in economic conditions.

While the City offers general obligation bonds and such bonds are deemed reasonable security, it is nevertheless the duty of this Administration to consider relative social desirability. As the funds of PWA are insufficient to meet municipal demands it is necessary that projects having higher social desirability be preferred. Where competitive conditions exist and the competitor offers rates as advantageous to the consumers as the proposed municipal rates, social desirability is lacking.

In addition to the foregoing considerations it also
415 appears that the proposed plant is not designed to supply the entire demand. In general a loss of part of a load requires higher charges to the remainder. Hence it appears that if the municipal plant is financed such financing will have a tendency to defer reduction of rates to other consumers served by the Ohio Public Service Company. This consideration might be outweighed by benefits to the consumers served, but those benefits do not appear here.

For the reasons stated it is recommended that the City of Sandusky accept the proposal of the Ohio Public Service Company referred to and notify the Public Works Administration that it wishes to withdraw its application for a loan and grant.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

Plaintiffs' Exhibit 129—For Identification

Washington, D. C.
October 2, 1934.

Mr. T. O. Kennedy,
General Manager,
The Ohio Public Service Co.,
Hanna Building,
Cleveland, Ohio.

Dear Sir:

This will acknowledge your letter of September 28 enclosing brief from your attorney supporting the authority of a municipality to enter into a contract specifying maximum rates for electric service for a period not to exceed ten years. We will give the brief our careful attention.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

416 *Plaintiffs' Exhibit 130.—For Identification*

Washington, D. C.
December 5, 1934

Mr. Robert L. J. Wager,
City Manager
Sandusky, Ohio.

Dear Mr. Wager:

The Electric Power Board of Review has examined the supplement dated October 29, 1934, to the application of Sandusky for a loan and grant to finance construction of a municipal electric system, Docket No. 7004, and is inclined to give favorable consideration to the application on the basis of a generating plant and distribution system to cover the entire city and to serve all the existing consumers with the exception of the larger industrial and commercial consumers. It is believed that the disparity between the rates offered by the existing utility and the rates now proposed by the applicant will make the project socially desirable.

The cost of material and labor has increased since the

original application was filed. Before proceeding with its recommendation this Board would like to have a detailed estimate of construction costs based on present prices and wages for the project as above described. The amount of the loan requested should be changed in accordance with the change in estimated construction costs. It is believed that the total cost will not exceed $1,550,000.

A supplement to the application containing the changes suggested, should be received by this Board not later than January 15, 1935.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

417 There was no cross examination.

Whereupon the following colloquy took place:

Mr. Acheson. Your Honor, I have another witness who will produce exactly the same sort of testimony. I am somewhat at a loss to know whether—I do not want to weary your Honor. Your Honor has listened to a great deal of argument, and I am rather appalled by the breadth of the ruling which your Honor has just made, which seems to me to go almost to the heart of this case. It seems to me that the matter has been left in a situation which is not the correct situation at all. If your Honor would not be wearied by a further statement of it, I should like to make it. Otherwise I will just put this witness on and offer his testimony.

The Court. I think that would be the best way for you to do.

Whereupon **D. E. Byerley** was called as a witness on behalf of the Plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination.

I am D. E. Byerley, general manager, Citizens Light and Power Company at Adrian, Michigan. That company in August, 1934, operated in Tecumseh, Michigan. The city of Tecumseh, prior to August, 1934, applied for a loan and grant for a municipal power system. On August 13, 1934, I wrote to Colonel Waite, Deputy Administrator of

Public Works, with reference to the Tecumseh, Michigan application, and received a reply addressed to Colonel Waite. This is the reply. Whereupon there was offered in evidence for the plaintiffs a letter identified by the witness dated August 22, 1934, addressed to Mr. D. E. Byerley, and signed

HENRY T. HUNT,
For the Administrator.

Mr. Holtzoff. If your Honor please, we object to this letter on the same ground, that it relates to a project not here in litigation, in Tecumseh, Michigan. There
418 appears to be no connection between that project and any of the projects here in suit.

Mr. Acheson. The letter is offered, your Honor, on account of the fourth paragraph, which states, on behalf of the Administrator, what is called the process in the Public Works Administration. If your Honor wishes me to read it, I shall be glad to—or I shall show you the letter.

Mr. Holtzoff. As to that last paragraph, we make the further objection that there is no showing that the writer of the letter had authority to make statements on behalf of the Administrator and to bind him by his statements.

The Court. I will sustain the objection.

Whereupon the Letter, August 22, 1934, Hunt to Byerley, was marked Plaintiff's Exhibit No. 131 for identification.

Plaintiffs' Exhibit 131—For Identification

Washington, D. C.
August 22, 1934

Mr. D. E. Byerley,
Vice President and General Manager,
Lenawee County Light and Power Co.,
Adrian, Michigan

Dear Sir:

Your letter of August 13 to Colonel Waite with reference to the Tecumseh, Michigan, electric power project, Docket #7307, has been referred to me for reply.

This project is now before this Board for recommendation.

I note the opinion of counsel to the effect that your Company has a perpetual franchise in Tecumseh. There is, however, no claim that it has an exclusive franchise.

The process in PWA is to examine into the question of engineering soundness, reasonable security and social desirability. The last factor depends upon whether or not the municipal project will provide current at rates substantially less than those at which it is provided by the existing utility. Hence this Board in all such cases
419 is aided by information as to existing rates and what prospect there is of rate reduction. In fact it has been its policy to afford the existing utility an opportunity to offer to place in effect such rate reduction as will meet the proposed rates of the municipality. If you wish to make any statement on this subject the Board would be glad to receive and consider it. The matter of a hearing can wait until we receive the information suggested.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

Mr. Acheson. Your Honor, may we have it clear on the record which ground of objection your Honor sustains?

The Court. I sustain it on the ground that it is immaterial to the issues here.

Mr. Acheson. I should like the record to show that I note an exception to the ruling of the Court.

Whereupon the witness resumed his testimony as follows:

After receiving the letter dated August 22, 1934, marked Plaintiffs' Exhibit 131 for identification, I went to Washington for a conference with Mr. Hunt.

By Mr. Acheson.

At that conference did Mr. Hunt suggest any action on your part which, if taken, would result in the Public Works Administration finding that the application of the village of Tecumseh had no further social desirability?

Mr. Holtzoff. If your Honor please, I object to this on the same ground.

The Court. Objection sustained.

Mr. Acheson. I note an exception, your Honor. I offer to prove that if the witness were permitted to answer the question he would testify that Mr. Hunt stated that the Public Works Administration had figured that the village could sell power for a certain percentage less than
420 the price stated in its application, and that if the company would put into effect a rate equal to or less than that rate, the project would lose social desirability.

The Court. What you want to do is to show the nature of the proof which has been excluded.

Mr. Acheson. That is right.

The Court. So that on appeal it will be noted.

Mr. Acheson. That is all.

The Court. I have no objection.

Mr. Acheson. The record may then show that my offer was rejected and an exception taken.

421 Whereupon the following occurred:

Offer of Proof

Mr. Acheson. By witnesses Edwin Vennard and Miles Cary, now in the courtroom and ready to be called, by witness V. L. Board, who is available but who it is agreed not be called for purposes of this offer, by further testimony from T. O. Kennedy who was previously on the stand but who it is agreed need not now be recalled for purposes of this offer, by the depositions of Clarence E. Moyer and E. F. Bulmahn and by twenty-five or thirty letters signed by Henry T. Hunt, Chairman of the Electric Power Board of Review, and beneath the signature bearing the notation "For the Administrator", copies of some of which letters have been subpoenaed from the defendants, the plaintiffs offer to prove that:

—and I should interpolate at this point that I have been requested by the defendants to state, and do state, that in that offer of proof which follows, we do not mean that all of the witnesses would testify to all of the statements, but that the offer represents the composite proof.

The Court. That is proper.

Mr. Acheson. And this is the offer:

From press release No. 709 of the Public Works Admin-

istration and quotation thereof in the press various privately owned electricity utility companies, by their officers and representatives, understood that the Electric Power Board of Review had been designated by the Administrator to review applications made by municipalities to the Public Works Administration for loans and grants for electricity projects, and to entertain protests relative thereto. As a result of this information and also as a result of PWA press release 989, such companies, through their representatives, called upon or corresponded with the PWA office in Washington to protest and present facts relative to electricity projects proposed for various municipali-
422 ties in which such companies were then conducting an electricity business. Their letters, whether addressed to the Administrator or to other officials, were replied to by Henry T. Hunt, Chairman of the Electric Power Board of Review, signing "For the Administrator"; and upon personal calls at the PWA offices the companies' representatives were referred to the Electric Power Board of Review of which Mr. Henry T. Hunt, PWA General Counsel, was Chairman, and Mr. Otto M. Rau was the rate expert. So far as these representatives learned the Electric Power Board of Review during its existence was the final agency to which representatives of such companies could protest or present information before the projects were placed before the Administrator for approval.

In conferences with the Chairman of the Power Board of Review and Mr. Rau, the rate expert, privately owned utility companies were repeatedly informed that electricity rates were generally too high and should be lowered and that the rate level of the existing utility was the important thing to be considered by PWA. Companies were informed at such conferences that it was useless to present facts relating to or to discuss the small amount of employment given in the construction of such municipal projects since the Board knew that, relatively, very little direct employment was given, particularly to workmen in the vicinity the bulk of whom was unskilled, that it was useless to present facts as to the number of the companies' employees who would be thrown out of work by curtailment of the companies' operations due to competition, that the likelihood

of the companies' financial failure if projects were authorized was immaterial, that it was beside the point if rates would have to be increased or business abandoned in towns near such municipalities if proposed projects therein were authorized—that these and similar considerations were of no consequence because it was the policy of PWA to finance electricity projects and only question for the Board
423 at such conferences was the question of the Companies' rates.

Even without previous inquiry on the subject letters and telegrams signed by Mr. Hunt "For the Administrator" as aforesaid asked various companies whether they would reduce their rates in municipalities where electricity projects were proposed, and even after approval of allotments by PWA for such projects Mr. Hunt and Mr. Rau would confer with companies regarding their rates for electricity in municipalities applying for such projects. In such letters and in such conferences the companies were told many times that the policy of the Adminstrator as approved by the President was that pending applications approved by the examining divisions would be approved and the projects financed unless the companies reduced their rates to a point equal to or lower than the rates which the municipalities would charge; that if a company did so reduce its rates the municipality would be given an opportunity to reduce its rates still further, if it could do so and repay the amount borrowed to build the plant; but if the municipality would not or could not do so the project would lack the social desirability requisite to approval by PWA.

Pursuant to these advices many companies did submit to the Board, sometimes by letter to the Chairman and sometimes personally to the Chairman or to Mr. Rau, reductions in rates in municipalities where such electricity projects were proposed. In several cases, as was explained by the companies, such proposals as a practical matter had to and did embrace surrounding towns. In some instances Mr. Hunt, or Mr. Rau to whom such proposed rate reductions were usually referred for study, informed the companies that in order to render particular applications for power projects lacking in social desirability the rate proposals so submitted would have to be adjusted further,

either by way of additional reductions or of instituting optional rates to certain classes of consumers. In
424 general, the rate level which Mr. Hunt and Mr. Rau indicated that the Board was seeking was that at which the municipality in question could sell electricity and receive only enough revenue to repay the amount lent for the project.

When companies were informed by the Chairman that their rate proposals were satisfactory to the Board, it was in many cases insisted by him that, before the Board would take up the matter with the municipalities or take any further action, the proposals should actually be placed in effect, with some steps taken to estop or otherwise to prevent the companies from making subsequent rate increases.

Where rate reductions were made in this manner, or were offered to municipalities, in some cases the municipalities reduced their rates still further and the projects were approved by PWA; in other cases loans and grants were not made.

The statements made and the action taken as heretofore described occurred in cases where a company was doing business in a municipality under a franchise having a long term to run, in cases where the franchise had expired or would expire within a year or two, and in cases where a company was merely serving a municipally owned distributing system under a wholesale contract that was about to or already had expired. In all such cases, in statements both to the companies and to the municipalities, where rate reductions were contemplated or proposed by the companies, Mr. Hunt signing as Chairman of the Board and "For the Administrator" said that even though the loan were reasonably secured, the question of social desirability depended upon whether rates would be lowered.

This offer covers conferences, correspondence, or negotiations as to rates with respect to some 40 or 50 electricity generating or distributing projects proposed for municipalities, none of which were involved in this suit, scattered
425 widely over the middle western and southern parts of the country. The conferences, correspondence, and negotiations referred to took place over a period of nearly a year, from the early summer of 1934 until March, 1935.

Mr. Holtzoff. If your Honor please, we object to the testimony offered, on the ground that it is irrelevant to any of the issues in this case, and on the ground that it is incompetent.

Now, all of the testimony is cumulative of testimony that your Honor has already ruled out; so that unless your Honor otherwise indicates, I do not suppose you would care to hear any further discussion or argument.

The Court. No. I shall sustain the objection. You do not object to the form of the offer of proof?

Mr. Holtzoff. No, I do not.

The Court. I shall receive the offer of proof, and rule as I have before about the admissibility of evidence proposed to be offered. And you have your exception.

Mr. Acheson. Your Honor, I now wish to offer in evidence a telegram from Spokane, Washington, dated November 7, 1934, to the Honorable Harold L. Ickes, Public Works Administrator, Washington, D. C., signed by F. T. Post, President of the Washington Water Power Company, and also a reply telegram, dated Washington, D. C., November 12, 1934, directed to Mr. Post and signed "Harold L. Ickes, Administrator."

The purpose of offering these telegrams is that we have had a great deal of testimony as to what the Electric Power Board of Review has done, which has been excluded. But here is a case where what the Electric Power Board of Review has done, is stated by Mr. Ickes, himself.

Mr. Holtzoff. If your Honor please, we object to the documents offered, on the ground that they are not related to this case; they relate to a project other than that in this suit. And your Honor has heretofore held that such
426 matters are not admissible.

The Court. I shall sustain the objection.

Mr. Acheson. May I have the telegrams marked for identification, and note an exception to the Court's ruling?

Whereupon telegram dated Spokane, Washington, November 7, 1934, to Honorable L. Ickes from F. T. Post, President, The Washington Water Power Company, was thereupon marked Plaintiffs' Exhibit No. 231 for identification, and telegram dated Washington, D. C., November 12, 1934, to F. T. Post, President, The Washington Water Power

Company, Spokane, Washington, from Harold L. Ickes, Administrator, was marked Plaintiffs' Exhibit No. 232 for identification.

Plaintiffs Exhibit No. 231 for identification is as follows:

"Spokane, Washington.
November 7, 1934.

Honorable L. Ickes
Public Works Administrator
Washington, D. C.

Congressman White of Idaho has recently stated publicly that Public Works Administration has approved application City of Coeurdalene, Idaho, for loan and grant to be used for construction Diesel engine electric generating plant and distribution system in competition with our efficient hydro system stop Feel sure this application has not been called to your attention because its approval would violate statement of principles contained in Public Works Administration press release number nine eighty nine dated September twenty-seventh nineteen thirty-four stop Our present rates in Coeurdalene are among the lowest in the United States and regulated by Idaho Public Utilities Commission stop Application of the City of Coeurdalene for loan and grant which we had an opportunity to answer does not contain any schedule of rates which City
427 purposes to put in force if PWA shall loan and give it money with which to build system to operate in competition with our company therein stop We have never seen any schedule of rates proposed by the City and it is impossible for the City to make this proposed project self-liquidating under schedules of rates lower than ours stop Construction of Diesel engine plant in Coeur d' Alene at this time would seem to violate all the principles contained in your press release and in other releases of the PWA not only because of the situation outlined above but also because there is at the present time in this territory a large surplus of hydro generated electrical energy which will be greatly augmented by the Government through the Grand Coulee development stop Feel sure you have no intention to depart from previously announced policies and that Coeur d' Alene application will not be granted stop Shall

greatly appreciate assurance that this situation will be given your personal attention and I will esteem it a privilege to have the opportunity of a personal interview and discussion of whole problem with you.

F. T. Post President The Washington
Water Power Company."

Plaintiffs' Exhibit No. 232 for identification is as follows:

"Postal Telegraph

Washington, D. C.
November 12, 1934.

C 47 58 Govt.
F. T. Post
President, The Washington Water Power Company
Spokane, Washington

Retel seventh Docket 6695 Coeur d'Alene City's proposed electric rates contemplate twenty percent reduction stop Proposed water deemed better quality than yours stop You have already had opportunity meet City's proposals however if your company places in effect rate 428 reduction equal or greater than that of City, Electric Power Board of Review will consider matter further.

HAROLD L. ICKES, *Administrator.*"

Mr. Acheson. Now, your Honor, we have subpoenaed from the defendants all the orders and findings of the President, the Administrator, the special Board of Public Works, and other agencies or officials having the authority to make ultimate determination relative to the allocation of funds to non-Federal electricity projects in the 11 cities which are involved in this suit.

In response to that subpoena, Mr. Frank has furnished me with the documents. And in lieu of having a witness on the stand to bring out the fact that these are all the documents of the character described, I have explained to Mr. Frank, and I think we are prepared to agree, upon the record, that this file of documents which I shall immediately introduce and describe, represents all the orders and findings of the President, the Administrator, the special Board

of Public Works, and other agencies or officials having authority to make ultimate determinations in regard to all the projects which are involved in this litigation.

Mr. Frank says that is correct.

Whereupon there was received in evidence Plaintiffs' Exhibit 233 a document entitled "Non-Federal Public Works that are deemed desirable, List No. 23, recommended by the Special Board for Public Works. Confidential. November 23, 1933." Inside the cover of this document is a page which has the same title on it; then a page and a half list which is entitled at the top "Non-Federal Public Works that are Deemed Desirable. November 23, 1933." There are four columns in the list. The first column is headed "Docket." The second column is headed "Location." The third column is headed "Project." The fourth column is headed "Amount."

Under the first column is given the docket number;
429 under the second column, the town and state where the project takes place; under the third column is the kind of project that it is, such as a toll road, a water system, sewerage system, electricity project. Under the fourth column is the amount in dollars; and following the amount are either the letter "L", which means "Loan", or the letters "L and G" which mean "Loan and Grant", or the letter "G" which means "Grant."

On the second page of these two pages of lists appear these entries:

"Docket No. 3124. Location, Sheffield, Alabama. Project, Light System. Amount, $230,000", followed by the letters "L and G". Under that appears "Docket No. 3125. Location, Tuscumbia, Alabama. Project, Light system. Amount, $130,000", followed by the letters "L and G."

There is then one other entry, and then there is the total of all the dollars in that list. At the bottom of that page, in pencil, are the letters "O. K", and under that "F. D. R."

Following that page and a half of list there is a separate sheet for each item listed. On sheet numbered 40 appears the following:

"City of Sheffield, Colbert County, Alabama

"State City or Locality Project Amount

"Alabama Sheffield. For the installation of an electric transmission line from Muscle Shoals to Sheffield, construction of a sub-station and a complete electric distribution system. This application supercedes the application as submitted under Docket No. 2979, by the City of Sheffield, Colbert County, Alabama, substantially in accord with Docket No. 3124. This allotment is to be in the way of a loan and grant to aid the financing of such project subject to the Administrator between the United States and the City of Sheffield, County of Colbert, Alabama."

430 The next page is numbered 41 and on it appears the following:

"City of Tuscumbia, Colbert County, Alabama

"State City or Locality Project Amount

"Alabama Tuscumbia For the installation of an electric transmission line from the City of Sheffield, construction of a substation and electric distribution system. This application supercedes the application as contained in Docket No. 2996, by the City of Tuscumbia, Colbert County, Alabama, substantially in accord with Docket No. 3125. This allotment is to be in the way of a loan and grant to aid the financing of such project subject to the execution of a contract satisfactory to the Administrator, between the United States and the City of Tuscumbia, Colbert County, Alabama.

"Not to exceed $130,000.

Plaintiffs' Exhibit 234

There was then received in evidence as Plaintiffs' Exhibit 234 entitled "Non-Federal Public Works that are deemed Desirable, List No. 42, Recommended by The Special Board for Public Works, Confidential, January 9, 1934." This list has a page inside the cover on which appear the words quoted above, with the addition that under those words there are the letters "O.K. F.D.R." That is all that appears on the second page.

There then follows the same sort of list described in connection with the preceding exhibit, two and a half pages long, on page 5-B appears the following item:

"Docket No. 4259. Location, Florence Alabama. Project, Electrical system. Amount, $412,000 L & G." There then follow separate sheets relating to each item on the list; and on page 52-B, as the sole matter on that page is the following:.

431 "City of Florence, Lauderdale County, Alabama

"State City or Locality Project Amount

"Alabama Florence For the construction of an electrical distribution system, a central substation of 3,000 K V A feeder circuits from the Government reservation at Muscle Shoals office building and warehouse, by the City of Florence, Lauderdale County, Alabama, substantially in accord with Docket No. 4259. This allotment is to be in the way of a loan and grant to aid the financing of such project subject to the execution of a contract satisfactory to the Administrator, between the United States and the City of Florence, Lauderdale County, Alabama.

"Not to exceed $412,000"

Plaintiffs' Exhibit 235

There was then received in evidence as Plaintiffs' Exhibit 235 a document entitled "Non-Federal Public Works That are Deemed Desirable, List No. 53, Recommended by the Special Board for Public Works, Confidential, February 1, 1934." This list first contains a tabular statement on page 2-A of which one of the items is "Docket 4259. Location, Florence, Alabama." Under that is the word "Amendatory." Project, Electrical system. Amount, $24,000 L and G." At the bottom of that page there are the letters "O. K. F.D.R."

On page 36-A there is the following:

"City of Florence, Lauderdale County, Alabama

"State City or Locality Project Amount

"Alabama Florence For the construction of an electrical distribution system, a central sub-station of 3,000 KVA, feeder circuits from the Government Reservation at Muscle Shoals, office building and warehouse, by the City of Florence, Lauderdale County, Alabama, substantially in

accord with Docket No. 4259. This allotment is in addition to allotment approved by the Special Board on
432 January 9, 1934, in the amount of $412,000. This allotment is to be in the way of a loan and grant to aid the financing of such project subject to the execution of a contract satisfactory to the Administrator, between the United States and the City of Florence, Lauderdale County, Alabama.

Not to exceed $24,000.

Plaintiffs' Exhibit 236

There was then received in evidence as Plaintiffs' Exhibit 236 entitled "Non-Federal Public Works That are Deemed Desirable, List No. 69, Recommended by the Special Board for Public Works, Confidential, March 21, 1934."

The Court. What is the significance of that word "Confidential"? That has appeared in them all.

Mr. Holtzoff. I am told by Mr. Sher, of the Public Works Administration's Legal Division, that the real significance of that was that until the President approved this list it was to be regarded as confidential.

List No. 69 has two and a half pages of tabulation, docket numbers of projects and amounts. On the first page of that tabular statement, which is numbered C-2 in the list there appears the following, among others:

"Docket No. 1820, Hominy, Okla. Project, Distribution. Amount, $150,000. L and G."

There then follow page C-3, which has the same sort of lists, and C-4, and on page C-4, directly under the total of this list, there appear the letters "O.K. F.D.R."

There are then several separate pages, one page for each item on the list. It reads as follows:

"Federal Emergency Administration
of Public Works

"Washington, D. C.

433 "Resolution of Special Board for Public Works
"Re: City of Hominy, Oklahoma

"Resolved that the Administrator and the Special Board include in the comprehensive program a project for the

construction of a 900 brake H. P. plant and distribution system, by the 'City of Hominy', Oklahoma, substantially in accord with Docket No. 1820, and allot a sum not to exceed $150,000, for the purpose of aiding by way of a loan and grant, the financing of such project, subject to the execution of a contract satisfactory to the Administrator, between the United States of America and the 'City of Hominy'."

Mr. Acheson. I have just read to your Honor a resolution. There is a similar resolution relating to each project on the list, on a separate page, in this so-called Presidential Book or List No. 69. I am informed that there is a minute in the minutes of the Special Board for Public Works which states that all of these resolutions in List No. 69 are presented to the Board at one time in this form and are passed by the Board.

That is a correct statement, is it not?

Mr. Frank. That is correct.

Plaintiffs' Exhibit 237

There was received in evidence as Plaintiffs' Exhibit 237 a list entitled "Non-Federal Public Works That are Deemed Desirable, List No. 1[illegible]5, Recommended by the Special Board for Public Works, Confidential, August 15, 1934."

The tabular statement or list of projects begins on page numbered 2 of this exhibit on which is this item:

"Docket No. 6587. Location, Decatur, Alabama. Project, Power. Amount, $350,000 L & G."

The list continues on and ends on page numbered 3 and is totaled on that page, and under that total appear the letters "O.K. F.D.R."

434 There then follow pages on which resolutions occur for each of the projects contained in the list, and on page numbered 25 is the following:

"Federal Emergency Administration of Public Works

Washington, D. C.

"Resolution of Special Board

"Subject: Docket No. 6587, Decatur, Alabama.

"Whereas the Electric Power Board of Review and the Deputy Administrator recommend that the project of the

city of Decatur, Alabama, for the construction of an electrical distribution system, including the low side of the substation and equipment, be included in the comprehensive program of public works for the reason, among others, that the Tennessee Valley Authority has acquired the necessary transmission lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its electrical energy:

"Resolved that said project be included in the comprehensive program and that the sum of $350,000 (of which not to exceed $100,000 shall be a grant) be allotted to finance the accomplishment thereof, subject to the execution of a contract satisfactory to the Administrator and in accord with the recommendations of the Electric Power Board of Review dated June 22, 1934, as amended by its report of July 30, 1934.

The Court. What is that term "low side"?

Mr. Baker. It means low tension current, your Honor.

Plaintiffs' Exhibit 238

There was then received in evidence as Plaintiffs' Exhibit 238 a document entitled "Public Works Projects that are Deemed Desirable, Federal List No. 120; Non-Federal Lists Nos. 207-213, Recommended by The Special Board for Public Works, March 27, 1935."

This exhibit is made up of eight lists bound together. In about the middle of the exhibit is list 212. It begins
435 with a page entitled "Non-Federal Public Works That are Deemed Desirable, List No. 212, Recommended by the Special Board for Public Works, Confidential, March 27, 1935." On page 2 of that list begins the tabular statement. On page 3 there is this item, among others:

"Docket No. 8021. Location, Plainview, Texas Project, Generating Plant. Amount, $423,346. L & G."

On page 5 the tabular statement comes to an end, a total appears, and under that is the following writing: "O.K. in principle. Subject to unemployment check F. D. R."

Under that, in writing: "Unemployment check is now satisfactory and projects are approved. F. D. R."

Following that statement there is a separate resolution for each item on the list. On page numbered E 227 there appears the following:

"Federal Emergency Administration of Public Works

Washington, D. C.

"Resolution of Special Board for Public Works

"Re: City of Plainview, Texas

"Resolved that the Administrator and the Special Board include in the comprehensive program a project for a Diesel electric generating plant and distribution system including street lighting by the 'City of Plainview', Texas, substantially in accord with Docket No. 8021, and allot a sum not to exceed $423,346, for the purpose of aiding by way of a Loan and Grant, the financing of such project, subject to the execution of a contract, satisfactory to the Administrator between the United States of America and the 'City of Plainview'."

Plaintiffs' Exhibit 239

There was then received in evidence as Plaintiffs' Exhibit 239 a letter to which there is attached a tabular statement.

436 "The White House
Washington

"August 15, 1934.

"My dear Mr. Secretary:"—

By virtue of the authority vested in me under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, it is requested that the following funds be transferred from the appropriation made in said Act to the Public Works Administration for the purpose indicated below:

Amount; $15,659,882.

Purpose: For financing by way of a grant projects of States, Territories, Possessions, subdivisions or agencies thereof, in accordance with the attached schedules of projects. Subject to the application of Title III of the Treasury and Post Office Appropriation Act, fiscal year 1934, to the acquisition of articles, materials and supplies for use in carrying out such projects. (O.P. No. 52-358 to 52-413)

"I have determined with respect to each of the projects listed on the attached schedule that not less than 25 per centum of the grant is to be expended for work under each particular project.

"Sincerely yours,

(Signed) "Franklin D. Roosevelt."

The Honorable,
The Secretary of the Treasury.

The tabular statement attached to the letter is entitled "Public Works Administration". Under that appears "In accordance with docket of Non-Federal projects indicated below." There are then six columns headed: "Location"; "Character of Work"; "Docket Number"; "Allotment"; and "N. E. C. Number." "N. E. C." means "Na-
437 tional Emergency Council." The last column is headed "Project Number."

There are several pages of items. On the last page the last item is as follows:

"Location, Iowa. Iowa City, Johnson Co. Construction of steam-electric power-house, boilers, generators and complete electric distribution system, Docket Number 7738, allotment $413,000, N. E. C. Number 3907, Project Number O. P. 52-413."

Whereupon counsel for plaintiffs called upon counsel for defendants to produce the two reports Electric Power Board of Review dated January 22, 1934, and July 30, 1934, referred to in the resolution contained in Plaintiffs' Exhibit No. 237. The documents having been produced, that entitled "Electric Power Board of Review," referring to application of the City of Decatur, Alabama, dated January 22, 1934, was marked "Plaintiffs' Exhibit No. 237-A" and received in evidence, and a Resolution with reference to Decatur, Alabama, Docket No. 6587, dated July 30, 1934, was marked "Plaintiffs' Exhibit No. 237-B" and received in evidence.

The Exhibits are as follows:

Plaintiffs' Exhibit 237-A

"Electric Power Board of Review

Jan. 22, 1934.

Subject: Application for loan and grant of the City of Decatur, Alabama (Docket No. 6587) for the purpose of constructing distributing system, including low side of the substation and equipment, in the sum of $371,743.

After review of the Docket, this Board finds:

1. The Engineering Division by its supplemental report made the following conclusion and recommendation:

'It is our opinion that the proposed project is a public necessity and of social desirability; that it will afford needed employment; and that on the above assumptions it is technically and economically sound.''

438

The assumptions referred to are that

(a) ''The municipal plant will receive, in addition to all the municipal load, 60 percent of all other business in the first year of operation, and 80 percent at the end of the loan interval.''

This assumption, in the opinion of this Board, is far below that portion of the total business the municipality will receive, inasmuch as it will offer rates at least 60 percent less than the present rates being charged by the Alabama Power Company by reason of the contract offered the City by the T. V. A.; and as the Alabama Power Company, the competitor, cannot reduce its rates by anything like 60 percent of its present rates by reason of its service to the City of Birmingham, and as it would be under the necessity of reducing its rates to other cities served by it in Alabama. If rates required by the T. V. A. contract are charged and the City obtains the same business the Company now has, its income will provide for maintenance and operating costs, interest, amortization and taxes, and a net income over all of $10,525. This appears by the estimate of O. M. Rau attached. This estimate makes no allowance for what may reasonably be expected in the way of an increase of current sold and of income by reason of the heavy reduction of rates. That a reduction of rates produces larger net income is shown, among other examples, by the experience of the City of Washington under its contract with the Potomac Electric Company covering the years 1925 to 1934. Under this contract the Company is required to apply one half its surplus to rate reduction. The maximum rate in 1924 was 10c per KWH. Rates are now, after successive reductions, 3.9c for the first 50 KWH, 3.3c for the next 50, 2c for the next 100 and 1.5c for all over 200. In 1924 the Company earned 3.4 times its bond interest after allowing for depreciation and taxes. In 1932 with rates cut to one third it earned its interest twelve times. Earnings per share increased from $26.90 in 1924 to $68.08 in 1932. The privately owned electric company in Hartford, Connecticut, has had a like experience. Hence this Board finds that the

439

assumption of the Engineering Division on which it bases its conclusion that the project is technically and economically sound is far less favorable to the City than the facts warrant.

The same finding applies to the estimate of Mr. O. M. Rau. This Board is of opinion that during the first year after the City begins business it will have at least 75 percent of the business measured in dollars, and an increase of not less than 10 percent in each succeeding year. Accordingly it finds that the project is technically, economically and financially sound.

The said finding of financial soundness is supported by the report of the Finance Division dated April 12, 1934. This report was based upon a report of the Engineering Division dated March 6, 1934, a prior report to that referred to above and one less favorable to the City. The Finance Division report of April 12 found that on the basis of the division of business estimated by the engineer-examiner "50 percent of sales the first year and 75 percent the twentieth year and all municipal business," the project will earn only about 1.05 times the debt service for the first several years with a deficit for the first year. Inasmuch as the estimate of the engineer-examiner referred to has now been modified so that the estimate of division of business is altered to all the municipal load and 60 percent instead of 50 the first year, with an increase of 2 percent each year, it is obvious that the Finance Division would approve the loan on the revised basis. Furthermore, this Board is of opinion as stated above that even the revised estimate upward of the engineer-examiner is too low in view of the heavy
440 reduction of rates proposed. As stated above this Board is of opinion that the said reduction will increase the portion of the business obtained by the City and also the new revenue.

2. This Board has further reviewed the conditions attached to the report of the Engineering Division dated March 6, 1934, as follows:

"3a. The applicant shall furnish evidence satisfactory to the Administrator that the Alabama Power Company can be legally required to furnish service on a day to day basis until the acquisition by the municipality of the used and usable portions of the existing distribution system."

This condition having been reviewed by this Board is disapproved as impossible of performance; and the following condition substituted:

The applicant shall furnish evidence satisfactory to the Administrator that the Alabama Power Company can be legally required to furnish service on a day to day basis until the municipal system is ready for service.

This Board has reviewed the further conditions:

"3b. And that thereafter" (the acquisition of competitive system) "the Power Company will be without authority to sell power within the municipal limits."

This condition is also disapproved for the reason that it prevents any loan being made as such a showing involves a law suit and is probably impossible of performance as the Company has a franchise until October 1, 1949. If the T. V. A. fails to purchase the distribution system of the Company and the municipal system being under the necessity by its contract with T. V. A. of offering rates at least 60 percent less than existing rates, the Company, being unable to provide an equally low rate, will be unable
441 to continue to compete and must withdraw. Hence this condition should be stricken out.

This Board has further reviewed condition 4a of the engineer-examiner:

"(a) That no depreciation charges, taxes or any other items of expense, except normal operating expenses and power and lighting extensions shall be charged against the revenues of this project."

It approves this condition.

It has also reviewed condition 4b:

"That all municipally used electric energy shall be paid for at current selling rate schedules annually during the interval of the loan from the general fund into the account of this project."

This Board also approves this condition.

This Board finds also that the Engineering Division omitted to recommend a grant. Its report does not show any reason for this omission.

This Board finds that the applicant is as much entitled to a grant as other applicants to which grants have been allowed.

Resolved, that this Board recommend an allotment to the

applicant in the sum of $372,000, of which not to exceed thirty percent of the cost of the labor and materials employed thereon, estimated at $100,000, shall be a grant.

Henry T. Hunt
Chairman."

442 *Plaintiffs' Exhibit 237-B*

Federal Emergency Administration of Public Works

Electric Power Board of Review

Washington, D. C.

Decatur, Alabama, Docket No. 6587 July 30, 1934.

Resolution

Whereas, the Electric Power Board of Review under date of June 22, 1934, recommended an allotment to the applicant in the sum of $372,000 (loan and grant); and

Whereas, it now appears that a loan and grant in the sum of $350,000 should be sufficient:

Resolved, that this Board recommend a loan and grant to the City of Decatur, Alabama, Docket No. 6587, in the amount of $350,000.

Henry T. Hunt
Chairman.

Whereupon the following occurred:

Now, your Honor, I will refer to the resolution with reference to the City of Plainview which occurs in Plaintiffs' Exhibit No. 238 as a preface to a request. It says—

"Resolved that the Administrator and the Special Board include in the comprehensive program a project for a Diesel electric generating plant and distribution system including street lighting by the 'City of Plainview', Texas, substantially in accord with Docket No. 8021", etc.

I wish to request that what is referred to there as Docket 8021 be produced so that we may see what this project is to be substantially in accord with. I do not want to put a great burden on the Government, but I understood from the testimony of Mr. Wheeler on the stand that there were three reports, recommendations or statements which
443 summarized everything which is in the docket. One is the report of the Engineering Division; the next

one is the report of the Financial Division; the third one is the report of the Legal Division, and, possibly, if the project goes to the Electric Power Board of Review, the overruling or approval of the various statements which were made.

We think that when the resolution says that it approves a project substantially in accord with Docket No. so and so, we are entitled to have the salient features of that docket produced so that we may see exactly what the project is which the President has approved.

Counsel for defendants objected to the request upon the grounds that the documents requested were both irrelevant and confidential, intradepartmental communications. The matter was extensively argued by counsel.

The Court. I do not want to hear any more discussion. I am going to hold that you do not have to produce those papers. I think they are wholly immaterial.

Mr. Acheson. The record will show an exception?

The Court. Yes.

Mr. Acheson. Your Honor, May the record show that in the case of each project, wherever it appeared in the authorization that the Special Board of Public Works or the President approved a project "substantially in accordance with docket so-and-so", I asked to have produced the reports of the three examining commissions and of the Electric Power Board of Review, which have already been subpoenaed; that that was objected to by the defendants; and that the Court ruled that they need not produce those documents; and that I noted an exception?

The Court. You want an exception in each case?

Mr. Acheson. In each case, your Honor.

The Court. Very well. That may be understood.

444 *Plaintiffs' Exhibit 240*

There was then received in evidence as Plaintiffs Exhibit 240 a document entitled "Non-Federal Public Works That Are Deemed Desirable, List No. 255-A, Confidential, August 19, 1935", the first page of which reads as follows:

"Federal Emergency Administration of Public Works

Washington, August 19, 1935.

"Memorandum to accompany Non-Federal List No. 255-A.

"I hereby authorize and approve Project Orders contained on the attached List, providing $28,022,382, for the the purpose of aiding by way of Loans and/or Grants, the financing of 56 Non-Federal projects in various localities throughout the United States.

"(Signed) Harold L. Ickes, *Administrator.*"

"Attachment".

Then follows a long list of projects. On page numbered 3-57, there is the following:

"Federal Emergency Administration of Public Works

"Washington, D. C.

"Project Order of the Federal Emergency Administrator of Public Works

Re: Iowa City, Johnson County, Iowa

"Whereas, the Advisory Committee on Allotments has recommended and the President has approved the inclusion in the Works Program of a project for the construction of steam-electric power house, 3-300 Hp. boilers, 2-3000 Kw. generators and complete electric distribution system, by the Iowa City, Johnson County, Iowa, substantially in accord with P. W. A. Docket No. 7738, and

"Whereas, funds in the amount of $413,000, for
445 the purpose of aiding by way of a grant the financing of this project, have been made available from the Emergency Relief Appropriation Act of 1935 to this Administration; Now therefore

"It Is Hereby Ordered and Directed, that said project be included in the comprehensive program of Public Works and the above allocation utilized to aid the financing of such project, subject to the execution of an agreement satisfactory to the Administrator, between the United States of America and the Iowa City.

"Harold L. Ickes, *Administrator*

"Date of Order August 19, 1935."

Plaintiffs' Exhibit 241

There was then received in evidence, as Exhibit No. 241, a document entitled "Public Works Projects That Are Deemed Desirable, Federal List No. 142, Non-Federal List No. 264, Recommended by The Administrator of Public Works, September 21, 1935."

This document is made up of Federal List No. 142 and Non-Federal List No. 264. Non-Federal List No. 264 begins on page D-7, and consists of a tabular statement of various projects.

On page D-23 there is the following entry:

"Docket 7738
"Location Iowa City, Iowa
"Project Electric Plant and Distribution System
"Remarks Amendment in description to obviate unnecessary detail. No change in allotment."

On page D-26 there is a summary, as follows:

"Summary Sheet

"Increases in Allotments	$2,121,107.11
Reductions in Allotments and Rescissions	5,136,500.00
Net Reductions	$3,015,392.89

O. K.
F. D. R."

446 *Plaintiffs' Exhibit 242*

There was then received in evidence as Plaintiffs' Exhibit No. 242, a document entitled "Non Federal Public Works That are Deemed Desirable, List No. 264, Amendments, Rescissions and Specials, Confidential, September 24, 1935."

The first page consists of a document on the letterhead of the Federal Emergency Administration of Public Works, Washington, September 24, 1935:

"Memorandum to Accompany Non-Federal List No. 264

"I hereby authorize and approve Project Orders contained in the attached List affecting funds in the following manner:

"Increases in Allotments	$2,121,107.11
Reductions in Allotments and Rescissions	5,136,500.00
Net Reductions	$3,015,392.89

"(Signed) Harold L. Ickes, *Administrator*"

"Attachment"

Attached is a series of papers, similar in character, page 109 of which reads as follows:

"Federal Emergency Administrator of Public Works

"Washington, D. C.

"Project Order of the Federal Emergency Administrator of Public Works

Re: Iowa City, Johnson County, Iowa

"Whereas, by Project Order under date of August 19, 1935, the Administrator ordered that a project for the construction of steam-electric power house, 3-300 Hp. boilers, 2-300 Kw. generators and complete electric distribution system, substantially in accord with Docket No. 7738, be included in the comprehensive program of Public-
447 Works and that an allotment of $413,000, for the purpose of aiding by way of a grant, which was made available from the Emergency Relief appropriation of 1935 to this Administration, be utilized to aid in the construction of this project, and

"Whereas, it has been recommended that the above description of the project be amended to obviate unnecessary detail; Now therefore

"It Is Hereby Ordered and Directed, that an amendment be made to said Project Order by striking out the words 'for the construction of steam-electric power house, 3-300 Hp. boilers, 3-300 Kw. generators and complete electric distribution system', and inserting in lieu thereof the words 'for the construction and equipping of an electric plant and distribution system'.

"HAROLD L. ICKES, *Administrator.*

"Date of Order 9/24/35

"Date of Presidential Approval 9/24/35."

Plaintiffs' Exhibit 243

There was then received in evidence as Plaintiffs' Exhibit No. 243, a letter from the President to the Secretary of the Interior, to which is attached a large number of other documents.

"The White House
"Washington
"September 25, 1935

"My dear Mr. Secretary:

"Pursuant to the Emergency Relief Appropriation Act of 1935, I hereby:

"I. Approve the projects included in the program of public works set forth in the annexed 'Schedule A', as to each of which I find and determine that not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular
448 project.

"II. Allocate and transfer to the Federal Emergency Administration of Public Works, subject to agreements to be entered into with the United States of America satisfactory to you as Federal Emergency Administrator of Public Works:

"A. From funds appropriated by the Emergency Relief Appropriation Act of 1935, the sum of $200,139,036 to aid in financing the construction of the projects approved above by making a grant for each such project in the amount set forth in the grant column of Schedule A;

"B. From moneys realized from the sale of any securities acquired by the Federal Emergency Administration of Public Works, the sum of $88,701,481 to aid in financing the construction of such of the projects approved above as contemplate a loan by the Federal Emergency Administration of Public Works in the amount set forth in the loan column of Schedule A for each such project.

"III. Approve the projects included in the program of public works set forth in the annexed 'Schedule B', as to each of which I find and determine that not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular project.

"IV. Authorize you as Federal Emergency Administrator of Public Works:

"A. To decrease, to amend, or to rescind any allotment

heretofore approved by me and made through, by or to the Federal Emergency Administration of Public Works pursuant to Title II of the National Industrial Recovery Act or pursuant to the Emergency Relief Appropriation Act of 1935, or made by this order or authorized to be made hereby; and to allocate or to re-allocate for any project or projects included in Schedule B:

"(1) Any funds now available to the Federal Emergency Administration of Public Works, or

449 "(2) Any funds made available by this order to said Administration, or

"(3) Any funds which may hereafter become available to said Administration by any decrease, amendment or rescission heretofore or hereafter made in respect of any such allotment, or

"(4) Any funds which may hereafter become available to me by the sale of any securities acquired by the Federal Emergency Administration of Public Works;

"B. To increase any allotment heretofore approved by me and made through, by or to the Federal Emergency Administration of Public Works pursuant to Title II of the National Industrial Recovery Act or pursuant to the Emergency Relief Appropriation Act of 1935, or made by this order or authorized to be made hereby; and to use for such purpose:

"(1) Any funds now available to the Federal Emergency Administration of Public Works, or

"(2) Any funds made available by this order to said Administration, or

"(3) Any funds which may hereafter become available to said Administration by any decrease, amendment or rescission heretofore or hereafter made in respect of any such allotment, or

"(4) Any funds which may hereafter become available to me by the sale of any securities acquired by the Federal Emergency Administration of Public Works;

"C. To delegate to the Assistant Administrator, Federal Emergency Administration of Public Works, the powers hereby conferred.

"Very sincerely,

"(Signed) Franklin D. Roosevelt

"The Honorable,

"The Secretary of the Interior."

450 Schedule A attached to the letter consists of a great number of sheets, grouped in order of States, in alphabetical order. In that part headed "Alabama", on page 2 thereof, there appears the following:

"Docket Number	7032
"Location	Russellville
"Type	Elec. Dist."—

which means Electric Distribution—

"Loan	69000
"Grant	56454
"Est. Cost	125454
"Grant Cost Man-Yr.	441
"Start Days	——
"Weeks to Complete	——
"No. Men on Work	256
"County Code	030"

On the page, "Alabama—Page 3", appears this:

"Docket Number	7341
"Location	Guntersville
"Type	Elec. Dist.
"Loan	48000
"Grant	39272
"Est. Cost	87272
"Grant Cost Man-Yr.	584
"Start Days	——
"Weeks to Complete	——
"No. Men on Work	135
"County Code	048"

And on page "Alabama—Page 4" appears:

	"Docket Number	6611
	"Location	Hartselle
	"Type	Dist. Syst.
451	"Loan	33000
	"Grant	27000
	"Est. Cost	60000
	"Grant Cost Man-Yr.	394
	"Start Days	15
	"Weeks to Complete	26
	"No. Men on Work	137
	"County Code	052"

Plaintiffs' Exhibit 244

There was then received in evidence as Plaintiffs' Exhibit 244, a letter dated October 28, 1935, from the President to The Secretary of the Treasury, with attached papers:

"The White House

Washington

Oct. 28, 1935

"My dear Mr. Secretary:

"By virtue of the authority vested in me under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, it is requested that the following funds be transferred from the appropriation made in said Act to the Public Works Administration for the purposes indicated below:

"Amount: $175,000,000

"Purpose: The funds allocated hereby, together with any funds heretofore allocated by me for financing projects of the Public Works Administration by way of a grant shall be available for financing by way of grants (1) any or all of the projects, aggregating $175,331,395, set forth in the attached schedule of projects, and/or (2) any or all projects set forth in any schedule of projects to be financed by way of a grant heretofore approved by me; provided that the amount expended upon any one project shall not exceed the amount indicated therefor in such schedule of projects. Subject to the application of Title III of
452 the Treasury and Post Office Appropriation Act, fiscal year 1934, to the acquisition of articles, materials and supplies for use in carrying out such projects. (2999 projects)

"I have determined with respect to each of the projects listed on the attached schedule that not less than 25 per centum of the grant is to be expended for work under each particular project.

"Sincerely yours,

"(Signed) Franklin D. Roosevelt

"The Honorable,

"The Secretary of the Treasury."

Among the papers attached to that letter of the President, on page 4 there is the following:

"In accordance with docket of Non-Federal Projects below

"Alabama

"Location	Russellville, Franklin County
"Character of Work	Construction of Distribution System to distribute TVA energy.
"Docket Number	7032
"Allotment	56,454
"N. E. C. Number	13707
"Project Number	O.P. 52-922"

On page 6:

"In accordance with docket of Non-Federal Projects indicated below

"Alabama

"Location	Guntersville, Marshall County
"Character of Work	Construction of Electric Distribution system for city of 3,000.
"Docket Number	7341
"Allotment	39,272
"N. E. C. Number	15105
453 "Project Number	O.P. 52-914"

And on page 7, with the same heading:

"Location	Hartselle, Morgan County
"Character of Work	Construction of Substation and Electric Distribution System.
"Docket Number	6611
"Allotment	27,000
"N. E. C. Number	16091
"Project Number	O.P. 52-923"

Plaintiffs' Exhibit 245

There was then received in evidence, as Plaintiffs' Exhibit No. 245, a document entitled "Non Federal Public Works, List No. 1014, for approval of the Administrator, December 4, 1935."

The first page is:

"Federal Emergency Administrator of Public Works

"Washington
December 4, 1935

"Allotment Order for Non-Federal List No. 1014

"Pursuant to the authority vested in me by Executive Order of the President No. 7064, dated June 7, 1935, I hereby allocate to the projects included in the annexed Non-Federal List No. 1014 (each of said projects having been heretofore approved by the President):

"A. From funds appropriated by the Emergency Relief Appropriation Act of 1935 and heretofore transferred to the Public Works Administration pursuant to direction of the President, the sum of $5,219,529, to aid in financing the construction of said projects by making a grant for each such project in the amount set forth in the grant column of said list.

"B. From moneys realized from the sale of any securities acquired by the Federal Emergency Administra-
454 tion of Public Works, the sum of $2,477,500, to aid in financing the construction of such of the projects included in said list as contemplate a loan by the Federal Emergency Administration of Public Works, by making a loan to each such project in the amount set forth in the loan column of said list;

"Subject to the execution of agreements satisfactory to the Administrator, between the United States of America and the respective applicants therefor.

"(Signed) Harold L. Ickes
"*Administrator.*

"Attachment."

On page 2-16, appears the following:

"Approved by the Adminitrator of Public Works for Inclusion in Schedule 'A', as Part of Works Program.

Non Federal List No. 1014

Alabama

"Location: Russelville, Franklin Co.
"Character of Work:
Construction of distribution system to distribute TVA energy
"Docket Number: 7032
"Grant Amount: $56,454
"Loan Amount: $69,000."

On the next page, under the same headings:

"Location: Guntersville, Marshall Co.
"Character of Work:
Construction of Electric Distribution system for city of 3,000
"Docket Number: 7341
"Grant Amount: $39,272
"Loan Amount: $48,000."

455 On the next page is Hartselle:

"Location: Hartselle, Morgan Co.
"Character of Work:
Construction of substation and electric distribution system.
"Docket Number: 6611
"Grant Amount: $27,000
"Loan Amount: $33,000."

456 **Richard L. Harkness**

was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

I live at 2928 P Street, Washington. I am a newspaper man for the United Press. I have been in Washington, for the United Press since November, 1934. During that time, my duties required me to cover the Public Works Administration and other agencies concerned with work relief. I have attended the press conferences held by the Administrator, Mr. Ickes. I wrote the press dispatch handed to me, dated December 21, 1934, following a press conference held by Mr. Ickes. At that conference, Mr. Ickes said that

he would refuse to make allotments for municipal power plants where the private utility, the existing utility, rates were below the rates to be charged by the projected municipal plant. He said that the reasonableness of private utility rates would be one of the determining factors in consideration of loan and grant applications. By that, I mean the reasonableness of the private utility rate in the town which applied for the loan and grant. Mr. Ickes made this statement more than once. I could not estimate how many times, although it has run repeatedly through his discussion of municipal power plants, and his program. I attended a press conference about August 20, 1935, at which Mr. Ickes announced the loan and grant which he had made to Iowa City. At that conference he said this: that municipalities in some instances could afford to pay something to have private untilities out of their city and not meddle in politics and government. As I remember it, he did not say that specifically regarding Iowa City. He said that the City of Chicago could well have afforded to have paid something to Mr. Insull—could have afforded to have paid something to keep him in Greece, to have built him an acropolis.

457 *Cross Examination*

At these press conferences it is usually the practice for the newspaper men to ask questions of the Administrator, and most all of that occurs in the form of brief answers to questions.

Q. When Mr. Ickes, on these occasions to which you refer, spoke of the competitive rates, did he not in the same context indicate that his interest therein as Administrator had to do with the security of the loan? A. Well, Mr. Ickes has always, according to my impressions from what he has said, held the ability of the project to be self-liquidating, one of the prime requirements of any project.

458 The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #119 Circular No. 1 of the Federal Emergency Administration of Public Works, being "The Purposes, Policies, Functioning and Organization of the Emergency Administration, and Rules Prescribed by the President, July 31, 1933," published by the Government Printing Office.

"Article I.

Circular No. 1 states the purposes of the National Industrial Recovery Act (title II, Public Works), and the purposes, policies, functioning, and organization of the Emergency Administration of Public Works, created by the President to effectuate title II.

It also states the rules and regulations prescribed by the President pursuant to section 209, as necessary to carry out the purposes of the title. These rules and regulations control all contracts let for construction of public works, financed under the act, whether Federal or non-Federal, and all loans and grants pursuant to title II. Any violation of any such rule or regulation is punishable by fine not to exceed $500 or imprisonment not to exceed 6 months, or both.

Section 1. *Purposes of title II of the act.*—(1) The comprehensive program of public works. The act (sec. 201) provides that the Administrator, under the direction of the President, shall prepare a 'comprehensive program of public works'. The comprehensive program is to be related to the reconstruction legislation of which the Recovery Act is a part. The purpose underlying the entire scheme is, as stated in the declaration of policy of the Recovery Act, 'to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.'

459 The formulation of a comprehensive plan of public works thus requires consideration of the functioning of the national economy as a whole. This in turn involves consideration of ascertained trends of population and industry, its centralization and decentralization, changes in the habits of the people caused by the substitution of the machine for human labor, the automobile, changes in railroad rates, in charges for electric current, the effect of massive projects like Boulder Dam, Tennessee Valley, and the St. Lawrence River improvement.

The formulation of the immediate comprehensive plan (which is necessary to provide employment quickly) involves the formulation of a long-range national plan to follow and be consistent with the immediate plan. To that end

the President has directed the creation of a long-range planning board more particularly described later.

Obviously the purpose of the act to provide employment quickly cannot await the complete formulation of the comprehensive program. But it is possible to select projects which will be consistent with such program when formulated. The President and the Emergency Administration under his direction will not await complete formulation, but, 'with a view to increasing employment quickly, while reasonably securing any loan made by the Administrator', will aid in the construction and financing of any public works project deemed worthy of inclusion (sec. 203.).

The policies adopted by the Administrator, by the authority of the President, hereinafter set forth, are designed to provide an immediate program, Federal and local.

Sec. 2. The duty and function of the Emergency Administration as to Federal projects and/or public works is to determine eligibility from the standpoint of national planning, and to determine and effectuate allotment of funds appropriated under the act, and to aid in ob-
460 taining compliance by Federal contractors with the rules prescribed by the President. It is not necessary to describe this process in detail in this circular.

Sec. 3. But as to non-federal projects it is necessary to describe the duties, powers, organization, and functioning of the Administration.

The classes of non-Federal projects (public works) eligible for loans under the act are set forth in section 202.

(a) Construction, repair, and improvements of public highways and parkways, public buildings, and any publicly owned instrumentalities and facilities (such as bridges, tunnels, docks, viaducts, waterworks, electric power and light plants, canals, markets, etc.)

Note.—$400,000,000 has been allotted for highways under another section of the act. This allotment does not preclude consideration of additional highways and parkways.

(b) Conservation and development of natural resources, including the control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, river and harbor improvements and flood control, and also the construction of any river or drainage improvement, required to satisfy

any obligation incurred by the United States through a treaty with a foreign government, heretofore ratified, and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations, heretofore assumed.

Note.—The State Advisory Board, later described, will instruct projectors of river and harbor improvements and of the river or drainage improvements pursuant to treaties to forward their applications direct to the Administrator.

(c) Any projects of the character heretofore con-
461 structed or carried on either directly by public anthority or with public aid to serve the interest of the general public.

Note.—As to such projects not constructed or carried on directly by public authority, see Part 2 of this circular.

(d) Construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum clearance projects.

Note.—See Part 3 of this circular.

(e) Any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932 as amended, and paragraph 3 of such subsection (a), shall for such purposes be held to include loans for the construction or completion of hospitals, the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks.

Note.—Such hospitals, reservoirs, pumping plants, and dry docks are thus within the classes eligible for loans. See Part 2 of this circular.

Other classes of projects, not included in (a)-(e) of section 202, and enumerated in the Emergency Relief and Construction Act are:

(1) Loans to private corporations to aid in carrying out the construction, replacement, or improvements of bridges, tunnels, docks, viaducts, waterworks, canals, and markets devoted to public use and which are self-liquidating in character.

(2) To make loans to private limited-dividend corporations to aid in financing projects for the protection and de-

velopment of forests and other renewable natural resources
which are regulated by a State or political subdi-
462 vision of a State and are self-liquidating.

Note.—As to (1) and (2), see Part 2 of this circular.

Returning to the Recovery Act itself, section 203 (a) (4) empowers the President, through the Administrator, to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

Note.—State advisory boards are not concerned with applications by railroads for financing railroad maintenance and equipment. Such applications are to be made direct to the Administrator. A separate circular will be issued on railway maintenance and equipment.

Sec. 4. *President's power to make grants to public bodies.*—Excerpts from the act relevant to the grant follow:

'* * * The President is authorized and empowered * * * upon such terms as he shall prescribe to make grants to States, municipalities, and other public bodies for the construction, repair, or improvement of any such project (those within (a)-(e) above), but no such grant shall be in excess of 30 percentum of the cost of the labor and materials employed upon such project' (sec. 203(a)).

'Provided that in deciding to extend any aid or grant to any State, county, or municipality the President may consider whether action is in process or in good faith assured therein, reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof' (sec. 203 (a)).

Sec. 5. *Other powers of the President.*—(a) He may extend the benefits of the title to public bodies notwithstanding limitations on their power to borrow.

'The President, in his discretion, and under such
463 terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur any indebtedness' (sec. 203(a)).

This provision is related to the leasing provision of the act which follows.

(b) The President has power also to acquire any real or personal property in connection with any projects within the classes (a-e, above) approved by him to construct or finance the construction thereof and to lease such projects with or without privilege of purchase as appears by the following excerpt:

'The President is authorized and empowered * * * (3) to acquire by purchase, or by the exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project or (and) to lease any such property with or without the privilege of purchase * * *' (sec. 203(a)).

(c) The President may sell any security or property acquired:

* * * The President is authorized and empowered * * * to sell any security acquired (in connection with loans made by the United States under the act), or any property so constructed or acquired (by purchase or by exercise of the power of eminent domain) in connection with the construction of any project' (sec. 203(a)).

(d) Power of President to prescribe rules:

'The President is authorized to prescribe such rules and regulations to carry out the purposes of this title and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment not to
464 exceed six months or both (sec. 209)

The act throughout is permissive only. The President may exercise all, any, or none of the powers it invests in him.

Sec. 6. The Executive orders appointing the Special Board for Public Works and an Administrator.

The President has appointed a Special Board for Public Works consisting of the Secretary of the Interior, chairman, the Attorney General, the Secretaries of War, Agriculture, Commerce, and Labor; the Director of the Budget, Henry M. Waite (Deputy Administrator), and Assistant Secretary of the Treasury Roberts.

On July 8, 1933, the President appointed Harold L. Ickes (Secretary of the Interior) as Administrator to exercise the powers of that office.

The President has prescribed rules and regulations to carry out the purpose of the title. (See art. 2, sec. 3.)

The Administrator, with the approval of the President, has adopted policies to control the administration of the act.

Article II. Policies of the Emergency Administration of Public Works

Section 1. Labor policy.

(1) Opportunities for employment on projects authorized under the Emergency Administration of Public Works shall be equitably distributed among the qualified workers who are unemployed, not among those who merely wish to change one good job for another.

(2) These work opportunities shall be distributed, geographically, as widely and as equitably as may be practicable.

(3) Qualified workers who, under the law, are entitled to preference shall secure such preference.

465 (4) The wasteful cost and personal disappointments due to excessive increase of labor in the vicinity of work projects shall be avoided.

(5) Local labor required for such projects and appropriately to be secured through employment services, shall, as far as practicable, be selected from lists of qualified workers submitted by local employment agencies designated by the United States Employment Service. Highly skilled or organized labor shall not be required to register for work at such local employment agencies, but shall be secured in the customary ways through recognized trade-unions locals. In the event such highly skilled organized workers are not furnished by such locals within forty-eight hours after request is filed with them, then such workers shall be obtained through local employment agencies designated by the United States Employment Service.

Section 2. 'All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted

to work more than 30 hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order; (a) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political
466 subdivisions and/or county in which the work is to be performed, and (b) citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage' (sec. 206)

Sec. 3. Rules prescribed by the President to carry out the purposes of title II (sec. 206).

(1) No convict labor shall be employed on any project financed in whole or in part by funds provided by the United States.

No materials manufactured or produced by convict labor shall be used on any projects so financed.

Violation of this rule may be notified by the agency of the United States, executing the contract, to the district attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

(2) Thirty-hour week so far as practicable and feasible. This requirement shall be construed to permit hours of work per week as provided for any class of labor in the code covering such class, adopted pursuant to title I of this act. If the class of labor be not covered by such code then persons in classes not covered shall be permitted to work only 30 hours per week. This requirement shall be construed:

(a) To permit working time lost because of inclement

weather or unavoidable delays in any one week to be made up in the succeeding week or weeks of any calendar month.

467 (b) To permit the limitation of not more than 130 hours' work in any one calendar month to be substituted for the requirement of not more than 30 hours' work in any one week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

It shall not be considered practicable and feasible to apply either of these limitations to work located at points so remote and inaccessible that camps are necessary for the housing and boarding of all the labor employed and if so determined by the State engineer (P.W.A.) prior to advertisement: *Provided,* That in such cases no individual shall be permitted to work more than 8 hours in any one day or more than 40 hours in any one week.

Violations of this rule may be notified by the Administrator or by the agency of the United States executing the contract to the district attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

(3) Just and reasonable wages. Such wages shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort.

Note.—It is intended that schedules will be furnished the State advisory boards and the State engineer (P.W.A.), which will determine minimum wages.

(a) All wages shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount earned by each individual at the time of payment. There shall be no deductions on account of goods purchased, rent, or other obligations. Such obligations shall be subject to collection only by legal process.

Any violation of rule 3 (a) may be notified by the Administrator, or by the agency of the United States executing the contract, to the district attorney of the ap-

468 propriate district who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

(4) The contractor under any construction contract entered into by the Administrator, or by any agency of the

United States, financed by funds appropriated under the National Industrial Recovery Act, shall post in a prominent and easily accessible place at the site of the work a clearly legible statement of all wage rates to be paid the several classes of labor employed on the work.

Any violation of this rule may be notified by the Administrator, or by the agency of the United States executing the contract, to the district attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

(5) If it shall be found by the Administrator, or by the agency of the United States executing the contract, that any laborer or mechanic employed by the contractor or any subcontractor under any contract financed in whole or in part by funds appropriated under the authority of the National Industrial Recovery Act, has been or is being paid less than is prescribed in the contract, the Administrator, or the agency of the United States executing the contract, shall notify such contractor or subcontractor to pay such laborer or mechanic all wages due him according to the prescribed rate. Upon 10 days default on the part of such contractor or subcontractor, the Administrator, or the agency of the United States executing the contract, shall notify the district attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

Sec. 4. *Construction contract provisions.*—(1) There shall be no requirement in any construction contract providing price differentiations for or restricting the use of
469 materials to those produced within the Nation or State, provided, however, that preference shall be given to the use of materials produced under codes of fair competition approved under title I of the National Industrial Recovery Act, if prices, quality, and quantities available are satisfactory to the Administrator or to the agency of the United States executing the contract.

Note 1.—The above provision, insofar as it prohibits restriction of materials to those produced within the Nation, does not apply to Federal contracts.

Note 2.—To the extent that it is feasible and practicable and does not involve higher costs, inferior quality, or insufficient quantity, it is the policy of the Administrator that local materials should be used.

(2) All construction contracts shall provide that the Administrator, through his authorized agents, shall have access to all pay rolls, records of personnel, invoices of materials, and other data relevant to the performance of the contract.

(3) Every person who performs the work of a laborer or of a mechanic on a project financed in whole or in part by funds appropriated under the act shall be entitled to the benefits of the labor and wage provisions thereof, regardless of any contractual relationship between the contractor or subcontractor and such laborer or mechanic.

(4) All construction contracts and subcontracts shall prescribe minimum wage rates as determined by the agency of the United States executing the contract, which contractors shall pay to classes of skilled and unskilled labor. Such minimum rates shall be stated also in the advertisements for bids and in all proposals of bids submitted, including those of subcontractors.

(5) Preference in the order stated in sec. 206 (4) shall be given to ex-service men with dependents where qualified.

The contractor will be furnished with lists of such
470 ex-service men from the United States Employment service.

Note.—Instructions will be issued stating procedure in case of dispute as to the application of this provision in connection with section 1 (5) of this article.

(6) To the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be preferred. The State engineer (P.W.A.) will make this determination before advertisement.

Sec. 5. *Bidding not to be confined to local contractors.*—Bidding shall be open to all qualified contractors. The State engineer (P.W.A.) will determine what contractors are qualified, pursuant to instructions to be furnished by the Administrator.

Sec. 6. Tests for eligibility or projects.

The Administrator, the State advisory board and the State engineer (P.W.A.) will apply the following tests in determining the eligibility of each project submitted:

(1) The relation of the particular project to coordinated planning, and its social desirability.

Note.—No project will be considered which is a mere makeshift to supply work. No non-Federal project will be considered which will require for its maintenance or operation an additional outlay by the Federal Government.

The Administrator and the State board will consider ascertained trends as to changes in population, industries, and other social and economic factors. (See art. III, sec. 2.)

(2) Economic desirability of the project; i.e., its relation to unemployment and revival of industry.

(3) The soundness of the project from an engineering and technical standpoint.

(4) The financial ability of the applicant to complete the work and to reasonably secure any loans made
471 by the United States.

(5) The legal enforceability of the securities to be purchased by the United States or of any lease to be entered into between the applicant and the United States.

Sec. 7. *Preferences.*—(1) Projects integrated with and consistent with a State plan are to be preferred to the isolated or inconsistent. (2) Projects which can be started promptly are to be preferred to those requiring delay. (3) Projects near centers of unemployment are to be preferred.

Sec. 8. *Tests for the grant to public bodies.*—The President is empowered to make grants, to States, municipalities, or other public bodies, for the construction, repair, or improvement of any project approved by him, not in excess of 30 percent of the cost of the labor and materials employed upon such project. The terms are to be such as the President shall prescribe.

The President has prescribed and the Administrator will apply the following test to enable him to determine whether to make the grant, and if so, to what extent: The social and economic significance of the project and its relative importance in the comprehensive national program of public works contemplated by the act, and the extent its construc-

tion will provide employment and purchasing power in the vicinity.

The following classes of projects will be preferred as to the grant: (1) Waterworks projects not unduly burdening the community with debt and necessary for its health and convenience; (2) sewer projects of the same character; (3) sewage-disposal projects sufficiently comprehensive to render a river or lake system, used by many communities, safe as a water supply, and other sewage-disposal projects; (4) other projects, which, like the foregoing, are regenerative, i.e., tend to stimulate further projects, such as highways, bridges, and tunnels, opening of new territory for homes and industry, projects for the transmission of
472 electrical energy into territories not now served.

The President, in determining whether to allow or withhold the grant, will also consider to what extent the budget of the applicant is balanced or in process of balancing and will prefer those public bodies which put their finances in order.

The grant will not be allowed unless the public body either (a) has power to sell to the United States its bonds in sufficient amount to reimburse the United States for its outlay (less the grant if allowed) in connection with the project and enters into a contract so to do and to complete the project, or (b) has power to convey the site of the project to the United States and contracts so to do, and to pay rental sufficient to reimburse the United States for its outlay less the grant if allowed, and to complete the project, or (c) is in process of securing the necessary powers and the Administrator is convinced that such powers will be obtained, or (d) in special cases as the President may determine.

Sec. 9. *Price of bonds and interest rate of public bodies.*—The United States will bid par and accrued interest, for bonds to finance projects of public bodies, approved by the Administrator, provided all bonds bear interest at the rate of 4 per cent or more. In the event such bonds bear interest at the rate of more than 4 percent the difference between 4 percent and the coupon rate will be refunded by the United States from time to time during the period while such bonds remain in the posession of the United States.

Sec. 10. *Amortization.*—Bonds and obligations under contract of lease are to be annually amortized pursuant to State statutes and according to the life of the project not to exceed 30 years except in the case of such projects as obviously have a longer life and in no case to exceed 50 years.

Sec. 11. The contract between the United States
473 and the applicant (public bodies and others) for benefits under the act.

When the applicant shall have furnished information and evidence sufficient to assure the fulfillment of the legal, financial, engineering, and social requirements of the act, and the project has been approved as to eligibility and terms, a contract will be drawn embodying such approved terms and if agreed to, will be executed by the Administrator and the applicant. The contract will state all the terms, including the wage and labor conditions, and will provide for supervision by the Administrator to a degree sufficient to insure compliance with the construction and other terms thereof.

Sec. 12. There shall be created a Labor Board of Review which shall hear all issues arising under the operation of these contracts and such problems as may result from fundamental changes in economic conditions during the life of these contracts. The Board of Review to be created shall consist of one representative of labor, one representative of the contractors, and a chairman representing the Administration. The decisions of this Board of Review shall be binding upon all parties.

Article III. Duties, Functions, and Organization of the Emergency Administration

Section 1. The act (title II) requires the performance of three functions: (1) The formulation of the comprehensive plan. This involves the application of the factors described above (Art. II, sec. 6, p. 7) to determine the eligibility of any project for inclusion in the plan. It involves also the ascertainment of the facts as to the feasibility of the project from an engineering, financial and legal standpoint. (2) The negotiation and drafting of a contract between the United States and the applicant when the project has been approved by the Administrator. (3)

The supervision and policing by the Administrator of the performance of the contract.

474 In order to effectually and promptly perform these functions, the administration is organized decentrally with centralized control.

Sec. 2. The central organization (a) The Planning Board. Its functions are (1) To advise and assist the Administrator in the preparation of the "Comprehensive program of public works" required by the Recovery Act, through—

1. The preparation, development, and maintenance of comprehensive and coordinated plans for regional areas in cooperation with national, regional, State and local agencies; based upon

2. Surveys and research concerning (a) The distribution and trends of population, land uses, industry, housing and natural resources; and (b) the social and economic habits, trends and values involved in development projects and plans; and through

3. The analysis of projects for coordination in location and sequence in order to prevent duplication or wasteful overlaps and to obtain the maximum amount of cooperation and correlation of effort among the departments, bureaus, and agencies of the Federal State, and local governments.

(b) The labor board. This board will advise and assist the Administrator as to the requirements of contracts insofar as they affect labor. This board will function in cooperation with the Department of Labor.

(c) The technical board of review. To be referred to this board are projects approved in principal by the Administrator but of an unusual character and/or involving difficult questions of engineering, finance, or law. To it also will be referred projects of a controversial character for the hearing of objectors.

(d) Units of central organization. Units are set up with appropriate technical personnel for the consideration of the following classes of projects: (1) Federal; (2) projects of public bodies (other than housing); (3) housing;

475 (4) private projects, i.e., those of public facilities operated by private corporations devoting their property to a public use (bridges, tunnels, docks, viaducts,

waterworks, canals, markets, hospitals, reservoirs, dry docks, and limited dividend corporations for the protection and development of forests and other renewable natural resources; (5) railroad maintenance and equipment for approval by the Interstate Commerce Commission.

(e) Serving the Administration as a whole, legal and financial units are set up.

Sec. 3. *Travel allowances.*—Allowances for authorized travel by the various classes of officers and employees of the Federal Emergency Administration of Public Works will be computed as prescribed by existing laws applicable to such classes, but shall be paid from the funds made available by the provisions of the National Industrial Recovery Act.

Sec. 4. *Control and method of meeting expenses of technical field forces by the central administration.*—The central office will appoint and direct a State engineer, who will advise with the State advisory board. The central office will utilize and direct the disbursing officers of the Treasury in the disbursement of Federal funds for the payment of allowances and expenses of the State advisory boards and the regional advisers.

Sec. 5. *Method of providing funds to finance approved projects.*—The central office will utilize banks of the Federal Reserve System as depositaries of securities purchased by the Administrator and as fiscal agents for the disbursement of Federal funds to finance the construction of approved projects. This matter will be covered by bond-purchase contracts to be executed by the applicant and the Administrator.

Sec. 6. The central office will receive projects forwarded by the State boards by the Reconstruction Finance Corporation, the Federal departments and independent
476 offices, and will consider them in accordance with the policy declarations described in Article II. It will submit through the Administrator to the President for his approval all projects deemed eligible for the benefits of the act and for the determination of the grant (if the projects are those of public bodies) and of other terms. This submission will be in the form of a recommendation supported by a brief summary showing the nature of the project, the name of the applicant, its estimated cost, its

social desirability, to what extent its construction will provide employment and such other supporting information as may be appropriate.

The central office, through the appropriate State advisory board, will elicit from the applicant such additional information and data (if any is necessary) as will make possible the drafting of a contract embodying the necessary terms and conditions, and will agree with the applicant on such terms. Upon the execution of such contract the central office will forward a copy thereof to the appropriate State engineer with other information to enable him to supervise and police the execution of the contract. The central office will also arrange for the disbursement, pursuant to the contract, of Federal funds to the applicant for the financing of construction.

Sec. 7. *Registration and promulation of comprehensive program.*—The Administrator will designate an officer whose duty it will be to register the comprehensive program as projects, Federal and non-Federal, are from time to time approved by the President, or by the Administrator under his direction. It will be the duty of such officer to attest the inclusion of such projects and from time to time cause to be printed a list of projects so included and attested for the information of the Federal departments, public bodies, and others as may be appropriate.

Article IV. The State Advisory Boards and State Engineer
(P.W.A.)

477 Section 1. *Functions of State advisory boards.*—(a) To stimulate the submission of projects, (b) to inform the public of the classes of projects eligible for the benefits of the act, (c) to elicit from applicants the supporting data (social, engineering, legal and financial), necessary for the consideration of the project, (d) to consider the project from the standpoint of local coordinated planning, social and economic desirability, provision of employment, diversification of employment, engineering soundness and otherwise in accordance with the policies set out in article II, (e) promptly to submit to the Administrator with its recommendations all projects considered.

Sec. 2. *Duties of State engineers* (P.W.A.).—(a) General duties. The engineer will be appointed and directed by the

administrator and responsible to him. The engineer will be the executive officer of the board, will organize its office and employ and direct its personnel, receive, record, and examine all applications and report to the board on each from the standpoints stated in section 1 (d) of this article.

(b) Procedure as to applications. When an application (in four counterparts) is received and recorded the engineer will examine it to ascertain whether it includes all necessary engineering, financial, legal, and other information, and will elicit from the applicant further information if needed. When all needed information has been supplied the application will be listed for final examination according to the priorities stated in article II, section 7. Upon completion of examination the engineer will submit the application to the board and the board to the Administrator with its recommendation.

Sec. 3. *Organization of State advisory boards.*—Compensation to each member will be $10 per diem, subsistence at $5 per diem, and reimbursement for expenses other than subsistence (as allowed by Government travel regu-
478 lations). They are authorised to employ such clerical assistance as is necessary and approved by the Administrator. Each board is authorized to employ, on a per diem basis not exceeding $15 per diem (expenses as above), such legal, financial, publicity, and other personnel *as may be approved by the Administrator,* to enable it to perform its functions.

Sec. 4. *The immediate program.*—Each State advisory board promptly will apply itself to the formulation and submission to the Administrator of an immediate State program of public works. In some States official agencies have approved programs of projects. The board will obtain such programs, examine the projects thereon as to conformity with the policies set out above and expedite the submission to the Administrator of such as conform.

In those States where no officially approved program exists the board will proceed to formulate an immediate program of its own. To that end it will call meetings of such State, municipal, and other officers, persons, and agencies as it deems qualified in the premises.

The immediate program shall include only such projects as (1) can be started within 30 days; (2) are safe and

sufficient from an engineering standpoint; (3) are necessary and convenient from a social standpoint; (4) the applicant has a balanced budget, is in process of balancing it, or action toward such balancing is in good faith assured.

To the extent such projects are before it, the Board and the State engineer will give priority in the following order: (1) Waterworks and sewage projects; (2) sewage-disposal projects sufficiently comprehensive to render river or lake systems safe as water supply for large masses of the population, and other sewage-disposal projects; (3) other regenerative projects as defined in article II, section 8; (4) other projects that are socially necessary and economically sound.

The Board will not hold for the completion of the
479 immediated program projects satisfying the above tests and priorities, but will submit each project considered by it to the Administrator (after obtaining the fulfillment of engineering, financial, and legal requirements). Forms of reports and recommendations will be furnished the State engineers. (P.W.A.)

Article V. Method of Financing Projects of Public Bodies.

Section 1. A project of a public body approved by the Administrator will be financed on the basis of either (a) purchase of the bonds or other obligations of the public body issued to finance the project, or (b) lease, in that event the United States acquiring and holding title to the property until paid for its outlay (less the grant, if made) through rental or payment of purchase price.

Sec. 2. In the case of purchase of bonds, the United States will bid on the bonds of a public body to finance a project approved by the Administrator. The United States will bid par and accrued interest, provided the bonds bear 4 percent interest, and will be amortized as provided above.

Note.—The terms of the bond purchase, including the application of the grant if allowed, will be covered by a contract to be drawn by the central office after agreement with the applicant.

(a) *Non-revenue-producing projects.*—The usual method of financing such projects is by the sale of general obligation bonds. Most public bodies now have statutory au-

thority to issue this type of security. When available this method should be adopted.

(b) *Revenue-producing projects.*—Some States authorize public bodies to issue bonds with debt service limited to the earnings of the utility (waterworks, electric-light plants, etc.). The courts in some of those States have decided that such bonds are not debts within constitutional or
480 statutory limitations. In other States the courts hold that such bonds constitute debt if issued for extensions to an existing utility and are made payable out of current revenue, as distinguished from new revenue to be earned through the extension. Applicants will ascertain and state the law on these points in connection with their applications.

* * * * * * * * *

Sec. 7. *Policing of construction contracts.*—(a) The administrator will supervise and police the performance of contracts, including the labor and wage provisions.

Sec. 8. (a) *Construction contract bonds.*—The Administrator will require the adequate bonding of construction contracts. Instructions in this regard, including provision for bonding, to protect labor and material men, will be supplied.

Article VI. Regional Advisers

Section 1. *Functions.*—(a) To assist the planning board to formulate a plan for each region. In such formulation the regional adviser will consider State plans and apply, so far as applicable, the statement of functions of the planning board (art. III, sec. 2 (a), p. 9). The said board will advise and assist the regional adviser in the premises and he will accumulate and collate and submit to said board all available information useful to it.

The regional adviser will endeavor to stimulate, by publicity and otherwise, so far as may be within his power, public interest in regional and general planning.

Sec. 2. Each regional adviser will obtain from the State advisory board of his region lists of projects under consideration by them and a copy of their recommendations and rejections. Each regional adviser will from time to time visit the offices of the State advisory boards in his region and will advise and consult with them to the end

that their action may be consistent with sound regional planning.

481 The plaintiffs next prepared to offer a series of documents and plaintiffs' counsel made this statement:

"That this documentary evidence is intended to support the allegations of the bills, to the effect that the loans and grants in these cases are being made pursuant to, and as a part of, a policy or program, a national power policy or program, of which the PWA activity in these phases is an integral part, for the purpose of regulating intrastate rates, promoting public ownership, and otherwise interfering with what we believe to be the reserved rights of the States.

And we offer that as applicable to both of our contentions: The first one being that the National Industrial Recovery Act, properly construed, does not authorize the Administrator to make loans and grants of Federal funds for the purpose of regulating intrastate rates, promoting public ownership, or regulating rates of labor and hours and conditions of labor on intrastate projects; and, second, that if it be construed to grant that power to the Administrator, it is to that extent unconstitutional and void."

The plaintiffs marked for identification as Plaintiffs' Exhibit No. 123 a book entitled "Back to Work, the Story of PWA" by Harold L. Ickes, Secretary of the Interior and Administrator of Public Works, published by the MacMillan Company in New York in June, 1935, the copyright of which is held by Harold L. Ickes. There was no question that the copy so marked was an authentic copy and that the book was written by the said Harold L. Ickes.

The plaintiffs then offered in evidence, as admissions of the defendant Ickes, and exhibited to the Court, the material beginning with the last paragraph on page 21 through page 22, the paragraph at the bottom of page 46 and ending on the top of page 47, and all of Chapter VI entitled "Cheap Power". Plaintiffs' Exhibit 123 for identification is the same document as Defendants' Ex-

482 hibit 12 and the portions here indicated will be found *infra* in the said Defendants' Exhibit.

The plaintiffs offered the statements of the Administrator to show that his administration of the statute consti-

tuted a scheme and plan to foster public ownership
483 of electricity utilities and to bring about a lowering of electricity rates by the threat of federally subsidized competition and by the consummation of such competition. Plaintiffs' counsel stated: The offer is made to show, not a state of mind, but, as alleged in the bills of complaint, what the Administrator actually did, and to show that he was not spending federal funds in accordance with the stated purposes of the statute but with other purposes. The evidence offered, along with other evidence in the case or to be offered, will show that the defendants promulgated and carried out a national power program to drive down intrastate electricity rates where they were deemed to be too high and to promote a theory of public versus private ownership of local electricity utilities. If the Administrator had issued written rules and regulations to this end those rules and regulations would be admissible. The evidence offered is just as admissible. In the preface to his book the Administrator writes that he is rendering a "general accounting of what PWA has done and been during the almost two years of its existence".

The statute directs the formulation of a comprehensive program of public works. The evidence offered shows what that program was insofar as it relates to electricity projects.

If the statute is construed to authorize the Administrator to construct projects at strategic places for the purpose of bringing down intrastate electricity rates then the statute would be unconstitutional. The evidence offered shows that that is what the Administrator did.

The statements made by the Administrator in this book are admissible; the plaintiffs are not limited to what the Administrator may say on the witness stand.

The defendants objected to the receipt in evidence of any portions of Plaintiffs' Exhibit 123 for identification on the following grounds:

484 The evidence is irrelevant. Manifestly it has no bearing on the constitutionality of the statute. As to the issue whether the Administrator is exceeding his statutory authority, a municipal power plant obviously comes within the terms of the statute and that is the end of the

matter. Any collateral objects which the Administrator may seek are irrelevant.

The evidence does not mention the specific projects in suit and is therefore irrelevant.

Whatever the Administrator says, whatever the effluvia of his motives, wishes, desires, or pronouncements may be, can have nothing to do with the central question whether these particular agreements are valid under the statute and whether that statute is constitutional. The reasons that the Administrator acted are irrelevant, if what he actually did came within the statute.

In any event statements appearing in a privately published book—not an official report—are not admissible.

After an extended argument along the lines indicated, which the Court invited as bearing upon issues to be raised by offers of evidence to be made subsequently and upon the merits of the case, the Court ruled:

"The Court. This is very interesting, and ultimately goes right to the meat of the controversy. What I have before me just at this moment is this book. I am going to sustain the objection. I think that we have to judge the acts of the Administrator by official pronouncements, and not by books. If that book were admissible, then a speech that was made could be introduced in evidence, or a private conversation would be admissible. I do not believe that that is the proper kind of evidence. The Administrator's acts have to be judged by what he did officially. That is my view of it, so I will have to sustain the objec-

485 tion."

Exceptions were allowed the plaintiffs.

Thereupon each paragraph of the foregoing excerpts from Exhibit 123 for identification was separately offered for the same purposes, separately objected to on the same grounds, the objections separately sustained and separate exceptions allowed the plaintiffs.

486 The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #132 Press Release #44 of the Federal Emergency Administration of Public Works, dated August 8, as follows:

An allotment of $400,000 from public works funds to the Federal Power Commission was announced today by Public Works Administrator Harold L. Ickes.

The Power Commission, under the direction of President Roosevelt, will prepare a comprehensive national plan for the development of water power and the transmission of electricity, examine public works power projects referred to it by the Public Works Administration and make a study into the costs of the transmission of electricity from generating stations to consumers.

The allotment will enable the Commission to begin its investigations and studies at once.

The determination of facts with regard to the cost of transmitting and distributing electricity to consumers under varying conditions is of great importance not only in ascertainng the economic feasibility of power projects but also the distribution cost element properly to be included in rates to consumers of electricity.

Such an investigation was ordered by the Senate at the last session through a resolution introduced by Senator Costigan, of Colorado.

National planning of water power development, the Federal Power Commission advises the Public Works Administration, will effectuate the purposes of Congress, which in the Federal Water Power Act of 1920, authorized the commission to investigate "the water power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be
487 advantageously used by the United States for its public purposes, and what is fair value of such power, to the extent the Commission may deem necessary or useful for the purpose of this act."

The Federal Power Commission points out that up to the present time the development of the water power resources of the United States, both public and private, has been carried on without reference to any comprehensive or integrated national plan. As a result, there have been many instances in which the full economic and social value of the Nation's resources has not been secured. In other cases there has been a lack of proper coordination between projects developed in the same region. Power projects have also sometimes been developed without proper regard for the available market to consume the electricity gen-

rated. The failure to develop a national power program has therefore resulted in great economic loss.

It is planned to organize the work on a regional basis so that local projects under the Public Works Administration may receive prompt consideration. Making use of the trained personnel and facilities of the Power Commission will obviate the necessity of setting up a new organization for this purpose within the Public Works Administration.

In the preparation of the national plan the Federal Power Commission will cooperate with the Public Service Commissions of the several States, as well as with the Public Works Administration, the Tennessee Valley Authority and leading authorities of the electrical industry throughout the United States.

The Federal Power Commission is composed of Frank R. McNinch, of North Carolina, Chairman; Basil Manly, of the District of Columbia, Vice Chairman; Herbert J. Drane, of Florida; Claude J. Draper, of Wyoming, and George Otis Smith, of Maine. (P. W. 74444)

488 The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit 133 the Executive Order of the President dated August 19, 1933, providing:

Pursuant to Title II of the National Industrial Recovery Act the President designates the Federal Power Commission as an agency to aid the Federal Emergency Administrator of Public Works in the preparation of that part of the comprehensive program of public works provided for in Section 202 of the Act which pertains to the development of water power and the transmission of electrical energy. As such agency the Commission shall make a survey of the water resources of the United States as they relate to the conservation, development, control and utilization of water power; of the relation of water power to other industries and to inter-state and foreign commerce; and of the transmission of electrical energy in the United States and its distribution to consumers, and on the basis of this survey shall formulate a program of public works. Upon the request of the Federal Emergency Administrator of Public Works the Commission will investigate applications for loans to be made under Title II of the National Industrial Recovery Act for the construction of public works projects which involve the development of and the

utilization of electric power and will make recommenda-
(No Sheet 489)
tions with respect thereto to the Administrator.

490 The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #134 Press Release #201 of the Federal Emergency Administration of Public Works dated October 15, 1933, which was a resume of PWA activities for the preceding three months. The resume notes among other things:

Since July 8, when the President appointed Secretary of the Interior, Harold L. Ickes, Administrator of Public Works, the PWA offices in Washington and every State have been bending every energy to get idle men back to work.

Machinery was perfected early for the speedy handling of thousands of applications for loans with due regard to the taxpayers' interest.

And today, 99 days after the Administrator took office, the PWA has made allotments amounting to more than $1,709,000,000, covering over 7,000 Federal and non-Federal projects. In this brief space of time hundreds of thousands of persons have been put to work, directly and indirectly. This number will increase steadily as hundreds
of projects, already authorized by the Administra-
491 tor and Special Board for Public Works, move into actual construction as soon as legal requirements are met as to the advertisement of bids and letting of contracts.

Difficulties which the PWA had to meet in its infancy were almost insurmountable. Congress had ordered a revolutionary change in the old method of authorizing public works in the United States. Naturally there were many different schools of thought as to how the Act should be administered.

One of Administrator Ickes' first recommendations to the President called for a decentralized PWA, with regional advisers in ten regions of the country and State Advisory Boards and State Engineers representing the Washington office in each State. Control of the money was to remain in Washington, however. This was done.

Despite the many details incident to the creation of such a vast organization no time was lost in authorizing allot-

ments from the $3,300,000,000 fund. The Special Board on July 18 announced allotments amounting to approximately $65,000,000 for work to be done under the direction of Federal Departments.

The first of the big allotments were made. Among them were $63,000,000 for the Grand Coulee Dam on the Columbia River, $22,700,000 for the Casper-Alcova project in Wyoming and $11,500,000 for work on the Upper Mississippi River.

An important announcement was made on August 8, concerning an allotment of $400,000 to the Federal Power Commission to survey comprehensively the country in a National plan for development of power and to ascertain costs of the transmission of electricity from generating stations to consumers.

Two gigantic projects for New York City were approved during the month—the $44,200,000 Triborough Bridge and the $37,500,000 Hudson Tunnel connecting Manhattan with Weehawken, New Jersey.

September marked the beginning of another phase
492 of activity. Applications from public bodies began to arrive in larger numbers from State Advisory Boards. To spur cities to even greater activity Colonel H. M. Waite, the Deputy Administrator, held regional meetings throughout the country, covering a 6,500 mile itinerary by airplane in nine days.

An important unit in the PWA is the Housing Division charged with passing on applications for low-cost housing and slum-clearance. At the end of the three-month period low-cost housing projects had been authorized in the amount of $40,427,458.

When destructive storms swept the Eastern seaboard in August the PWA made allotments to the Navy, Army and Coast Guard so that repairs could be made to damaged Government properties at once without awaiting the convening of Congress in January to authorize appropriations.

The PWA also has set up three boards to consider all plans and projects for the future development of the Mississippi River and its tributaries, the Red River and the Arkansas River Basin. Several hearings already have been held by the Mississippi Drainage Area Board.

Large allotments have been made to the Army for flood control and rivers and harbors work in all parts of the country, to the Navy, Interior and Agriculture Departments and in fact to virtually every branch of the Federal establishment. As a result, men, long idle, are working in shipyards, on the rivers and in the forests.

About 50,000 men are at work on the Nation's highways and this number is mounting daily.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #135 Press Release #701 of the Federal Emergency Administration of Public Works which notes that the Administrator had announced an allotment of $300,000. to the Federal Power Com-
493 mission to carry on an investigation with respect to rates charged for electrical energy. The investigation was ordered by the President under the authority of Senate Joint Resolution approved on April 14, 1934. The allotment is an addition to the prior allotment of $400,000. made to the Commission by PWA.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #136 Press Release #1396 of the Federal Emergency Administration of Public Works which notes that the Administrator had announced an allotment of $125,000. to the Federal Power Commission to continue the electric rate survey and the national power survey. This allotment will be used for an analysis of an investigation of rates paid for electricity by federal agencies, for a special field investigation of power requirements and resources in the area that may be served by the Tennessee Valley Authority, and for the completion of publication of studies in the course of preparation by the Commission. The studies include rural electrification, the cost of the distribution of electricity and economies of inter-connection and coordination.

The tabulation and analysis of rates was requested by the Procurement Division of the Treasury Department, to be used in connection with negotiations for light and power contracts for the next fiscal year. The field investigation in the TVA area will be of use to TVA.

The original investigations by the Federal Power Commission, financed by a PWA allotment, were authorized by the Senate and by executive order.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #137 'Press Release #1733 of the Federal Emergency Administration of Public Works which notes that an additional allotment of $250,000. to the Federal Power Commission to continue investigations
494 and studies authorized by executive order in accordance with a Senate Joint Resolution was announced by the Administrator. The money is to be used for the collection of data concerning the present cost of generation, transmission and distribution of electrical energy and concerning the control and utilization of national water resources, including location, capacity, development costs and relation of power sites to markets; also concerning the relation of the hydro-electric industry to other industries and to inter-state and foreign commerce. The money is also to be used for the continuance of the investigation regarding rates charged for electricity and for the preparation of a report to the Senate.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #138 a document numbered P. W. 18366 reading as follows:

"President's Letter Creating the National Power Policy Committee

Establishment by the President in the Public Works Administration of a Committee called the 'National Power Policy Committee' was announced today at the White House. (July 16, 1934).

495 Secretary Ickes will be Chairman of this Committee, the membership of which will be composed of:

Dr. Elwood Mead, of the Bureau of Reclamation,

Honorable Frank R. McNinch, of the Federal Power Commission,

Honorable Morris L. Cooke, of the Mississippi Valley Committee, PWA,

Major General Edward M. Markham, Chief of Engineers, War Department,

Honorable Robert E. Healy, of the Federal Stock Exchange Commission,

Honorable David E. Lilienthal, of the Tennessee Valley Authority,

Honorable T. W. Norcross, Assistant Forester of the Forest Service.

In the following letter from the President to Secretary Ickes under date of July ninth the purpose and duties of this committee are outlined:

'I wish to establish in the Public Works Administration a Committee to be called the "National Power Policy Committee" Its duty will be to develop a plan for the closer cooperation of the several factors in our electrical power supply—both public and private—whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic and, particularly, to agricultural consumers.

'Several agencies of the government, such as the Federal Power and Trade Commissions, have in process surveys and reports useful in this connection. The Mississippi Valley Committee of Public Works is making studies of the feasibility of power in connection with water storage, flood control and navigation projects. The War Department and Bureau of Reclamation have under construction great hydro-electric plants. Representatives of these agencies have been asked to serve on the committee. It is not to be merely a fact-finding body, but rather one for the development and unification of national power policy.

'As time goes on there undoubtedly will be legislation on the subject of holding companies and for the regulation of electric current in interstate commerce. This committee should consider what lines should be followed in shaping up this legislation. Since a number of the States have commissions having jurisdiction over intrastate power matters, it is necessary that whatever plan is developed should have regard to the powers of these various State commissions as well as of the States in general.

'It is not thought that it will be necessary to have frequent meetings of the full Committee. An adequate administrative staff will be provided, and personal expenses of the members of the Committee in connection with its meetings will be met.

'The Committee is to be advisory to the President. I hope that you will accept membership on this Committee and act as its Chairman.' "

Counsel for the defendants agreed that the date of the President's letter given as July 9 should be understood to be July 9, 1934.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #139 Press Release #868 of the Federal Emergency Administration of Public Works, which states that the Administrator had announced an allotment of $100,000. to the newly appointed National Power Policy Committee for necessary expenses. The release also states that the Committee's duties will be
497 to develop a plan for the closer cooperation of several factors in electrical power supply, both public and private, whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic and, particularly, to agricultural consumers.

Whereupon the following occurred:

Mr. Jackson. The plaintiffs now produce a document marked "P. W. 1073, Federal Emergency Administration of Public Works", addressed "To State Engineers", dated November 8, 1933, signed "H. M. Waite, Deputy Administrator", and offer it in evidence as Plaintiffs' Exhibit No. 140. (Federal Emergency Administration of Public Works, No. P. W. 1073, dated November 8, 1933, was thereupon marked Plaintiffs' Exhibit No. 140 for identification).

Mr. Holtzoff. We object to this as irrelevant and incompetent, and not binding on the defendants.

The Court. You mean that it was not signed by Mr. Waite?

Mr. Holtzoff. It is incompetent because it is not signed by any of the defendants; and it is irrelevant because it does not bear on any of the issues in this case or any of the projects.

The Court. I shall see what it is.

Mr. Jackson. I should like to read it. Shall I read it?

The Court. Yes. Well, I can read it myself, quicker than you can read it aloud.

Mr. Jackson. Yes. And I want to have it transcribed into the record. (Plaintiffs' Exhibit No. 140 for identification is herewith transcribed into this record as fol-
498 lows:)

'Federal Emergency Administration
Of Public Works

To State Engineers November 8, 1933

A number of inquiries have come in to me regarding our attitude and procedure to regard to applications for loans for municipal light plants. I have prepared the present letter to set forth my views.

It seems to me that we should do all in our power to prevent becoming embroiled in local political disputes. I think it is going a bit too far and creates an unnecessary amount of work to notify all the utility companies when a municipal utility application comes in. Isn't it a fact that when you hear one argument you hear all of them? In principle they are the same. After all, the question for you to decide is one of whether or not it is engineeringly, economically and socially sound.

The entire procedure of the utility company is one of delay. You find this everywhere. We are most anxious to set up around the country sound publicly owned utilities as yard-sticks to determine the principle of whether or not communities can satisfy themselves and give lowered rates for electricity.

Where you do find it necessary to have a hearing, both sides, of course, should be present. I cannot see why it is necessary for the utilities to get into a three-cornered engineering discussion between the utilities, the applicant and ourselves. As far as the engineering is concerned I don't think it is any of the utilities business. Your engineering force, together with the engineering which has been done by the applicant and which will be checked
499 here, is sufficient.

If the utility desires to file a brief or be heard, and you decide it is necessary and advisable to do so, you can give them enough of the facts on which they can prepare their brief.

H. M. WAITE
Deputy Administrator

P. W. 1073'.

(Plaintiffs' Exhibit 140 for identification was examined by the Court.)

The Court: I shall sustain the objection; I think it is immaterial.

Mr. Jackson. May I inquire whether any objection is sustained on the ground that it is signed by Mr. Waite, as Deputy Administrator?

The Court. I think it is irrelevant.

Mr. Jackson. Sir?

The Court. I think it is irrelevant.

Mr. Jackson. I wish to have it appear in the record, because it is the only copy we have—so that we may show what it is; and we wish to note an exception to the ruling of the Court."

The plaintiffs offered an excerpt from a certain document; the offer was rejected on the grounds that a portion of a document was not admissible. Thereupon the following occurred:

"Mr. Jackson. And now, reserving our exceptions to the last two rulings of the Court, with reference to refusing to admit admissions appearing in Plaintiffs' Exhibit No. 141 for identification, I offer the entire document, and ask to have it transcribed in the record, from that document, if it admitted, the same material which I originally offered separately.

500 The Court. I think the whole thing is wholly immaterial,

Mr. Jackson. See what you are doing: You have probably been through thousands and thousands of pages of material that has been handed out by press agents; and wherever you could find a sentence that in some way reflected on the Administrator, you are now offering that in evidence. And I do not like it.

Mr. Jackson. I protest, your Honor, against the statement 'reflecting on the Administrator'.

The Court. But that is what it is. The very sentence following the one you introduced, or asked to be introduced in evidence, is rather complimentary to him. It does not purport to be written by him. You have selected something that you think is against him. You have a right to do that, but I am not going to admit it.

Mr. Jackson. Well, may I observe that it is written by Mr. Ickes, and it is put out by the Federal Emergency Administration of Public Works—issued to the public.

But I do not want to exhaust your patience, in offering this; but I do want to make our record upon it.

The Court. All right; go ahead.

Mr. Jackson. Now, may I find out what the state of the record is on this particular point, Mr. Reporter?

The Court. You offered the whole thing, and I understand that it has been excluded.

(Several excerpts from the record were thereupon read by the Reporter.)

Mr. Holtzoff. Well, we object to it.

The Court. Very well; I shall sustain the objection.

Mr. Jackson. Let us have, now, an exception to the ruling of your Honor upon this."

The document offered and exhibited to the Court
501 was a copy of an article written by Public Works Administrator Harold L. Ickes, as released for publication by the Federal Emergency Administration of Public Works on November 15, 1934. The article appeared in the magazine Today, in the issue of November 17, 1934. The article was offered in evidence by the plaintiffs because of the following paragraph contained therein:

"This is not the place for a detailed discussion of the power policy of Public Works. But that policy also conforms to the general purpose to strengthen private enterprise. There is nothing, with the possible exception of a comprehensive housing program, that holds more promise for the future of industry in this country than the development and utilization of cheap power. Great natural water-power sites are being developed for the benefit of the communities they serve. Private companies serving these communities will, where sufficient power is developed have an opportunity to purchase this cheap power if they are willing to share its benefit with their consumers. Loans for municipal power plants have been granted only upon application of the municipality concerned and upon a clear showing that the existing rates can be substantially reduced after adequate provision for interest and amortization. Private companies furnishing adequate service at reasonable rates have nothing to fear from the power policy of PWA."

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #142 Press Release #709 of the Federal Emergency Administration of Public Works, which states:

"A Public Works Administration Electric Power
502 Board of Review has been estab' shed Public Works Administrator Harold L. Ickes today announced.

"This board will be composed of Henry T. Hunt, General Counsel of PWA, Morris L. Cooke, Chairman of the Mississippi Valley Committee, and Otto M. Rau, Counselor for the Administrator. Mr. Cooke is a Pennsylvania authority on power development and Mr. Rau is a qualified expert on utilities costs and operations.

"It will be the duty of this board to review disapprovals and special conditions imposed by any division of PWA and to make recommendations to the Deputy Administrator with regard to applications of public bodies to finance the construction, repair, improvement or extension of electrical power plant facilities.

"Because of the wide variety of conditions under which such applications are made the controversial nature of certain of the projects and the important economic factors involved in the general questions of power development, Administrator Ickes has decided such projects should receive the attention of the new review board comprised of men who have made detailed studies of the issues involved and who are fully informed on various developments in this field.

"The Administrator ordered the Technical Board of Review and the Projects Division of PWA to refer such applications to the Electric Power Board of Review.

"The Administrator directed the power board to formulate and submit instructions for the guidance of various PWA divisions with regard to controversial questions affecting this class of projects so that uniform policies and handling of these questions might be evolved."

The plaintiffs offered in evidence Press Release #468 of
the Federal Emergency Administration of Public
503 Works dated February 4, 1934, marked Plaintiffs' Exhibit 143 for identification, which contains quotations from an article by Administrator Ickes in the current

issue of the magazine Survey Graphic, including the following:

"The Administrator discussed at some length the need to bring cheap electricity to the largest possible number of people.

'In comfort and convenience as well as efficiency, farm living is heavily penalized by lack of this Alladin's lamp. A water pump to make possible the kitchen sink and the bathroom that the citydweller takes for granted—electric lights, relief from household drudgery by electric washing machines, electric iron and mangle, mechanical refrigeration, electric churn, a continuous supply of hot water—these are only a few of the means to easier and more satisfactory living that electricity could bring to the farm home. And if Ireland, Bavaria, Alsace-Lorraine, Norway and Ontario can take cheap electric current to the farms, then the farmers of the United States can have these modern conveniences too. * * *

'At present rural electric rates are almost prohibitive. President Roosevelt is leading the effort not only to make cheap current more widely available, but to lower the cost of distribution and of electrical appliances. * * * If any such dream is to become a reality, it will be under governmental leadership and supervision, insuring a development planned and carried out with advantage to the consumer, rather than to the power companies, as the first objection.'"

After the press release and the above excerpt were exhibited to the Court, the following occurred:

The plaintiffs offered the item as an admission of the defendant Administrator. The defendants objected on the ground that the evidence was irrelevant. The objection was sustained and the plaintiffs took an exception.

504 The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #144 the following:

"P. W. 38777

Federal Emergency Administration of Public Works

July 31, 1935

Order No. 188

For the purpose of giving special attention to applications for publicly owned power plants there is hereby estab-

lished in the Public Works Administration a separate division to be known as the Power Division, with Mr. Clark Foreman as Director.

The Power Division shall have complete jurisdiction over all power projects from the time they are received in the State Director's offices until they are finally approved or disapproved.

Preference shall be given in all State offices to the study of power projects. The State Director shall see that all necessary information be gathered as quickly as possible. In the event that it appears impossible for the State office to deal with these matters in a reasonable length of time through lack of qualified personnel or other cause, he shall forward the application promptly to the Power Division in Washington.

All correspondence in the Washington office relating to power projects will be referred to the Power Division for handling and reply.

This order will be effective as of August 1, 1935.

505 Harold L. Ickes
Administrator.

(Administrative Order No. 76)"

The plaintiffs offered and there was received in evidence as plaintiffs' exhibit No. 146 the following:

"P. W. 39837.

Federal Emergency Administration of Public Works

August 15, 1935.

Administrative Order No. 76 (Supplement 2)

Subject: Power Projects.

1. Applications for publicly-owned gas and electric utility projects will be examined and forwarded to Washington within thirty days after receipt in the State Director's office. If for any reason this is not possible, the Central Office must be advised promptly.

2. All applications for publicly-owned gas and electric utility projects will be forwarded to the Central Office whether approved or disapproved (see procedure outlined in Administrative Order No. 75 for handling applications).

3. The Projects Division will furnish a report to the Director of the Power Division on Saturday of each week on the status of all publicly-owned power projects that have not been forwarded to the Power Division by the field offices.

Horatio B. Hackett,
Assistant Administrator

Adm., Distribution: General."

506 The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #147 Office Order #43 of the Federal Emergency Administration of Public Works dated August 15, 1935, and signed by Horatio B. Hackett, Assistant Administrator. The order provided that all applications for publicly owned gas and electricity facilities which have been approved by the President but which have been held up in Washington for any cause should be referred immediately to the Director of the Power Division. It was also provided that applications which have been disapproved by any of the examining divisions but regarding which the applicants have not yet been notified should be referred to the Director of the Power Division, that all new applications should be sent directly to the Power Division, and that all correspondence concerning power projects in which any technical or controversial question is involved should be approved and signed by the Director of the Power Division.

The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #148 a supplement to Office Order #43 also signed by Horatio B. Hackett, dated August 23, 1935, providing that "all dockets under study or in suspension shall be delivered to the Power Division not later than September first, 1935. If the study can be completed by that time the regular report shall accompany the docket. If it is impossible to finish the study by September first, a memorandum should accompany the docket giving the Power Division the status of the examination."

The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #150 Letter of Instruction #32 of the Federal Emergency Administration of Public Works dated December 4, 1935, and signed by Horatio B. Hackett,

Assistant Administrator. The letter directed that,
507 in order to give the Power Division a record of all power applications in the field, each state director should send to Washington at once one of the dockets whether or not examination was completed.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #152 Administrative Order #109 of the Federal Emergency Administration of Public Works dated December 19, 1935 and signed by Harold L. Ickes, Administrator. The order provides, among other things, that the Power Division of PWA shall have jurisdiction and control of all non-federal applications for loans and grants and all non-federal projects having to do with the construction, repair, extension and improvement of electricity and gas generating, supply and distributing systems. It is also provided that if there is a lack of personnel in any of the state directors' offices adequate to the examination of any such application, or when a state director is so instructed by a director of the Power Division, then the state director shall transmit to the Washington office the appropriate application documents without a prior examination and report. State directors are also instructed to give preference to applications under the jurisdiction of the Power Division. Each such application shall be transmitted to the Washington office within 30 days from the date of its receipt in the state director's office, whether or not the state director's examinations and reports have been completed. Correspondence, drafting of government offers, action upon requisitions and upon proposed change orders involving additional work or materials, when pertaining to electricity or gas projects, shall be handled by the Power Division.

The plaintiffs introduced and there were received in evi-
dence as plaintiffs' exhibits #153a, 153b and 153c
508 the forewords of the Government Manual for the years 1934, 1935 and 1936, which point out that the Manual is published by the National Emergency Council to give to the public an outline of the functions and organizations of various federal agencies. The factual information therein has been authenticated and approved by the heads of the respective departments and agencies and their chief counsel.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #154 pages 449 and 450 of the United States Government Manual, dated September 24, 1935, stating, among other things, that the Federal Emergency Administration of Public Works was established under Title II of the National Industrial Recovery Act, was extended until June 30, 1937 by the Emergency Relief Appropriaion Act of 1935, and by Executive Order 7064 was authorized to continue functions under Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935. The Administration has as its chief aim the reduction of unemployment and the restoration of purchasing power through the construction of useful public works and encouragement of long range planning of public works. In each state there is a state director representing PWA. The decentralized organization with centralized control in Washington serves to promote public works throughout the country in connection with allotments of loans and grants to public bodies and to certain private corporations. The basis for allotments has been social benefit, economic feasibility and financial, legal and engineering soundness. "Before a project is finally approved for an allotment it must be found socially desirable and sound from legal, financial and engineering standpoints." Interest at 3% a year is charged on loans to public bodies. The Power Division of PWA is maintained "to give special consideration to applications for publicly owned power plants. State offices also are instructed to give preference to the study of such power projects."

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The plaintiffs introduced and there were received in evidence as plaintiffs' exhibits 155a, 155b and 155c pages 365 to 370 of the United States Government Manual for 1936. The exhibits make the same statements as those contained in plaintiffs' exhibit #154, and also contain the following, among other things:

Any public body meeting the requirements of PWA is entitled to borrow. These bodies include states, municipalities, school districts, drainage districts and others. Grants of money are also made to public bodies, not exceeding 45% of the cost of the project. "The public grants are given to induce public bodies to undertake construction of useful works. The grant is made in consideration of the agree-

ment by the applicant to apply in the construction of the project the requirements of the Public Works Administration, including the 30 hour week, veterans' preference, and just and reasonable wages as determined by the Special Board for Public Works." Large sums are advanced to public bodies for construction or repair of water works, sewer systems, electric light plants, streets and highways, bridges, schools, hospitals and regional facilities. The Administration prefers projects upon which work can be started quickly and completed within a year. These should also meet all the aims embraced by the Administration's purposes. Classes of projects preferred for grants are "water works projects not unduly burdening the community with debt and necessary for their health and convenience," "sewer projects of the same character", sewage disposal projects, "municipal power plants", other projects such as highways "and projects for the transmission of electrical energy", public schools and hospitals. There are also included statements of policy as to the 30 hour week,
the adoption of wage rates subject to the approval
510 of PWA state directors, weekly payments of wages,
investigations of irregularities and violations of law or regulations conducted by special agents of PWA, registering of complaints, etc. The Manual is signed by Harold L. Ickes, Administrator, and Henry T. Hunt, General Counsel.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #156 Press Release #1522 of the Federal Emergency Administration of Public Works. The release states that the Administrator had created the Power Division within the PWA for the purpose of giving special and expeditious attention to applications for publicly owned power plants and that preference would be given in all PWA state offices to the study of power projects. The Power Division will have jurisdiction over all power projects from the time they are received in the PWA state director's office until they are finally approved or disapproved.

The plaintiffs introduced and there were received in evidence as plaintiffs' exhibits #157 and 158 Press Release #1177 of the Federal Emergency Administration of Public Works dated January 13, 1935, and a pamphlet compiled

by PWA entitled "Municipally Owned Electric Utilities In the United States, 1934". The press release notes the publication of the pamphlet compiled by Mr. Otto M. Rau at PWA and summarizes the information given therein. This information consists of a map of the United States showing the location of all municipally owned electricity systems, the population of places served by municipal plants, the type and capacity of municipal plants, the location of municipal plants which compete with privately owned electricity systems, and other information relating to the extent of municipal ownership and the capacity and size of municipal plants.

The plaintiffs introduced and there was received
511 in evidence as plaintiffs' exhibit #159 page 173 of the United States Government Manual for 1936, which states that the National Power Policy Commitee was organized under authority of a letter from the President to the Secretary of the Interior dated July 9, 1934, that its purpose is "to plan for the closer cooperation of the several factors involved in the electric power supply of the United States, both public and private, whereby national policy in power matters may be unified and electricity made more broadly available at cheaper rates to industry, to domestic and to agricultural consumers." The Committee acts in a capacity advisory to the President. It is composed of officials of various federal government units. It has the cooperation of the Federal Power Commission and the Federal Trade Commission as well as other federal agencies. This information appears over the name of "Harold L. Ickes, Chairman."

The plaintiffs offered and there was received in evidence plaintiffs' exhibit #161, Press Release #248 of the Federal Emergency Administration of Public Works, dated October 30, 1933. The press release contains the following statements:

* * * * *

A survey of non-Federal allotments of PWA announced today revealed just what the taxpayers are getting for their money and how the map of the Nation is being dotted with works which have been qualified as "socially beneficial" in that they make the citizens' day-to-day life easier, more safe and comfortable.

More waterworks have received allotments than any other type of non-Federal projects with sewers coming next on the list.

The survey by types of 448 projects and amounts allotted showed:

Character of Project	*Number*	*Total Allotment*
Waterworks	100	$29,004,160
Sewers	91	41,805,195
512 Streets and highways	80	20,144,602
Housing	17	46,219,958
Bridges and Structures	23	91,239,351
Schools	35	5,537,495
Hospitals	14	2,300,500
Other buildings	57	11,647,160
Power projects	5	4,845,700
Recreation	3	377,200
Miscellaneous Improvements	23	2,336,450
Total	448	$255,457,771

* * * * * *

Millions are being spent for the generation of cheap electric power in various strategic locations, such as the Tennessee Valley and the Columbia River basin, where nature has made these developments possible.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #162 Press Release #587 of the Federal Emergency Administration of Public Works dated March 25, 1934, recording the announcement by the Administrator of allotments totalling $128,000,000. for power generating and distributing plants, including both federal and non-federal projects. Of this total $104,160,000. is being spent by the Federal Government and $24,700,00. has been allotted to 50 non-federal projects. The principal ones of such projects are described and the allotments for non-federal projects are listed. This list includes the allotments for four Alabama towns. Of these four three are Florence, Sheffield and Tuscumbia. The press release states that "two of the municipal allotments were made to Alabama towns to enable them to bring electricity from the government plant at Muscle Shoals and distribute it locally."

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #164 Press Release #912
513 of the Federal Emergency Administration of Public Works which notes a report by the Administrator that "PWA has made allotments totalling $192,518,900, which will result in the generation and distribution of cheap electricity by publicly owned power plants and distribution systems." The Federal Government is spending $146,250,000. of this money for five giant projects; the Bonneville and Grand Coulee dams and power plants on the Columbia River in the Pacific northwest section of the country, the Fort Peck dam on the Missouri River in Montana, Boulder dam and power plant on the Colorado River and the Casper-Alcova project in Wyoming. The release also states that "the money being spent by the Tennessee Valley Authority for power development on the Tennessee River" is not included in the amount reported by the Administrator as being spent by the federal government, for the TVA money was not allotted by PWA but was earmarked by Congress and allotted by the President. The allotments for non-federal electricity projects in various municipalities are listed. A number of non-Federal allotments were made for modernizing old plants to enable them to give better service to the communities owning them.

514 As bearing upon the allegations of the bill setting forth a national plan and program, of which the activities of PWA are a part, to further public ownership, to reduce rates charged for electricity, etc., the plaintiffs offered a series of documents:

Plaintiffs' Exhibit #165 for identification is Senate Document 110, 73rd Congress, Second Session, offered on account of the message from the President contained therein on the proposed ratification by the Senate of the "St. Lawrence Treaty with Canada". The President stated:

"The other great objective provided for in the treaty relates to the development of electric power. As you know, I have advocated the development of four great power areas in the United States, each to serve as a yardstick and each to be controlled by government or governmental agencies. The Tennessee Valley plants and projects in the Southeast, the Boulder Dam on the Colorado River in the Southwest, the Columbia River projects in the Northwest are already

under construction. The St. Lawrence development in the Northeast calls for action. This river is a source of incomparably cheap power located in proximity to a great industrial and rural market and within transmission distance of millions of domestic consumers.

"The Legislature of the State of New York by unanimous vote set up the necessary State machinery during my term as Governor of New York and the State stands ready to cooperate with the Federal Government in the distribution of power in accordance with what I believe is today a definite national policy."

The plaintiffs' exhibit #166 for identification is a compilation dated November, 1934, gathered for the National Power Policy Committee by its Executive Secretary, consisting of public statements by Franklin D. Roosevelt as President and as Governor of the State of New York,
515 and entitled "Power Views of Franklin D. Roosevelt" and submitted to Harold L. Ickes, Chairman of the Committee. The compilation bears the identifying number P. W. 22982. It includes several state papers by Mr. Roosevelt as Governor of New York. Also included are excerpts from the speech of Governor Roosevelt at Portland, Oregon on September 21, 1932. These excerpts are in part as follows:

". . . I have strengthened the belief that I have had for a long time, and that I have constantly set forth in my speeches and papers in my work as Governor of the State of New York, that the question of power, of electrical development and distribution is primarily a national problem.

". . . Let me make it clear that I have no objection to the method of control through a public service commission. It is, in fact, a proper way for the people themselves to protect their interests.

"In practice, however, it has in many instances departed from its proper sphere of action and, I may add, from its theory of responsibility.

"It is an undoubted and undeniable fact that, in our modern American practice, the public service commissions of many states have often failed to live up to the high purpose for which they were created.

"In many instances their selection has been obtained by the public utility corporations themselves. These corpora-

tions have often influenced, to the prejudice of the public, the actions of public service commissions.

". . . The reason that we cannot take advantage of our own possibilities is frankly and definitely because many selfish interests in control of light and power industries have not been sufficiently far-sighted to establish rates low enough to encourage widespread public use. The
516 price you pay for your utility service is a determining factor in your use of it.

". . . I do not hold with those who advocate government ownership or government operation of all utilities. I state to you categorically that as a broad general rule the development of utilities should remain, with certain exceptions, a function for private initiative and private capital.

". . . I therefore lay down the following principle: That where a community, a city or county or a district is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable right as one of its functions of government, one of its functions of home rule, to set up, after a fair referendum has been taken, its own governmentally-owned and operated service.

"That right has been recognized in most of the States of the Union. Its general recognition by every State will hasten the day of better service and lower rates.

". . . State-owned or Federal-owned power sites can and should properly be developed by government itself. When so developed, private capital should be given the first opportunity to transmit and distribute the power on the basis of the best service and the lowest rates to give a reasonable profit only.

"The right of the Federal Government and State Governments to go further and to transmit and distribute where reasonable and good service is refused by private capital gives to the government, viz., the people, that same very essential 'birch rod' in the cupboard.

". . . Here you have the clear picture of four great government power developments in the United States, the St. Lawrence River in the Northeast, Muscle Shoals in the Southeast, the Boulder Dam project in the Southwest, and, finally, but by no means the least of them, the Co-
517 lumbia River in the Northwest. Each one of these will be forever a national yardstick to prevent extor-

tion against the public and to encourage the wider use of that servant of the people—electricity.

"The power issue, where vigorously handled in the public interest, means abundant and cheaper current for American industry, reduced rates and increased use in millions of urban and rural homes, and preservation of our water power resources in coordination with flood control, reclamation and irrigation."

Included in the compilation are excerpts from the book by Franklin D. Roosevelt entitled "Looking Forward", March, 1933, as follows:

"The regulation commission must be a tribune of the people, putting its engineering, accounting and legal resources into real use for the purpose of getting the facts and doing justice to both the consumers and the investors in public utilities. This means positive and active protection of the public against private greed.

"Therefore I lay down the following principle: that where a community or a district is not satisfied with the service rendered or the rates charged by a private utility, it has the undeniable right as one of its functions of government, one of its functions of home rule, to set up, after a fair referendum has been taken, its own governmentally owned and operated service.

"This right has been recognized in most of the states of the Union. Its general recognition by every state will hasten the day of better service and lower rates.

"State-owned or Federal-owned power sites can and should properly be developed by government itself. When so developed, private capital should be given the first opportunity to transmit and distribute the power on the basis of the best service and the lowest rates to give a reasonable profit only."

518 Also included in the compilation is the message to Congress of President Roosevelt dated April 10, 1933, dealing with proposed legislation for the development of the Tennessee River. Also included in the compilation is the President's letter creating the National Power Policy Committee, set forth supra as plaintiffs' exhibit #138. There is also included President Roosevelt's speech at Tupelo, Mississippi, dated November 18, 1934 wherein he says:

"I cite certain figures for the benefit of the gentlemen of the press, who have come hither from many climes. I am told that from March of this year, when you started using TVA power, the consumption of power for residential purposes has risen from 41,000 kilowatts to 89,000 kilowatts, an increase of 126 per cent. I understand that from the financial point of view, in spite of various fairly tales that have been spread in other parts of the country, your power system is still paying taxes to the municipality. That is worth remembering. Furthermore, that, as a whole, it is a remarkable business success.

"I talk about those figures first because it has been so often wrongly alleged that this yardstick which we are using could not be applied to private business and because a Government yard-stick recieves so many favors, that it is left off from paying this and paying that and paying the other thing. Well, we are proving it in this Tennessee Valley that by using good business methods we can instruct a good many business men in the country."

Aside from the foregoing the compilation likewise sets out Press Release #989 of the Federal Emergency Administration of Public Works, and the portion of the "Johnson Act" Public Number 222, 73rd Congress, May 14, 1934, that limits the jurisdiction of Federal District Courts with respect to injunctions against state rate making bodies. Section 10 and 11 of the Act setting up the Tennessee
519 Valley Authority are also included in the compilation.

The compilation likewise includes a release to the public press by the Tennessee Valley Authority dated Au-
520 gust 25, 1933, entitled "The Power Policy of the Tennessee Valley Authority", which is as follows:

"1. The business of generating and distributing electric power is a public business.

"2. Private and public interests in the business of power are of a different kind and quality and should not be confused.

"3. The interest of the public in the widest possible use of power is superior to any private interest. Where the private interest and this public interest conflict, the public interest must prevail.

"4. Where there is a conflict between public interest and private interest in power which can be reconciled without injury to the public interest, such reconciliation should be made.

"5. The right of a community to own and operate its own electric plant is undeniable. This is one of the measures which the people may properly take to protect themselves against unreasonable rates. Such a course of action may take the form of acquiring the existing plant, or setting up a competing plant, as circumstances may dictate.

"6. The fact that action by the Authority may have an adverse economic effect upon a privately-owned utility, should be a matter for the serious consideration of the Board in framing and executing its power program. But it is not the determining factor. The most important considerations are the furthering of the public interest in making power available at the lowest rate consistent with sound financial policy, and the accomplishment of the social objectives which low cost power makes possible. The Authority cannot decline to take action solely upon the ground that to do so would injure a privately-owned utility.

"7. To provide a workable and economic basis of operations, the Authority plans initially to serve certain
521 definite regions and to develop its program in those areas before going outside.

"8. The initial areas selected by the Authority may be roughly described as:

(a) The region immediately proximate to the route of the transmission line soon to be constructed by the Authority between Muscle Shoals and the site of Norris Dam.

(b) The region in proximity to Muscle Shoals, including northern Alabama and north-eastern Mississippi.

(c) The region in the proximity of Norris Dam (the new source of power to be constructed by the Authority on the Clinch River in northeast Tennessee.)

"At a later stage in the development it is contemplated to include, roughly, the drainage area of the Tennessee River in Kentucky, Alabama, Georgia and North Carolina, and that part of Tennessee which lies east of the west margin of the Tennessee drainage area.

"To make the area a workable one and a fair measure of public ownership, it should include several cities of sub-

stantial size, (such as Chattanooga and Knoxville) and, ultimately, at least one city of more than a quarter million, within transmission distance, such as Birmingham, Memphis, Atlanta, or Louisville.

"While it is the Authority's present intention to develop its power program in the above-described territory before considering going outside, the Authority may go outside the area if there are substantial changes in general conditions, facts, or governmental policy, which would necessarily require a change in this policy of regional development, or if the privately-owned utilities in the area do not cooperate in the working out of the program.

"Nothing in the procedure here adopted is to be
522 construed in any sense a commitment against extending the Authority's power operations outside the area selected, if the above conditions or the public interest required. Where special considerations exist, justifying the Authority going outside this initial area, the Authority will receive and consider applications based on such special considerations. Among such special considerations would be unreasonably high rates for service, and a failure or absence of public regulation to protect the public interest.

"9. Every effort will be made by the Authority to avoid the construction of duplicate physical facilities, or wasteful competitive practices. Accordingly, where existing lines of privately-owned utilities are required to accomplish the Authority's objectives, as outlined above, a genuine effort will be made to purchase such facilities from the private utilities on an equitable basis.

"10. Accounting should show detail of costs, and permit of comparison of operations with privately-owned plants, to supply a 'yard-stick' and an incentive to both private and public managers.

"11. The accounts and records of the Authority as they pertain to power, will always be open to inspection by the public."

There is also included an excerpt from the 13th Annual Report of the Federal Power Commission dated 1933, reciting:

"The Federal Water Power Act represents a declared policy of the Congress to provide for the improvement of navigation and the development of water power through the

instrumentality of private and governmental agencies, which, by the act, may be licensed to use, upon prescribed conditions, the water power of streams subject to Federal jurisdiction or to use public lands. These conditions to the granting of such valuable privileges are intended to promote the fundamental conservation purposes of the act through improvement of navigation and development of water power, and at the same time to safeguard the public interest by protecting the consumers of the generated power against exorbitant charges.

523

". . . Pursuant to an Executive order of the President (Executive Order No. 6251, Aug. 19, 1933, under title II of the National Industrial Recovery Act), the Commission has undertaken a survey of the water resources of the Nation as they relate to the conservation, development, control, and utilization of water power and of the relation of water power to other industries and to interstate and foreign commerce. The allocation of necessary funds available under the public works section of the National Industrial Recovery Act for this purpose permits the Commission to make an investigation prescribed by section 4 (a) of the Federal Water Power Act, which heretofore has not been possible for lack of necessary funds.

"On the basis of this survey the Commission is directed to assist the Federal Emergency Administrator of Public Works in formulating a comprehensive program public works pertaining to the development of water power and the transmission of electrical energy. Under authority of this Executive order, the Commission has also instituted an investigation of the cost of the transmission of electrical energy in the United States and its distribution to consumers, this being in harmony with the purpose of Senate Resolution 80, introduced by Senator Costigan. A still further duty imposed by this Executive order upon the Commission is that of investigating and reporting upon applications for loans referred to it by the Federal Emergency Administrator of Public Works for construction of public-works projects involving the development and utilization of electric power. In order to assist in expediting the national recovery program, the Commission has given immediate consideration to such applications in reporting on the engineering and economic aspects of the proposed projects."

Marked for identification as plaintiffs' exhibit
524 #167 was the text of the speech of President Roosevelt dedicating Boulder Dam on September 30, 1935, which included the following passage:

"These great Government power projects will affect not only the development of agriculture and industry and mining in this section they serve, but they will also prove useful yard-sticks to measure the cost of power throughout the United States. It is my belief that the Government should proceed to lay down the first yardsticks from this great power plant in the form of a State power line, assisted in its financing by the Government, and tapping the wonderful natural resources of southern Nevada. Doubtless the same policy of financial assistance to State authorities can be followed in the development of Nevada's sister State, Arizona, on the other side of the river."

Marked as plaintiffs' exhibit #168 for identification was the text of the address of Governor Roosevelt on September 30, 1932, at Milwaukee, Wisconsin, wherein he stated, among other things:

"After all, my friends, a public utility differs from a purely private business, because the utility is essentially a monopoly and therefore must be regulated by the people themselves through their government, with two broad purposes in mind:

"First, that they be compelled to give good service, and, second, that they be allowed to charge rates to the public that will bring to them only a reasonable return on their actual investment.

"We recognize, also, that because government regulation is often unable to keep up with the various devices of private utility companies that seek to evade the broad public policy, from time to time it is necessary for government to have what I called up in Portland, Ore., a 'birch rod' in the cupboard—two birch rods, in fact.

525 One of them is the development of government of certain great water-power resources to be used as a yardstick for the benefit of the people; and I have spoken out on the West Coast of four great natural resources which belong to the people, one on the St. Lawrence River, another the Muscle Shoals development, a third the Boulder Dam development and the fourth on the Columbia River in

the Northwest, which must never be allowed to be developed by anybody but the government itself.

The other 'birch rod' is the principle of public policy which would allow any community or county or city or any town or any village or any district actually to engage in the supplying of electricity—that great hand-maiden of the home, the farm and the factory—to supply them and industry if such community or district believes that they are unable to obtain adequately low rates or adequately good service from the private company."

Marked as plaintiffs' exhibit #169 for identification is the text of the address of Governor Roosevelt on September 24, 932, at Los Angeles, California, wherein he said, among other things:

"I have spoken on several occasions of the interest of government in hydro-electric power. You know of one project at Boulder Dam, the project which for this whole section of the country is to act as a yard-stick for the generations to come. I congratulate you and rejoice with you, but I want to point out to you that it is only one part of what the National Government can do toward this same end. Up in the Northeastern section of the country it so happens that there flows a great river, the St. Lawrence River, and its American section is capable of generating over a million horsepower, and we in the Northeastern part
526 of the country hope that that will be developed by the Government to act as a yard-stick on the charges and the service by private companies for the benefit of the whole section.

And then down in the Southwest part of the country nature has given us Muscle Shoals to act in exactly the same capacity for that part. And in the Southwest we have Boulder Dam. In the Northwest, the fourth corner, the fourth quarter of the country, nature has given us the Columbia River."

Marked as plaintiffs' exhibit #170 for identification was the text of the address of President Roosevelt delivered at the site of the Bonneville Dam on the Columbia River on August 4, 1934, wherein he said, among other things:

"Two years ago when I was in Portland I said the principle of government needs yardsticks so that the people in this country will know whether they are paying the proper price for the electricity of our times.

I conceived the idea that the government could create yardsticks. One has already been started on the Colorado River. Two other yardsticks have been undertaken, the Tennessee and the Columbia, and the fourth—the St. Lawrence—is going to be started."

The foregoing exhibits #165 to 170 for identification were separately exhibited to the Court and separately offered in evidence to prove the existence and objectives of the National Power program as alleged in the bills of complaint and to show the part played therein by PWA. Among other things plaintiffs' counsel stated:

"While this is a suit against Mr. Ickes as Administrator of PWA, the President is the real controlling administrator of PWA, and I assume, in any controversy, would dominate and determine its policy.

527 We offer them, further, because I am trying to connect up with everything because we are trying to make a record, and we contend that Mr. Ickes' book, which I must concede is excluded, and some of the other documents, show that Mr. Ickes has adopted the President's statement on the National power program as a statement of that program and of the part of the program which PWA seeks to carry out. That is, we offer it to show the objectives which are sought to be obtained by this National power program, and for the further reason that it appears, we think, that Mr. Ickes and others are acting together in carrying out this program."

The defendants objected separately to each of the documents "as irrelevant to any of the issues in these cases". The objections were sustained and exceptions separately allowed.

527A The plaintiffs then offered a series of press releases of the Tennessee Valley Authority; attached to them was a certificate of the Director of Information of the Tennessee Valley Authority stating:

"I hereby certify that the attached papers are correct copies of or extracts from documents furnished by me to the press upon my own responsibility and without any formal approval by any member of the Board of Directors of the Tennesse Valley Authority.

(sgd) W. L. STURDEVANT"

The press releases were as follows:

Marked as plaintiffs' exhibit #175 for identification was a TVA press release containing an address
528 delivered in Atlanta, Georgia, on Nov. 10, 1933, by Director David E. Lilienthal, Director and General Counsel of TVA, stating among other things:

"The Tennessee Valley Authority Act marks the beginning of a new national power policy and national power program. This new national policy has two major objectives. The first objective is more effective protection of the public interest, by the setting up of a measure of public operation of power as a 'yardstick'. The second objective of this new national policy is a greatly increased use of electricity in the homes, the farms, and the factories of the United States—an electrified America. * * * * *

"The national power policy of the President and the Congress written into the Tennessee Valley Authority Act recognizes that electric power, next to the soil, is our greatest resource. It recognizes that the people must maintain public control of this liberating force. This is the first objective of the national power policy to which I have referred.

"In order to comprehend fully the reasons for this phase of the program, it is necessary to recall what has been happening in the United States during the past ten years. It is necessary to understand that the people back home have become thoroughly aroused; that they are determined that the disgraceful looting of the public business of power shall not be repeated. You are all familiar with the sordid story. I need not recall to your minds the quarter of a million dollars which that leading citizen of Greece, Mr. Samuel Insull, paid to the Chairman of the State Commission which was supposed to be regulating his Illinois utilities. Those of you who are investors are familiar with the story of how some operating utilities were bled of their assets by speculating holding companies. You investors will recall the dizzy pyramiding of stocks, of bare-faced
write-ups, of unconscionable bonuses, of the pur-
529 chase of utility plants at outrageously high figures and the issuance of securities on the basis of such prices. Instances of these practices can be cited to you from coast to coast.

"I have no desire to intimate that every public utility followed such practices. There were many notable exceptions. But there can be no question that in the last decade the power business was dominated by financial pirates. * * *

"Now that is what had been going on throughout the United States. Regulation by commissions had in many states proved ineffectual. In some states it was perfectly obvious that the regulators were not regulating the utilities, but in effect, the utilities were regulating the regulators. In other states, the regulatory commissions were doing an honest and sincere job, but were hampered by the interminable procedure of regulation, with rate cases sometimes dragging through a decade. And so, to supplement regulation by commissions, Congress passed the Tennessee Valley Authorities Act. This Act is not an assault upon private ownership and management of public utilities. But it is a determined attack on private mis-management of the public business of power at the expense of the people back home—consumers and investors alike. * * *

"It was with such a background that Congress passed the Tennessee Valley Authority Act, and set up a measure of public operation of the power business. This public operation is to serve as a yardstick by which to measure the fairness of electric rates. It has an additional function. It is a reminder that electricity performs a public service. It is a reminder that unless that business is conducted by private corporation with fairness, without financial jugglery and with a due sense of responsibility to the paramount public interest, that the public at any time may itself assume the function of providing itself with
530 this necessity of community life."

"What the Tennessee Valley Authority is required to do in its power program is to set up an area for power operations. That area is to be on a comparable basis with typical private operations. To set up such a "yardstick" the Authority obviously must undertake to serve an area which is large enough and sufficiently concentrated, and with an adequately diversified industrial, commercial and residential load to provide a fair test. As business men, it is apparent to you that if the Authority is to serve only

the parts of a territory which a private utility has not chosen to serve, or is to serve only sparsely populated areas, the result of our operations cannot possibly be set up as a measuring rod. The Authority will necessarily have to undertake to serve a balanced area, including some cities of substantial size, good farm territory and reasonably favorable distribution possibilities.

This power program is a constructive measure. Congress has not declared a national policy against the private ownership and operation of public utilities. It has rather provided for an additional measure of public protection against abuses in the conduct of a business which, by its very nature, is a matter of fundamental public concern."

The objective of making electricity more broadly available looks to the electrification of America. We have a tremendous surplus supply of electricity in the country as a whole. Within the Tennessee Valley privately owned companies have facilities between 30% and 40% in excess of demand. The TVA is erecting more facilities. We must drastically revise rate structures for electricity. The rate levels have been the greatest single obstacle to increased use; they must be revised downward. High rate levels are due to tradition, to monopoly control by utilities, to the pressure of outrageous capital structure. The plans
531 of TVA to furnish lower rates afford the quickest means of accomplishing rate revision throughout the country. This is an essential part of the new national program inaugurated by the TVA Act.

Marked as plaintiffs' exhibits 177, 178, 179, 183 and 184 for identification were public releases of TVA giving the texts of addresses by Director Lilienthal made in the latter part of 1933 and early 1934 in Chattanooga, Memphis, Nashville, before the American Academy of Political and Social Science in Philadelphia, and before the League of Women Voters in Boston, wherein his statements were on the same subjects as those included in plaintiffs' exhibit 175 for identification.

Marked as plaintiffs' exhibit 176 for identification was a public release of TVA entitled "General Information" dated December, 1933, stating, among other things, that the objectives of the TVA include the utilization of Muscle

Shoals as a yardstick in determining the relative costs of public and private power operation. The release also identifies the statement included in plaintiffs' exhibit 166 for identification, *supra*, there entitled "The Power Policy of the Tennessee Valley Authority", as a statement by the Authority of its power policy, and as a statement of a major policy.

It is likewise stated that the region to be served by TVA includes northern Alabama, and that "every effort will be made to avoid the construction of duplicate physical facilities, or wasteful competitive practices. Accordingly, where existing lines of privately owned utilities are required to accomplish the Authority's objective, a genuine effort will be made to purchase such facilities on an equitable basis." There is also set out in detail the rates to be charged by TVA for electricity, and those to be charged to their consumers by municipalities purchasing from TVA which rates are fixed by TVA in the contract between TVA
532 and such municipalities.

The foregoing TVA releases were issued by the Director of Information of the Tennessee Valley Authority. The Board of Directors of the Tennessee Valley Authority had prior to the issuance of these releases adopted the following minute:

"It was decided that all publicity shall issue through the Publicity Department and that special publicity dealing with particular phases of the work shall have the approval of the director concerned before it is released."

Marked as Plaintiffs' Exhibit 181 for identification was a public TVA release which identifies David E. Lilienthal as the Director of TVA in charge of its power program.

The foregoing exhibits 175-179, 181, 183 and 184 for identification were in each of the cases separately offered, and exhibited to the Court, to show the nature and purpose of the nat nal power program of which the PWA power program is a part, namely a program to foster public ownership and to reduce the rates of local electricity utilities, and further to show the scheme which the PWA defendants and the Tennessee Valley Authority, and particularly its power Director Mr. Lilienthal, have been cooperating to carry out in the Alabama towns in suit and else-

where. Plaintiffs' counsel referred to evidence, theretofore introduced, showing this cooperation with respect to some of the Alabama towns. The defendants objected to the Exhibits separately on the ground "That they are irrelevant to any of the issues in these cases, and also on the ground that they are incompetent and not binding against any of the defendants". The objections were severally sustained and exceptions were separately noted.

The plaintiffs offered and there were received in
533 evidence the following Exhibits:

Exhibit 194. Press release No. 33 of the Federal Emergency Administration of Public Works dated August 1, 1933, states that Circular No. 1 of the PWA had been ordered sent to all state PWA officers for their guidance in handling non-federal applications.

Exihibit 195. The text of an address by the Administrator, Harold L. Ickes, at the United States Conference of Mayors in Chicago on September 23, 1933, which among other things states:

"It is now largely in the hands of the mayors of our cities to determine whether the Public Works Program will fully serve its purpose in aiding in the economic recovery of the country. Our National Treasury is waiting to be drawn upon for hundreds of millions of dollars for useful public works. The Administration in Washington can approve your projects and advance funds necessary to complete them."

"The Public Works Program, contemplating as it does the expenditure of funds in excess of $1,750,000,000 for State and municipal projects, offers the greatest opportunity for municipal improvements in the history of any country. We are willing to advance you as an outright gift 30 percent of your outlay for labor and material on an approved plan. We ask you to pay for the balance of the project. But we are willing to help you to finance your share. We will advance you the remaining 70 percent upon approved security and by approved security I don't mean that we will be as finicky about the security that you may offer as would be the investment bankers with whom you are accustomed to deal. We will lend you this 70 percent at 4 percent interest and permit you to amortize it over a period not to exceed 30 years.

"Here is an opportunity to build necessary and
534 desirable public works on more favorable terms than you have ever had before or than you may ever have again. Do you need new water works, or an extension of your present plant? Do you want a new or improved sewage system? Do you require bridges or viaducts or public buildings or roads or new schools? These things and others you may have on unbelievable generous terms.
• • •

"Naturally, the purpose of the Public Works Program is not merely to do work for the sake of doing the work. We want to increase buying power because it is realized that without increasing buying power our recovery program will fail. In this the municipalities are as much interested as the Federal Government.

"If at the same time that we increase buying power we build useful and socially-desirable public works, we are accomplishing two fine results by the same effort. I need not point out to you that for every hundred thousand men at work on public works projects there are at least an equal number at work back of the lines in saw mills, in steel mills, in factories, in quarries, and on railroads, producing materials and performing services necessary to supply the men on actual projects with what they need for their work. And as these men on the works and back of the lines acquire buying power, they are in a position to increase the buying power of others. They will be buying more clothing. They will be sending their children to school. They will be able to afford more and better food. A new automobile will not be beyond their hopes. They will want to repaint their houses and repair them. Thus, they will be helping turn the wheels of industry, giving employment to those who in their turn will give further employment to others, until the recovery movement will be able to keep moving of its own momentum and the stimulus which we are now ready and willing to provide in the way of public works will no longer be necessary."

535 Exhibit 196. Press Release No. 49 of the Federal Emergency Administration of Public Works dated August 13, 1933, notes that the National Planning Board of PWA is beginning a series of regional meetings to study

public works plans of various localities and to coordinate them into a national plan. The release states:

"In advance of its regional meetings the Board has already written to each regional advisor emphasizing the necessity to encourage and stimulate local and regional planning agencies as the best means of developing a national plan.

'Local initiative and responsibility is essential to both the rapid development and the permanent value of such a plan,' the Board said in its letter to regional advisors. 'It is, therefore, hoped that the regional Advisors will make, have, and take every reasonable opportunity to further the organization of planning boards and commissions where none now exist, or where they have ceased to function, to secure preparation of comprehensive plans by competent consultants, and encourage existing planning organizations.' "

Exhibit 198. Press Release No. 113 of the Federal Emergency Administration of Public Works states that Colonel H. M. Waite, Deputy Administrator of PWA had accepted an offer of the American Municipal Association to assist municipalities in preparing applications for projects.

Exhibit 197. Press Release No. 74 of the Federal Emergency Administration of Public Works, dated Aug. 24, 1933, announces the appointment of the executive secretary of the United States Conference of Mayors to act as liaison officer of PWA with municipalities. He will inform PWA of the progress of cities through the aid of the Public Works Program and will aid municipal officials in obtaining benefits of the program.

Exhibit 199. Press Release No. 116 of the Federal Emergency Administration of Public Works dated Sep-
536 tember 12, 1933, announces that in its speed-up drive PWA will send its Deputy Administrator, General Counsel, Finance Director and a member of its public relations staff on a 6000 mile airplane tour so the country may get a better idea of the purposes of PWA. The party will confer with and advise PWA state officials in the various regions. The need for speed will be emphasized.

Exhibit 200. Press Release No. 118 of the Federal Emergency Administration of Public Works announces allot-

ments for 19 non-Federal projects (none are power projects) and quotes Administrator Ickes as saying that the speeding up process in non-Federal allotments is bearing fruit, that PWA is not waiting on technicalities but makes tentative allotments so that plans may be completed and work started with a minimum of delay. He also stated:

"The law permits the Government to make outright grants up to 30 percent of the cost of labor and materials. Non-Federal public bodies which received allotments today took advantage of this opportunity to meet part of the expense of their local construction while they financed the balance through other means. All local officials would do well to study the opportunity offered by the section of the law permitting grants. It permits the Government to cause employment without bearing the entire financial load."

Exhibit 201. Press Release No. 135 of Federal Emergency Administration of Public Works, dated September 18, 1933, reports on the progress of the airplane tour. The Deputy Administrator wires the Administrator that municipalities realize the necessity for speed.

Exhibit 203. Press Release No. 144 of the Federal Emergency Administration of Public Works, dated September 23, 1933, notes end of the airplane tour and the Deputy Administrator reports that the PWA program is
537 gaining momentum. He found some opposition to the PWA wage scales but cleared away much misunderstanding with his explanation that the 30% grant more than offsets increased labor costs. Another of the party reported:

"By and large there will be plenty of projects sound enough to accept. The purpose of the Federal grant of 30 percent in some parts of the country was generally misunderstood. Col. Waite has made it clear that the grant more than covers the increased cost due to higher wages and shorter hours. The cities now realize that the grant is the Federal Government's contribution to restore purchasing power and that some of the responsibility rests upon the municipality itself."

"Past financial difficulties of the applicant will not necessarily stand as a bar to eligibility for aid under the Public Works Act. Unemployment must be helped. The ap-

plicant can show not only a budget currently balanced, but a projected spending program adjusted to known present factors."

Exhibit 204. Press Release No. 152 of the Federal Emergency Administration of Public Works, dated September 25, 1933, states, among other things:

"Within the past two weeks there has been a noticeable increase in applications for non-Federal loans due to the continued pressure of the PWA and the recent appeals of the Administrator to municipalities and local authorities for the submission of practical and useful applications. The number of non-Federal applications reaching Washington after submission to the State Advisory Boards have grown day by day. Approvals have now been granted to 131 non-Federal projects.

"Thus far the PWA has approved more than 2,200 projects of every character after examining and rejecting as many more which were found to be impractical or unnecessary and not designed to remove men from relief rolls to pay rolls."

Exhibit 205. Press Release No. 153 of the Federal
538 Emergency Administration of Public Works states, among other things:

"Federal agencies today continued to press PWA officials for additional allotments despite the fact they have received the great majority of the allotments to date. * * *

"Col. Waite asked the Federal officials seeking more funds what progress they had made in turning allotments already made into men at work. In most cases he was informed that contracts were being advertised or let and that where men were not actually at work on construction projects already they would be soon.

"The Deputy Administrator remained convinced that enough non-Federal projects would be presented to permit proper allotment of the balance of the $3,300,000,00 fund by the first of the year but warned non-Federal bodies not to be slow because Government agencies were clamoring for the remainder of the funds."

Exhibit 206. Press Release No. 209 of the Federal Emergency Administration of Public Works, dated Oct. 19, 1933, publicizes a report on state legislation by the assistant general Counsel of PWA, which states in part:

539 "The greatest obstacle with which the Public Works Program has met are the restrictions and limitations placed upon States and municipalities by the provisions of State constitutions and State statutes."

"Where, however, restrictions are purely statutory, a forceful executive and legislature willing to cooperate can make the benefits of the Act available to their constitutents. There are several means available in such a case: First, it is desirable, where such a law does not already exist, to pass a revenue bond act. Under a revenue bond act the security in back of the bonds is the revenue from the particular project involved, which is thus made to pay its own way without any additional burden to the taxpayer.

Another method is to authorize cities to borrow from the Federal Government without regard to any statutory debt limits and to dispense with the necessity of referendum elections, notice of hearings, and other time-devouring impediments, such as the requirement of public sale."

"A third method is to make the raising of the debt limit dependent on review by a State commission set up for the purpose."

"A fourth method, and probably the best, is exemplified by Chapter 26 of the Acts passed by the Extra Session of the General Assembly of Virginia in 1933. This law is in effect for a limited period of time and deals specifically with loans and grants by the Federal Emergency Administrator of Public Works to the counties, cities and towns of Virginia. It supersedes the provisions of all inconsistent laws, general or special, including charters, and confers powers which are in addition to the powers conferred in other laws. Instead of being simply a revenue bond act or removing the specific restrictions, or raising the
540 debt limit, and going no further, the Virginia Act accomplishes all of these results and at the same time sweeps away all statutory limitations on the issuance of bonds contained in other statutes of the States."

"The main object of any legislation should be to make more expeditious the obtaining of loans and grants from the Administration and the removal of the numerous restrictions, ambiguities and outright contradictions which at present seriously hamper municipalities when they come

to the Federal Emergency Administration of Public Works for a loan or a grant."

Exhibit 207. Press release 309 of the Federal Emergency Administration of Public Works announces an allotment of $250,000 to the National Planning Board of PWA to carry out its work of stimulating local planning of public works by States and cities; the program contemplates sending technical advisers to state and city planning units.

Exhibit 208. Press release 380 of the Federal Emergency Administration of Public Works, dated December 17, 1933, states that the Administrator has instructed PWA state engineers to continue getting non-federal projects in to Washington as fast as possible regardless of the approaching exhaustion of the public works fund. The Administrator acted when some States with large allocations slowed down in preparing projects.

Exhibit 209. Press release 1165 of the Federal Emergency Administration of Public Works, dated Dec. 30, 1934, states that the President had written the Governors of the States offering the assistance of PWA in preparation of legislation to enable public bodies to obtain fuller benefits of whatever additional public works program might be authorized by Congress. The Legal Division of PWA, which already has assisted States at their request in the preparation of legislation to facilitate the public
541 works program, was designated by the President to assist the States upon their invitation. A typical letter says in part:

"Our experience in the past eighteen months has brought to light the difficulty of gearing the legal machinery which has served municipalities of your State adequately for decades to the speed with which the Federal Government must extend credit to achieve desired results. It has been found that revision of the procedure relative to municipal financing is essential, at least for the duration of the existing emergency. I wish to submit for your consideration in formulating your legislative program, the following general suggestions:

(1) Simplification of the procedure for the authorization and financing by municipalities of public works projects, for example, by eliminating the requirement for an election

and in lieu thereof substituting a permissive referendum on bond issues, by shortening the periods of notices before such referendum elections, and by permitting the sale of bonds privately to the Federal Government.

(2) Conferring of additional powers upon municipalities to undertake public works projects and issue bonds to finance the same, including the relaxing of statutory limitations upon taxing power to pay debts, and the delegation of a broader authority to municipal officials to make such contracts with the Federal Government as are deemed in the best interests of the municipality.

(3) Creation of municipal improvement authorities without power to tax, but with power to issue bonds payable solely from the income of revenue-producing improvements, such as water, sewer, and electric light and power systems.

(4) Authorizing municipalities to engage in slum clearance, including condemnation of necessary lands, and the construction, operation and maintenance of low-cost
542 housing, to make contributions therefor, and to enter into contracts with the Federal Government in connection therewith.

(5) Providing for the creation of non-profit public benefit corporations or agencies to provide for the electrification of rural communities with the assistance of the Federal Government.

(6) Validation of bonds and other obligations heretofore issued by municipalities for public works projects and sold to the Federal Government.

If you will write me how you feel about these suggestions, I will request Administrator Ickes to have prepared such bills as may be deemed advisable.

Quite apart from the above suggestions, I think it would be helpful if arrangements could be made whereby the Public Works Administration is furnished with copies of all laws enacted at the forthcoming legislative session. This will materially aid the Administration in advancing funds on approved projects.

Very sincerely,

FRANKLIN D. ROOSEVELT."

Exhibit 211. Press release No. 1192 of the Federal Emergency Administration of Public Works states that PWA state engineers have been given questionnaires and schedules to be filled out by local public bodies in order to survey available public works projects which might
543 be useful in connection with the President's program. Projects providing for employment of the maximum amount of direct labor were emphasized.

Exhibit 212. Press release No. 1419 of the Federal Emergency Administration of Public Works, dated June 16, 1935, is an article by Administrator Ickes giving an accounting of his two-year stewardship. He emphasizes the employment given by PWA projects, pointing out that essential public works which in the ordinary course of events would have been delayed for many a decade now promote the material and cultural welfare of the Nation. To promote construction, PWA offered free grants of 30% of the cost of labor and materials. PWA checked the downward trend of construction. PWA had to chart its own course, set its own precedents, pioneer its entire program. Yet projects have been required to have lasting social usefulness, as well as giving employment.

Statisticians are without means of accurately estimating the numbers of these behind-the-lines workers, but evidence they have gathered indicates the figure approximately 2,000,000 whose employment was made possible largely through the expenditure of nearly $1,000,000,000 for materials. And each of these wage-earners, statistics show, provides for an average of four dependents.

Exhibit 213. Press release No. 1564 of the Federal Emergency Administration of Public Works states that the Administrator has announced that, stimulated by the President's order setting Sept. 12 (1935) as the deadline for receipt of applications, local public bodies have filed over 4000 applications for loans and grants and for grants only under the new program, under which 45% grants are given. A 10,000 mile airplane tour of PWA officials has been made in the interest of expediting the public works program, visiting virtually every state.

Exhibit 214. Dated November 16, 1933, is a mem-
544 orandum to all PWA state engineers over the name of H. M. Waite, the Deputy Administrator, stating:

"The following extract from a letter from one of
545 our State Advisory Boards is indicative of action that may be taken to stimulate the submittal of applications to the Public Works Administration. This scheme is meeting with success in a number of states.

'Yesterday we held the first of a series of projected meetings which will cover this whole state, carrying the program of PWA out into the country.

The Mayor was host at a luncheon to eighty-two guests. The Mayors, City Engineers, City Attorneys, interested citizens and members of the Seventh Congressional District were in attendance. Our Chairman and State Engineer with myself represented PWA.

The meeting was a distinct success. It provided information which set at rest many stories and rumors that PWA was Santa Claus in disguise. It opened the way to a number of Cities to undertake projects which had been discarded and it made clear to every one in attendance that the way has been provided, for those who can avail themselves of the privilege, to take men off relief rolls and put them on pay rolls with the very same money.

So successful does our Board consider the meeting that we have today scheduled similar ones in each Congressional District in the State.' "

Exhibit 215. Dated March 11, 1936, is letter of instructions No. 52 to State PWA directors and Division Heads over the name of Horatio B. Hackett Assistant Administrator, stating in part that state directors will not solicit applications as the PWA has no funds for allocations at this time.

Exhibit 216. Dated April 29, 1935, is Staff Order No. 1 of the Federal Emergency Administration of Public Works to all Division Heads setting forth a telegram from Administrator Ickes to all State Engineers authorizing them to accept new applications for non-federal projects,
546 applications to be prepared as in the past subject to a future change in PWA rules, and directing that this matter be given widespread publicity in each Engineer's territory.

The plaintiffs separately offered each of the fol-
547 lowing exhibits, marked for identification as indicated, and exhibited to the Court:

Exhibit 217. Press release No. 52 of the Federal Emergency Administration of Public Works, dated Aug. 15, 1933, announces the appointment of ten regional inspectors assigned to various regions. of the country, to be under the direction of Louis R. Glavis, head of the Division of Investigations of the PWA. These inspectors will be in charge of the PWA investigators in the field, with the duty to assure that PWA money is spent as intended, and to investigate complaints.

Exhibit 218. Press release No. 299 of the Federal Emergency Administration of Public Works, dated Nov. 20, 1933, states that as a safeguard against graft, waste and slipshod work inspectors will be assigned to check up on each non-federal project and that the inspection work will be directed by an Inspections Division which will see that money on non-federal projects is spent as intended.

Exhibit 219. Press release No. 452 of the Federal Emergency Administration of Public Works states that inspectors are assigned to projects from start to finish to see that work is done according to the plans and specifications submitted to PWA, that costly methods of construction and extravagant materials are not used, that the 30 hour week, minimum wage, and other provisions of the PWA act are observed on non-federal projects.

Exhibit 220. Press release No. 460 of the Federal Emergency Administration of Public Works states that workmen on public works projects may make complaints to PWA inspectors as to any form of "kickback" or extortion and the inspector may require restitution. PWA will refuse to advance money under allotments where restitutions are not made. PWA holds the purse strings on every allotment until the work to be done is finished. Both the loan and grant will be paid over in installments or
548 deposited in escrow whence no withdrawals may be made except with the consent of PWA.

Exhibit 221. Press release No. 462 of the Federal Emergency Administration of Public Works states that local officials must show what the money has been spent for before they get it. Materials and methods used must be up to the standards as approved by PWA in the plans and specifications. Inspectors will require shoddy work to be torn out.

Exhibit 223. Press release No. 478 of the Federal Emergency Administration of Public Works announces the rescission of thirty allotments for non-federal projects in some cases because the recipients had failed to comply with the PWA requirements for the 30 hour week and with the minimum wage rates fixed by PWA.

Exhibits 225, 229 and 230. Press releases No. 558, No. 1818, and No. 1833 of the Federal Emergency Administration of Public Works announce further rescission of allotments for non-federal projects because of failure of recipients to comply with PWA requirements.

Exhibit 224. Press release No. 533 of the Federal Emergency Administration of Public Works announces that, pursuant to the determination of the Administrator and a resolution of the Special Board for Public Works, no project financed by public works funds is to be named without the prior consent of PWA nor may it be named after a living person.

Exhibit 226. Press release No. 721 of the Federal Emergency Administration of Public Works announces that the Administrator had disapproved a proposed contract between the St. Paul-Minneapolis Sanitary District and a firm of consulting engineers, and had exercised the government's right to supervise the project by ordering immediate beginning of the sewage works for the Twin Cities,
549 to be financed by PWA, with a board of nationally known engineers named by the Administrator to examine various phases of the project and supervise the plans subject to the Administrator's approval. There had been much bickering and dispute about the proposed contract with the engineers and the Administrator announced that he had little faith in the success of any contract for professional services when it is evolved from bitter controversy. The engineering board named by the Administrator will have many technical decisions to make to avoid waste or a type of plant not suitable for the community.

Exhibit 227. Press release No. 1046 of the Federal Emergency Administration of Public Works announces that PWA has demanded immediate termination of a construction contract between a contractor and the recipient

of a PWA allotment for a transit railway line. PWA acted on evidence from its inspectors of faulty construction by the contractor, and demanded that the recipient reorganize its engineering supervision staff in a manner satisfactory to PWA. Further funds would be withheld if the recipient failed to comply with the demand of PWA.

Exhibit 228. Press release No. 1647 of the Federal Emergency Administration of Public Works announces that, where projects are financed under the Emergency Relief Act of 1935, PWA will not be required by the Works Progress Administration to use labor from relief rolls in communities where sufficient relief labor is unavailable.

The purpose for which the foregoing Exhibits
550 were offered was stated by counsel for the plaintiffs as follows:

I may state that the purpose of offering these exhibits 217 to 230, inclusive, is to prove that PWA by contract exercised control over wages, hours of labor, conditions of labor wage preferences, plans and specifications of construction, and other matters of what we claim to be purely of state concern, on projects which were local non-Federal projects being constructed in the various states.

They show that this control was exercised by contract; that it was enforced by the appointment of a large number of inspectors who went about the country seeing that all rules and regulations of PWA were obeyed; and it was further enforced by control of the purse strings, as stated by the Administrator; and that wherever there was any failure to comply with rules and regulations of PWA the allotment was canceled and no money was advanced for the project, even though it was in process of execution. For example one exhibit, plaintiffs' exhibit 217, release No. 52, refers to the appointment of 10 regional inspectors under the direction of Mr. Glavis.

Counsel for the defendants' objected to the foregoing exhibits on the following ground:

Mr. Holtzoff: If your Honor please, we object to these exhibits as a group, and to each of them severally, on the ground that they are irrelevent, in that they do not relate to the projects here in litigation. The question before your Honor, if I may say so again, is the validity of 11 contracts

made or proposed to be made by the Administrator. Whether or not control over labor conditions was exercised by the Administrator in respect of other projects is immaterial and irrelevant. If the issue has any bearing in the case, it must be limited to those projects. In order to ascertain whether or not such control was exercised as to those projects, we must turn to what was done in respect to them, and to the contracts here in litigation.

551

As a matter of fact, the record shows that in none of the contracts are there any clauses conferring upon the Administrator the power to which my friend refers. In some of them the contracts were amended subsequent to the institution of these suits, in order to delete therefrom some of the clauses to which our adversaries so vociferously object. They are out of the case, and the only things before your Honor are the amended contracts. Therefore we respectfully submit that the evidence now offered is immaterial.

The offer of each exhibit was separately made in each case and separately objected to, the objections were separately sustained and exceptions separately granted.

Whereupon the following occurred:

552

Mr. Acheson. Your Honor, during the testimony of Mr. Rau, reference was made to two communications, one from the Administrator to the President, and one from the President to the Administrator. I should like to ask for those documents at this time. They have been subpoenaed.

* * * * * * * * * *

The Court. Are you going to produce them?

Mr. Frank. I want to make an explanation as to the nonproduction.

The Court. Very well.

Mr. Frank. These documents requested are described in the subpoena duces tecum as a letter dated September 8, 1934, from Harold L. Ickes, Federal Emergency Administrator of Public Works, to the President; and a memorandum dated Hyde Park, September 10, 1934, to Harold L. Ickes, Federal Emergency Administrator of Public Works, initialed in pencil "F. D. R."

Those papers are not being produced, for two reasons, the first of which I will state thus:

One of them is a memorandum dated Hyde Park, September 10, 1934, initialed in pencil "F. D. R."—obviously the President of the United States.

I am authorized by the President of the United States to say that he considers that document privileged; that he considers it not in the public interest, and prejudicial to the public interest and to the interest of the Government, that that memorandum should be produced.

As to the other memorandum, his views are the same. The memorandum addressed to the President falls in the same category, and the Administrator objects to the production of the documents, and is unwilling to produce them for like reasons.

After extended argument by Mr. Frank for the defendants and Mr. Baker and Mr. Acheson for the plain-
553 tiffs, the Court ruled as follows:

The Court. I do not think there is any question here at all. In fact, I am surprised that there really should be so much controversy about this. The attorneys for the plaintiffs have evidently got everything that could be found that had been printed or published. The last thing is a communication from the Administrator to the President, and the only purpose I can discover of that is to show that what the Administrator finally did was done by authority of the President.

The President, through Government counsel, asserts that in his opinion the disclosure of that would be detrimental to the public interest. I think I ought to respect it. It is not a question of personality of the President or of personality of the Secretary or of the Administrator; it is a question of the office itself. The question of privilege is sometimes confused with the question of exemption, the question of prohibition, the relation between attorney and client.

Certain things are prohibited: the testimony of wife and husband; testimony of a person who has had confidential relations with persons later deceased. There are a great many such things.

Then, of course, when you get down to the border line, where very grave things are involved, it seems quite hard

to send a man to the gallows when he might be acquitted by something that is favorably produced. We have not got that here. We have everything we can have of relevance to this issue. The last thing is a memorandum that the Administrator sent—or a letter—to the President, asking for instructions. What those instructions were, I do not know, but I would have to unhesitatingly say that what he did was done pursuant to what, in his opinion was sufficient justification for his actions.

And why there should be so much desire to get his
554 specific language, is more than I can understand.

But when he asserts that in his opinion it would be detrimental to the public interest to make that public, I have, I think, to respect it.

All these legal authorities are very interesting. The supposed derivation of the President's privilege from the immunities of the King is a matter of real historical interest, but that is not really important. We have here the question of the situation where, historically, the President has been exempt from divulging relations which he deems confidential between himself and one of his subordinates. And if that was not respected, just think of where it would lead.

Now, Mr. Baker will understand what I mean. I have been in a Government department; you gentlemen all know that. I have sat around a counsel table with the Attorney General, the Solicitor General, Solicitors from the different Departments, various employees of Departments, discussing some question as to, for instance, whether an appeal should be taken in a particular case. Half a dozen different attorneys have written recommendations, some recommending an appeal and some recommending that an appeal not be taken; we sat around there and threshed it out, and it was decided one way or another. Now, would it be conceivable that any attorney would have a right to subpoena those recommendations—and I simply cannot conceive it—showing that the appeal had not been taken in good faith, for instance, because one or two men had recommended against it?

I cannot conceive why confidential communications passing between the President or a cabinet officer and one of

their subordinates, with respect to the policy of some department, should be opened to public discussion; I can see no conceivable reason why that should be. It would be hard to think of a case, but it might be possible; let us take
555 the War Department, for instance; I do not doubt but the Secretary has had that experience. He and his subordinates conferred over certain matters and policies of the Department, certain officers made recommendations and certain officers did not make recommendations, certain officers recommended different things, and finally the Secretary had to decide what to do; and what he did was made a matter of public record.

Now, that is what we have here. I have no question or hesitation in finding that the action taken by Secretary Ickes was with the approval of the President; and that is all anybody can ask for. It is all anybody can ask for.

The Government is not asserting that it was not. If the Government were asserting that it was not taken with the approval of the President, that might be different. But that is not so.

It seems to me that we have spent more than ample time in this consideration. And of course it has been interesting; I love to think of these cases. As a matter of fact, it is easier for me to think, just now, than to talk, because I have such a bad throat.

But that is the view I have taken. I do not think there is any public necessity, so far as I can conceive, that could justify me in disregarding the solemn assurance of Government counsel that the President believes the making public of this communication of his to the Administrator, would be against the public interest. I cannot find justification for holding that it should not be regarded as confidential. I can see no reason for not regarding it as such. And I can see no harm coming to anyone from taking that position; because the only thing that could be shown by it, that has been suggested to me, is that what was done was done pursuant to his authority, with his approval. And enough has been shown to justify that.

And as I say, there is no question of the personal-
556 ity; it is not whether it is President Roosevelt or President Coolidge or President Wilson or Pres-

dent Madison. It does not make any difference who it is: The making public, under circumstances which are entirely devoid of any necessity, of confidential communications between officers of the Government—the President and one of his assistants, or between one of his assistants and some of his subordinates—if once recognized, would in my opinion lead to very grave consequences. And if that position is to be taken, it is to be taken by someone wiser than I.

So I shall sustain the position; I do not know just how it arises. But I shall not ask that these papers be produced pursuant to the subpoena.

Mr. Acheson. May the record show an exception?

The Court. The record will show the appropriate exception.

Plaintiffs introduced a Stipulation Agreement
557 which was received in evidence as Plaintiffs' Exhibit No. 246. This stipulation agreement was signed by attorneys for the defendants and for the plaintiffs and stated that the letter set forth below was a true copy of a letter sent by the Federal Emergency Administration of Public Works Advisory Board of Alabama under date of August 18, 1933, to all mayors or similar municipal executives of all towns and cities located in the State of Alabama. The letter read as follows:

(letterhead)

Federal Emergency Administration of Public Works
State Advisory Board

"Dear Sir:

"To quickly provide unemployment relief the President, under the Act creating the Federal Emergency Administration of Public Works, has named us as members of the State Advisory Board to review applications for loans for various classes of public works as may be submitted by municipalities and other public bodies, and to stimulate the submission of projects for such public works calling for labor employment.

"These classes of public works embrace municipal projects such as water works and sewerage systems, electric power and light plants, markets, viaducts, bridges, canals,

etc., and under the authority conferred upon the President he is empowered to make grants to municipalities or other public bodies not to exceed 30% of the cost of the labor and materials employed upon such project under terms as may be prescribed by him. The repayment of funds so advanced by the Federal government to public bodies can be amortized over a period of 20 to 30 years at low rate of interest.

"We submit the foregoing information with suggestion that should yourself and associate municipal authorities contemplate any public works we shall be very glad to consider such fiscal aid as is provided in the authority
558 conferred and it is hoped that the President's program for unemployment relief will prompt your immediate survey and your advices if there may be expected an application from your governing body for public works construction funds.

"We urge your cooperation for unemployment relief and would point out that construction of municipal projects at this time would serve both to cooperate with the President in his program for unemployment relief and provide your citizens with what may be needed facilities.

"We promise prompt consideration of any project submitted by you, requesting that you address reply to Secretary, State Advisory Board, Montgomery, Alabama."

"Very truly yours,

"MILTON H. FIES, *Chairman*
"MAYER W. ALDRIDGE, *Secretary*
"FREDERICK I. THOMPSON."

559 The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit 247 a stipulation between plaintiffs and defendants noting their agreement that the plaintiffs Texas Utilities Company and the Alabama Power Company had exhausted, before these suits, whatever administrative remedies there were open to them with respect to the proposed loans and grants of federal funds which such plaintiffs attack in these causes.

The plaintiffs offered and there was received in
560 evidence as Plaintiffs' Exhibit 248 Executive Order 6174, June 16, 1933, which was the original order of

the President setting up the Special Board for Public Works. It provided among other things:

"2. I hereby appoint a Special Board for Public Works consisting of the following: The Secretary of the Interior, Chairman; the Secretary of War; the Attorney General; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Labor; the Director of the Budget; Colonel George R. Spaulding and Assistant Secretary of the Treasury Robert.

"During the next 20 days it shall be the duty of the Federal Emergency Administrator of Public Works and the Board herein constituted to study and report to me on all public-works projects which have heretofore been submitted or shall hereafter be submitted."

Pursuant to subpoena the plaintiffs demanded:

The minutes or stenographic reports of those meetings of the Special Board for Public Works which considered, recommended, or determined the principles to be pursued by the Federal Emergency Administration of Public Works in allocating funds to non-Federal projects under Title II of the National Industrial Recovery Act; and the resolutions of the Special Board recommending or determining the principles which should be followed in allocating funds to non-Federal projects.

The defendants objected to producing the documents on the ground that the Executive Order gave the Board a life of only twenty days, that the Board had no power to act, and that whatever its deliberations with the Administrator were is irrelevant to these cases.

The plaintiffs requested them on the ground that the resolutions of the Board are the final things the President approved and it was relevant to have its rules which
561 showed how it acted.

The Court sustained the defendants objection and declined to require production of the documents on the ground that intradepartmental matters are not admissible in evidence. The plaintiffs were allowed an exception.

Whereupon the following occurred:

562 Mr. Acheson. We have subpoenaed all the administrative findings that have been made in determining the allocation of Federal funds to finance non-Federal electricity projects in all the cities involved in this suit.

We have used the term "administrative findings" there in the sense in which it has been used frequently by the Supreme Court, to mean a finding of fact, a determination of fact which is adopted and relied upon by the officer having the highest authority in making his final decision. It may be that we have already discussed every possible such finding, but I now state that by these administrative findings I am not asking again for the reports which the Court has excluded, that is, I am not asking for the reports of the engineering, the finance, and the legal division, nor of the Electric Power Board of Review. I am asking whether there are, aside from those things, any documents which may be fairly described as administrative findings of fact, and I ask the Government to produce those.

Mr. Scott. I am wondering if opposing counsel would at this time state for the record just what finding he means when he says "finding of fact or administrative finding by the Administrator." Is it a finding as to the public necessity and convenience? Is it a finding as to rates? Just what particular finding is it that they are inquiring about?

The Court. I do not know.

Mr. Scott. Nor do we.

Mr. Acheson. Your Honor, I think, has stated correctly that I do not know, because I do not know what exists. What I am really trying to do is to establish a negative. I want to be able to state at some point, that we have before us everything which the President or the Administrator, or any ultimate authority, found or ordered in connection with these projects, so that we will then have what I
562A am sure the Court will want to know about, the full legal hierarchy. We will have the Constitution; we will have the statute; we will have the order of the President, the order of the Administrator, and any further findings which they claim give legal validity to the action. If there were none, that is entirely satisfactory. I just want to know the fact.

Mr. Frank. We have now got everything, Mr. Acheson, that we think you think you want.

Mr. Jackson. Are you willing to state in the record that there are now in the record before the Court all administrative findings of fact that have ever been made in
563 all these cases now pending?

Mr. Frank. I do not know what the words mean.

We are trying to conjecture what they mean; and, sincerely and honestly, if we understand what they mean, the answer is Yes.

But, necessarily, it is a vague answer, because the question is vague. I certainly do not mean by that statement to say that the Administrator will not testify that he considered things other than the things before these gentlemen, because he did. He considered many things, as will appear, that were oral. If they are trying to get from me a statement that he did not, I certainly do not mean to give such a statement.

I just do not know. It is a "How big is a piece of wood?" question, and I do not know how to answer.

Mr. Jackson. Well, are there any of the administrative actions in this case that you say go to support the action taken?

Mr. Frank. That again is a difficult question. But if they are now referring to the Administrator, anything that he did or intended to do is finally merged in the execution of a contract.

And it seems to me that we have here a very simple question: That a statute authorized an administrative official, when certain things exist, to make a contract; and he has made the contract. Now, if counsel are contending, as I think they are, that every time an administrative official makes a contract, he has to go through all the formalities that the Interstate Commerce Commission or the Tariff Commission or the like must go through, then I say that such things do not exist.

The Court. The statute does not require it, and nobody is required to make findings, in the absence of a statute.

Mr. Frank. Do you mean in writing?

Mr. Acheson. I suppose if I ask for documents, I must mean in writing.

564 Mr. Frank. But as I understand the rule of law, it is—and the Court has not so long ago declared, by Mr. Justice Butler—that where an executive officer is acting and where there are conditions precedent to his action, there is a presumption that he has determined those things which are precedent. And in that sense the Administrator has made findings or else he has acted unlawfully.

But so far as documentary evidence is concerned, so far as I know you have everything in your hands.

The Court. I do not think you have to respond to a subpoena like that.

Mr. Frank. We just do not know what it means.

The Court. Of course I do not know what the defendants may put in here, but I have no doubt that the plaintiffs have exhausted everything of which they know, and that they want anything that they have not found.

Mr. Acheson. I think the answer is the reverse, your Honor; I think this is one of the few occasions where the answer is "No." We certainly should rather have it so.

The Court. It certainly would appear so, I think, unless the defendants themselves put in something.

Mr. Frank. If we understand the suggestion—and I think that we do, in a general way—the fact is that, as at the present time advised, they have everything of the character they have requested.

Mr. Acheson. We have also asked the Government to produce, by subpoena, the following: All documents containing the comprehensive program prepared by the Administrator and approved by the President, pursuant to the requirements of section 202 of the National Industrial Recovery Act.

The Court. I think I know what he means. The statute says that the comprehensive plan shall be made, and so forth. Now, what he wants to know is whether any comprehensive plan has been embodied in any document.

565

Mr. Frank. One, or more?

Mr. Acheson. Document or documents.

Mr. Frank. All right, here is this; this is "Senate Document No. 167, Seventy-third Congress, second session, Public Works Administration, letter from the Administrator of Public Works transmitting, pursuant to Senate Resolution No. 190, a report of the business of the Federal Emergency Administration of Public Works for the period ending February 15, 1934."

Mr. Acheson. May we have a list of what comprise the comprehensive program?

Mr. Frank. Well, you will have testimony on that sub-

ject. If you want everything that can be described as documentary evidence, I do not know that we can respond; because the comprehensive program in part will consist of all the projects which have been approved.

Now, if Mr. Acheson wants us to bring in all those, then we shall bring in not only the files relating to power projects but everything under the sun. Here is a list, up to a certain date, of approved projects. If he wants a subsequent list, we shall bring that in. If he wants a narrative of the work of P. W. A. in collecting information, more or less along the lines of Circular No. 1, why, we shall bring that in. But if he means, Is there a piece of paper or are there pieces of paper labeled "Comprehensive Program", then, so far as I know, there are not.

We will give Mr. Acheson a list of every project approved, if that is what he wants.

The Court. That is not what he wants. He wants to know if, before the commencement of this work, a comprehensive plan was laid out in a document.

Mr. Acheson. That is it.

566 The Court. And if it was not, he is going to say that everything you have done is void.

Mr. Frank. That is it.

The Court. And what he wants to do is to get you committed to that. And I think there is no reason why you should be committed.

His claim is going to be that there is a condition precedent to doing anything, and that there had to be a comprehensive plan drawn up in writing.

Mr. Frank. Which would have taken two years.

The Court. And which was not done; everybody knows it was not done.

Whereupon the plaintiffs, pursuant to subpoena,

567 demanded of the defendants all reports to the Administrator of the three PWA examining divisions and of the Electric Power Board of Review relating to the projects in suit. The following occurred:

Mr. Acheson. Yesterday your Honor excluded those when I asked for them, on the ground that they were incorporated by reference. I stated during the argument that they had been subpoenaed. I think Mr. Frank thought

that they had not been subpoenaed, so I should now like the record to show that, independently of the ground for request yesterday, I ask their production on the ground that they were subpoenaed, and that these are steps in the sifting of facts—formal steps which the plaintiffs are entitled to see, as a matter of right, in determining what was before the Administrator in a formal way. It may be that there were other things before him, too, so I am going to put the request on that ground.

Mr. Holtzoff. We decline to produce these papers on the grounds heretofore stated.

The Court. I will rule the same way.

Mr. Acheson. We note an exception to that.

Without pressing the point further, may I ask whether the Court said they were excluded on the ground that they were intra-departmental? Is that because they are confidential?

The Court. I exclude them on the ground that the plaintiffs are not entitled to have them. That covers almost everything. You have covered almost everything and taken an exception to each ground separately. You may have an exception on that ground. I do not think you are entitled to have them. I do not think they are relevant.

568 The plaintiffs offered and there was received in evidence as Plaintiffs' Exhibit 253 Executive Order of September 21, 1935, which is as follows:

Executive Order

Increasing the Limitation Contained in Clause (g) of Section 1 of the Emergency Relief Appropriation Act of 1935

WHEREAS I find it necessary, in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 7th Congress), to increase by $800,000,000 the limitation of $900,000,000, contained in clause (g) of section 1 of the said Act, on the amount which may be expended under the Act for loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia and self-liquidating projects of public bodies thereof:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me under the said Emergency Relief Appropriation Act of 1935, it is ordered that the said limitation be, and it is hereby, increased from $900,000,000 to $1,700,000,000.

FRANKLIN D. ROOSEVELT

The White House,
September 21, 1935.

569 The plaintiffs offered several further excerpts from Plaintiff's Exhibit 123 for identification, the "Back to Work" heretofore referred to, as admissions of the defendant Ickes. The Court indicated that the defendants' objections would be sustained, as before, the following colloquy occurring:

"The Court. I do not think a book like that is admissible as evidence in a case of this kind. There is no question raised about the authenticity of the book.

Mr. Holtzoff. No.

The Court. The book ostensibly comes from him, and there is no question that he was responsible for it. That is not the basis of the ruling. The basis for the ruling is not that he was not responsible.

Mr. Jackson. The authenticity was conceded, as I understand it, by Mr. Holtzoff.

Mr. Holtzoff. Yes; we do not claim that Mr. Ickes did not write the book."

Thereafter the defendants objected to each excerpt separately as it was offered, each objection was sustained, and to each ruling the plaintiffs were allowed exceptions. The excerpts offered and exhibited to the Court were as follows:

As bearing upon the issue of solicitation, indicating that from the very beginning the defendants were bent upon stimulating municipalities to apply for projects, the plaintiffs offered the first five complete sentences from page 20 of the book.

From the portion of the book dealing with the initial meetings of the Special Board for Public Works to formulate policies for the Administration of the public work program, the plaintiffs offered the last sentence of the first full paragraph on page 25.

From the portion of the book dealing with the
570 problems of organizing the administrative machinery for the public works program the full paragraph on page 51 was offered.

As a statement of the procedure of the PWA and the duties of its various divisions, the passage from the beginning of the first full paragraph on page 67 to the end of the last full paragraph on page 78 was offered.

All of these passages will be found in defendant's exhibit 12 infra.

In connection with the last excerpt, plaintiffs' counsel pointed out that it bore likewise upon the question raised in the cross-examination of the witness Wheeler, *supra* p. ...., as to the Administrator's sources of information.

With respect to the same question, and as bearing upon the duties of the Division of Investigations of PWA the plaintiffs offered in evidence, marked as plaintiffs' exhibit 254 for identification, a letter which was signed by Horatio B. Hackett, Assistant Administrator, and sent to the Mayor of the City of Wichita Falls, Texas. The letter, exhibited to the Court, stated:

"I have received by reference from the office of the Attorney General a copy of your letter dated February 11, relative to an investigation made by the Division of Investigations, Public Works Administration, at Wichita Falls and the alleged activities of the agents in connection therewith.

In answer to your inquiry, authority for the investigation was predicated upon the fact that Public Works Administration funds were involved. Since information had been received that the power trust was using illegal and unfair methods in opposition to the proposed light plant an investigation was deemed advisable in order to assure that the interests of the Government were properly protected.

I have ordered a further investigation and a rep-
571 resentative from this office will call on you in the near future, at which time I shall appreciate your cooperation."

The Defendants objected to its receipt in evidence on the ground that it related to an electricity project which was

not one of those in suit; the objection was sustained and an exception was noted for the plaintiffs.

The plaintiffs offered and there was received in
572 evidence as Plaintiffs' Exhibit 255 Press Release No. 1864 of the Federal Emergency Administration of Public Works which states that the research section of the PWA Projects Division had analyzed 1000 completed and finally audited construction projects and that it was found that the cost to the Federal Government, on the basis of a PWA grant of 30% of the cost of labor and materials, of keeping one man employed for a month was, according to types of projects, as follows:

Schools	$72.00
Other buildings	69.50
Sewer Systems	56.00
Engineering structures	73.00
Waterworks	70.50
Streets and highways	55.90
Flood control, water power	48.60
Power excluding water power	105.80
All others	45.20
All types	61.80

The release also states:

"The most common type of project in the first program was school building construction, with sewerage systems and waterworks coming next, followed by other common types of PWA construction such as bridges, streets, public buildings, and engineering structures."

The plaintiffs offered and there was received in evidence as Plaintiffs' Exhibit 256 pages 71-78 of the original 1934 edition of the Government Manual. This section deals with PWA and appears over the names of Harold L. Ickes, Administrator, and Henry T. Hunt, General Counsel. It states, in part, that $3,300,000,000 were appropriated to effectuate the National Industrial Recovery Act, that in each
573 State there is an advisory board and a state engineer for PWA, and that this organization with central control served to promote the public works program throughout the country in connection with non-Federal allotments. The basis for allotments has been social benefit,

economic feasibility, and financial, legal, and engineering soundness. Vast amounts have been allotted for Federal purposes, as road building in every State, naval construction, rivers and harbors work, Army housing, public buildings, soil-erosion control, forest conservation, irrigation, and power development, etc. Other large sums have been advanced in the form of loans and grants to States, municipalities, and other public bodies for projects such as waterworks, sewer systems, electric light plants, streets and highways, bridges, schools, hospitals, and recreational facilities. Still other large sums were set aside for loans to railroads and for slum-clearance and low-cost housing projects. In order to facilitate and expedite construction in the low-cost housing field, the Federal Emergency Housing Corporation was organized with an allotment of $100,000,000 from the public-works fund. An allotment of $400,000,000 was made to the Civil Works Administration. Any public body meeting PWA requirements may borrow, and is entitled to a grant as well which is not to exceed 30% of the cost of labor and materials. The purpose of the grant is to induce public bodies to undertake construction. The President of the United States is responsible for the program. "The law gives the President broad powers. The President may exercise all, any, or none of the powers it invests in him. The President has appointed an Administrator to exercise the powers of that office. He also has approved rules and regulations to carry out the purposes of the act." A survey in 1933 showed that the largest number of allotments had been made for waterworks, sewers, streets, schools, hospitals, bridges, power plants, and recreational facilities. Before a project is finally approved for an allotment "it must be found socially desirable and sound from legal, financial and engineering
574 standpoints". A project is financed by purchase of the applicants' general obligation or revenue bonds with 4% interest. If the applicant desires, the 30% grant will be made, without a loan, if the public body can show that it can otherwise finance the remainder of the cost. Classes of projects preferred for grants are (1) waterworks necessary for health and convenience of a community, (2) sewers of the same character, (3) sewage disposal

projects sufficient to render heavily used lakes or rivers safe as a water supply, and other sewage disposal projects, (4) municipal power plants, (5) other projects such as highways and streets opening new territory for homes and industry, and projects for transmitting electricity into territories not now served. The Technical Board of Review studies unusual projects, those involving difficult technical questions and those involving controversial issues. PWA polices the performance of all PWA contracts including labor and wage provisions, checks materials, and closely supervises all payments of money.

As Plaintiffs' Exhibit 257 there was offered and received in evidence the August, 1934, revision of page 71 of the 1934 Government Manual which states that the Deficiency Appropriation Act, fiscal year 1934, had provided an additional sum for PWA, not to exceed $500,000,000.

As Plaintiffs' Exhibit 258 there was offered and received in evidence the 1935 edition of the Government Manual, pages 449-454, which is the portion dealing with the Federal Emergency Administration of Public Works, appearing over the name of Harold L. Ickes, Administrator, and Henry T. Hunt, General Counsel. This contains the same information as that in Plaintiff's Exhibit 256, *supra*, but adds that the function of the Electric Power Board of Review is to review considerations of social desirability, financial and technical soundness, as to publicly owned electric projects. It is also stated that generally contracts
575 are required for work on all projects but in exceptional cases the state engineer with the approval of the Administrator may authorize work by force account.

As Plaintiff's Exhibit 259 there was offered and received in evidence the July, 1935, revision of pages 449-454 of the 1935 Government Manual which states that the life and functions of PWA were extended for two years under the Emergency Relief Appropriation Act of 1935, that the amount of grants has been increased to 45%, and that the interest rate for loans to public bodies is 3%. The Government Manual for 1936 states that the interest rate for loans to public bodies is 4%.

The plaintiffs introduced and there was received in evidence as Plaintiffs' Exhibit 260 a letter from the President

to the Secretary of the Treasury allocating $400,000,000 to PWA from the Appropriation Act of 1934. The letter follows:

(Here follows photostat marked page No. 576)

577 The plaintiffs introduced and there was received in evidence as Plaintiffs' Exhibit 261 Senate Document 184, 74th Congress, 2d session, which was a report dated March 6, 1936, from Harold L. Ickes, Administrator of PWA, to the Senate in response to a Senate Resolution requesting a list of all gas or electricity projects with an indication as to which projects are under construction and which are delayed because of litigation. The report states:

"On February 15, 1936, there were [illegible]69 allotments outstanding to public bodies, other than the Federal Government, for electric and gas projects. These projects are itemized, with information as to amount, type, and status, in table 1, which is attached. On the same date there were 29 allotments outstanding for gas projects, an itemized list of which is given in table 2, attached. As of the same date, there were 48 allotments for Federal electric proj-
578 ects and 2 for Federal gas projects. These are itemized in table 3, attached.

It is difficult to estimate the exact amount which has been allotted for electric and gas purposes, as many of the projects combine other features as well. An estimate has been made, however, of the cost of that part of all projects which may be properly described as electric power. In the federal projects this amount is $151,240,482; in the non-Federal the amount is $76,091,446. A corresponding estimate of that part of the allotments which have been made for gas projects amounts to $49,500 in the Federal projects and $2,088,216 in the non-Federal projects.

There has been no litigation on the Federal projects and none on the non-Federal gas projects. Obstructive litigation has been confined almost entirely to electric generating plants or distribution systems in places where these facilities were not publicly owned at the time of the allotment. Of 93 allotments outstanding for such new publicly owned electric facilities, 56 are now in litigation. Still

THE WHITE HOUSE
WASHINGTON

June 29, 1934.

My dear Mr. Secretary:

The Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (Public No. 412, 73d Cong.), appropriated the lump sum of $899,675,000, to remain available until June 30, 1935, to be allocated by the President for carrying out the purposes of certain acts of Congress, including the National Industrial Recovery Act.

It is requested that the sum of $~~400~~401,000,000, which is hereby allocated to the Administrator of Public Works from said appropriation of $899,675,000, be set up on the books of the Treasury under the appropriation title "Public Works Administration, 1935".

Sincerely yours,

Franklin D. Roosevelt

The Honorable,

The Secretary of the Treasury.

others have been delayed by litigation and the projects have either been given up by the applicants or, in a few cases, construction was allowed to proceed after favorable court decisions. Almost all the suits have been brought by private power companies who fear the competition which such publicly owned facilities will provide either directly or as a comparative standard. In most cases, such litigation attacks the constitutionality of the Federal statutes, and restraining orders have been issued by the Federal courts, prohibiting the Public Works Administration from making payments to the applicants, in 36 different cases.

One case, in which the Public Works Administrator is included as a party, has been tried on the evidence and argued before the upper court *(Duke Power Co., et al v. Greenwood County, et al, and Harold L Ickes)*. This case
579 was decided in favor of the Government, the circuit court holding that the power company had no right to sue and that, even if it did, the act was constitutional and was not being violated. The injunctions against the 36 projects, however, still remain in force and the employment of thousands of people is thus impeded."

There is attached a list of all the projects, giving their location, amount of allotment, and the other information requested.

The plaintiffs introduced and there was received in evidence as Plaintiffs' Exhibit 262 Senate Document 193, 74th Congress, 2d session, which was a report of the Administrator of PWA, in response to a Senate Resolution, giving a list of all non-federal projects which have been approved or not finally disapproved but for which no allocations of funds have been made by PWA as of March 31, 1936. (The document is attached to and made a part of this statement of evidence.)

Whereupon the Plaintiffs read the deposition of
580 **John H. Carlock**, who having first been solemnly sworn to tell the truth, the whole truth and nothing but the truth in answer to such questions as were propounded to him he testified as follows:

Direct examination.

My name is John H. Carlock and Ardmore, Oklahoma, is my home. I am in the banking, lumber and farming busi-

ness. I was appointed as a member of the State Advisory Committee or Board of Public Works Administration in July 1933 and was subsequently elected Chairman of that Board. I remained Chairman of the Board until our work was terminated early in 1934, about March 1934. Our general instructions from Washington with regard to obtaining applications of municipalities for public works loans and grants were to advise the public what the Public Works Administration was. We received no applications until the engineer was appointed. It was a dual set-up, a Board and an engineer. Our first work was to inform the public what the Public Works program was. Of course, we had a great many inquiries at the office and we had public meetings, perhaps a half a dozen. I remember one we had in Clinton in western Oklahoma one at McAlester, one at Clarence, and I believe one at Norman. I won't say how many we had. I attended most of these meetings but not all. We also gave out interviews to the press and otherwise, anyone who came in we advised them. The Municipal League helped us to get the publicity for these meetings. The relation between our Public Works Administration Board and the Municipal League was no more than with any other group of citizens. We were trying to assemble people so that we might disseminate what we knew about the Public Works. Mr. Lybrand was a member of that committee and the third member was Mr. Higginbotham. Mr. Higginbotham was connected with the Municipal League as its Secretary. He attended the meetings which

I attended. I remember at Clinton that we had a
581 large attendance to come, some 40 or 50 mayors of western Oklahoma. Two or three of us addressed the whole mass of people and talked from a patriotic standpoint that it was their duty to take advantage of everything that would help bring us out of the depression. Then we divided into groups. I think at Clinton we asked that the teachers and superintendents go into a certain room and we asked that all engineers representing different cities go into another room. As I recall, we had three or four separate meetings and designated someone to explain to each group. As I recall there were more people at that meeting interested in country schools than anything else. The other meetings I attended the same general procedure was followed.

Whereupon the plaintiffs read the deposition of **R. A. Thompson,** who having first solemnly sworn to tell the truth, the whole truth and nothing but the truth in answer to such questions as were propounded to him, testified as follows:

Direct examination.

My name is R. A. Thompson. I am 65 years old and live at Dallas, Texas. I became Federal Emergency Administration of Public Works State Engineer for Texas about August 15, 1933. I was appointed by Mr. Ickes, Administrator of Public Works.

I was continuously engaged as State Engineer of Public Works Administration from August 15, 1933, until October 1, 1934. I was the first one employed in Texas as State Engineer of Public Works Administration. Immediately after I became State Engineer of Public Works Administration I began to receive applications for loans and grants, and continued to receive applications until some time in March 1934. Generally no field investigation of these applications was made. No written report on these applications was made by the State Advisory Board of Public Works Administration. They just made a memorandum approving certain reports as being admissible for
582 investigation and examination. This memorandum, which was simply a list of applications, was referred to me by the Advisory Board of Public Works Administration with the suggestion that engineering reports thereon be prepared. Generally, however, there was no engineering report made with respect to a project that was not approved by the Board. But in case the project was approved by the Board, which approval was signified by its inclusion in the list of applications transmitted to me by the Board, then I made an engineering investigation and report on the particular project. That system was in effect up to the time that the Board was in session, which was March first, 1934, up to which time applications were examined and reports made upon the recommendation of the State Advisory Board. After the Advisory Board went out of office, the State Engineer proceeded on his own motion and under instructions from the Administrator to complete reports on all applications. I recall that while I was

State Engineer, I received an application from the city of Plainview, Texas, for a loan and grant for the purpose of building and financing a municipal electric project. That application was received State Office on October 4, 1933 and carried Application No. 417. I did not make or cause to be made by our engineering examiner an engineering investigation and report with respect to that project.

"Q Why not?

"Mr. Scott. To which we object, if your Honor please, for the reason that the witness has testified that he did not make any report and it calls for a conclusion of the witness.

"The Court. I will sustain the objection.

* * * * * * * * * *

"Mr. Westwood. I note an exception."

The State Engineer of Public Works Administra-
583 tion made no report on the Plainview application up to March 1, 1934, at which time the Public Works Administration State Advisory Board was dissolved. Subsequent to March 1, 1934, under instructions from the Administrator, an examination was made of each application then remaining in the office and a memorandum made on each application, which included, among others, the Plainview application. This memorandum set forth the principal points of the application without any recommendation and was forwarded to the Administrator for further examination and report in the Washington office. I did not receive any information from the various agencies of the Federal Government with respect to the amounts of unskilled labor on the relief rolls and the amount of skilled labor on the relief rolls. I terminated my connection with Public Works Administration on October 1, 1934. Mr. Ickes wrote me that I did not seem to be in harmony with the Administration, indicating that I did not seem to be handling the job in accordance with his ideas and suggested that I terminate my service. I made a reply to his letter but did not receive any other letter from Mr. Ickes. I received a telegram accepting my resignation. I have the letter that I received from Mr. Ickes in my personal file and do not mind exhibiting it to you.

(Whereupon the letter was exhibited to the Commissioner and marked Plaintiffs' Exhibit No. 5)

The letter which I have identified is on the letterhead of the Federal Emergency Administration of Public Works, Washington, D. C., dated December 6, 1934, and is signed by Harold L. Ickes, Administrator. I am familiar with Mr. Ickes' signature and I am of the opinion that the signature on this letter is that of Mr. Ickes.

Whereupon this letter was received in evidence by the Commissioner as Plaintiffs' Exhibit No. 5, which read as follows:

584 "My dear Mr. Thompson:

"For sometime I have not been entirely satisfied with the way the Public Works business is handled in Texas and I feel that a change would be advantageous. I am not unaware of the difficult problems involved in handling the applications for a State as large as Texas but there have been unmistakable evidences of a lack of proper cooperation on your part with the divisions of inspections and investigations that do not make for good administration. Also, I have not been satisfied with my inability to obtain compliance with my instructions that all applications received, regardless of whether or not they were recommended for approval, should be examined and submitted to me.

"There are also strong grounds for believing that you have, as State Engineer, opposed applications for funds to construct municipal power plants.

"It is with regret that I have reached the conclusion that a change in the Texas Administration is necessary. Perhaps you would prefer to terminate your service by resignation, and in order to give you that opportunity I shall take no final action until you have had time to consider that step.

"Sincerely yours

/s/ HAROLD L. ICKES
"Administrator."

Just following the receipt of this letter I did not send in my resignation. I requested permission to come to Washington and explain the situation to him and to offer him my defense. He refused me this and so I wired him my resignation. I never had any difficulty with Mr. Ickes con-

cerning the making of these reports which the rules and instructions in Public Works Administration Bulletin No. 2 required. His letter was the first indication that I had ever received that he was not entirely satisfied. I had no
585 complaints nor comments from him prior to that time.

Cross-Examination.

My wife owns, and I also own, some preferred stock in Dallas Power and Light Company and Texas Power and Light Company. This stock was purchased prior to my employment with Public Works Administration.

Whereupon plaintiffs read the deposition of **Leo M. Ewing**, who having first solemnly sworn to tell the truth, the whole truth and nothing but the truth in answer to such questions as were propounded to him, testified as follows:

Direct examination.

My name is Leo M. Ewing and I live at Kirksville, Missouri. I have lived in Kirksville for 43 years and at present I am with the Right-of-Way Division of the Missouri State Highway Department. I served as mayor of Kirksville for 3 terms 1928 to 1934. I know Colonel Hugh Miller. I met Colonel Miller around the middle of December. He was State Public Works Engineer for Missouri. I met Colonel Miller around the middle of December 1933 at the Travellers Hotel in Kirksville, Missouri. Colonel Miller had called to promote bond issues and a meeting was held at the Travellers Hotel at which Colonel Miller spoke. He stated that he was the Public Works Administration Engineer of the State of Missouri representing the United States Government and promoting Public Works Administration work, and, he asked the citizens there at that meeting to wire their State Senator asking for the passage of certain bills relative to municipal light plants, especially Senate Bill No. 9, because if that bill was passed we would have an opportunity to vote a bond issue in Kirksville to build a municipal light plant. The Government would give us outright 30 percent of the cost and would loan the other 70 percent to the municipality at an interest rate of 4 percent. The city would not be obligated financially because

this money would be paid back from profits accruing from the operation of this plant. At that time he urged
586 us to wire and write to our Senator who was also Chairman of the Municipal Committee of the State Legislature. This committee had charge of these bills. He further stated that it was the wish of President Roosevelt that these bills pass and was also the wish of Governor Parks. He also mentioned the name of Mr. Ickes. Colonel Miller arrived about 2 o'clock in the afternoon and there were possibly 40 or 50 of us in the dining room at the time that he came in and spoke. He said that he was making a thousand mile campaign over the State urging the passage of these bills so that Missouri might get the benefit of this Public Works Administration money. He was there possibly an hour and a half or two hours and left immediately. He stated at that time that he was leaving for Trenton, Missouri.

Whereupon plaintiffs read the deposition of **Robert L. Sawyer**, who having sworn to tell the truth, the whole truth and nothing but the truth, in answer to questions propounded to him, testified as follows:

Direct examination.

My name is Robert L. Sawyer and I live at Warrensburg, Missouri. I lived in Trenton, Missouri, until February 1935, where I was editor of the "Republican Times'" a newspaper. That was the only daily newspaper in Trenton. I know Colonel Hugh Miller, State Public Works Administration Engineer. He came to Trenton, Missouri, in the early part of December, 1933, and made a speech at a meeting that was called there. He talked primarily about the passage of the revenue bond issue bill which was before the Legislature at that time. He urged the people present at the meeting to wire their State Senators and urge them to vote right on the revenue bond bill. He stated substantially that if they did not vote right on that bill, we would know what to do with them when election time came.
587 He spoke in regard to urging the municipality to get money from the Public Works Administration. I made notes of that meeting and subsequently as editor of the daily paper, I wrote an article from the notes concern-

ing it. The article was published in the paper. I wrote the article myself.

Whereupon plaintiffs read the deposition of **Albert C. Laun**, who being sworn to tell the truth, the whole truth and nothing but the truth in answer to questions propounded to him, testified as follows:

Direct examination.

My name is Albert C. Laun and I am Vice-President of the Union Electric Light and Power Company. I am a resident of St. Louis County, Missouri. I know Colonel Miller. I first met him in September, 1933, at the Missouri Hotel at Jefferson City, Missouri. At that time he was Engineer in Charge of Public Works Administration for the State of Missouri. I met him in September, 1933, at which time he told me his title and the work he was doing and he remained in Missouri until early in the Spring of 1935. I met Colonel Miller again in Jefferson City in November 1933. On this occasion a special session of the Missouri Legislature had been called by the Governor of Missouri. This session started sometime during October 1933. Early in the session Senate Bill No. 9 was introduced into the Senate. The bill in regular course of events was assigned to the Municipal Corporations Committee and that committee, in deciding what they should do with the bill, had called a hearing. The first hearing was devoted to parties who wished to appear in behalf of the passage of this bill, and at this meeting Colonel Miller appeared in behalf of the passage of the bill. Colonel Miller appeared before this committee and argued for the passage of the bill (Senate Bill No. 9) and in his argument stated that this
588 bill had been prepared by attorneys of the Public Works Administration in Washington and that he was co-author of the bill. He stated that there should be no disposition on the part of private utilities to fight the passage of this bill as it was the Government's purpose to give large sums of money to various municipalities in the State of Missouri which money would come in the form of grants or gifts, and would not have to be repaid by the municipalities. In addition, he stated, that the Government would loan additional large sums of money at low rates of interest which could be paid back to the Government

from the earnings of the power plants if Senate Bill No. 9 were passed, and, that if the power plants failed to make money, the cities would not have to pay anything back to the Government. He also said that this was not only an expression of his views but was instruction from President Roosevelt, the United States, and from Mr. Ickes. And that he spoke in full authority of Washington in fighting for the passage of this bill which had been prepared by the attorneys for the Public Works Administration in Washington. He stated that it was the Federal Government's purpose wherever possible to loan these sums of money and to give these grants of money so that power plants could be set up by the municipalities and used as yardsticks so that the people of Missouri could judge for themselves whether or not they were paying too much for electricity throughout the State. He went further and stated that the people of Missouri in many instances were overcharged for electricity and that this was the only way people could come into their own and judge for themselves the prices they should pay for electricity. I was present and heard Mr. Miller make these statements. Certain members of the committee said that the bill as written would allow the people of the municipality to vote as to whether or not they should bond themselves for the construction of a power plant and distribution system but the bill was so constructed that if a deficiency existed after they
589 started to build a plant and the people had voted on an actual question that the Board of Aldermen had the right to issue additional bonds without any limit. They could float as many bonds as they found necessary to complete the project, and Colonel Miller at that time stated that he was not sure that the bill was so constructed, but that if it was, the municipalities and governing bodies would certainly use discretion in issuing such additional bonds as they needed. Colonel Miller again appeared before this committee about the middle of November 1933, on which occasion the Senate Committee of Municipal Corporations had called a hearing so that people who were opposed to the passage of this bill could be heard. At this hearing, those people who were opposed to the passage of the bill were heard and after their statements, Colonel Miller jumped on the floor and asked that he be heard. The Chairman of the

Committee stated that those people who were in favor of the passage of the bill had been assigned one night on which to be heard and on this particular occasion those people who were opposed to the passage of the bill were being heard. Colonel Miller stated that this was gag rule on the part of the Senate committee and that he was going to take this question to the people. He stated that the Federal Administration in Washington was in favor of the passage of these bills and that the Public Works Administration was in favor of the passage of these bills. He said that Mr. Ickes was in favor of the passage of these bills and that the Senate committee had no right to block the passage of them and that if they dared to block the passage of them that he was going out to tell the people of Missouri that they should be beaten when they ran for office again. I heard Colonel Miller speak at Jefferson City in the latter part of December 1933 on the occasion of a meeting of certain people who favored municipal ownership of electric light and power companies in Missouri. They had called a meeting in Jefferson City and Colonel Miller ad-
590 dressed that meeting. I was present at the meeting and heard Colonel Miller say that he had just completed a trip through Missouri in which he had visited most of the towns of any size throughout the State and that he had advocated that all Senators who had opposed the passage of Senate Bills 7, 8, 9 and 10, should be beaten when they were up for re-election. He stated again that the Government was willing to give large sums of money and loan large additional sums of money at a low rate of interest to municipalities so that they could build municipal plants throughout Missouri which would serve as yardsticks in measuring the cost of electricity paid by consumers to private plants throughout the State. He pointed out that these bills, if passed, would not have increased the bonded indebtedness of the cities due to the fact that the bonds which are issued under these bills would not be styled as a debt of the cities, but would be paid for out of the earnings of the power plants. He stated that this would enable cities in Missouri which had reached the statutory limits of their indebtedness to float these additional bonds so that they could build power plants and pay for them out of earnings, if they had earnings, and if they did not have any earnings,

the cities had nothing to lose by the building of the power plants. He also stated that if the mayors of these towns and the people at this meeting had read the St. Louis Post Dispatch, the St. Louis Star and Times, and the St. Louis Globe Democrat, or most of the other papers throughout the State, that they were familiar with this thousand mile tour he had made through Missouri in which he had advocated that the members of the Missouri Senate who had voted against the passage of this bill should be beaten for re-election. He also stated that if Missouri did not take advantage of these loans for municipal power plants that the Government will have to loan this money in some other State and that the result would be that the amount of allotments of Public Works Administration funds to Mis-
591 souri would be much smaller than if these bills were passed. At that time he stated that he was the authorized agent of the Federal Government in Missouri and any statement made by him was a statement authorized from Washington by President Roosevelt, Mr. Ickes, and of other governing bodies that had anything to do with the loaning of Public Works Administration money. Those were not his exact words but the summing up of the meaning of his words. Colonel Miller stated that he had received a letter from Secretary Ickes and that in this letter, Mr. Ickes stated that if the Senate held up the passage of Senate Bills 7, 8, 9 and 10, that he would take the fight out to the people and the independent newspapers throughout Missouri and let them know that Missouri was not receiving its portion of Public Works Administration funds that they could receive if the Senate Bills 7, 8, 9 and 10 were passed.

The plaintiffs introduced and there was received
591A in evidence as plaintiffs' exhibits 263, 264 and 265, respectively, the following three letters:

"November 10th, 1933

Hon. Harold L. Ickes,
Administrator,
Through, Col. H. M. Waite,
Deputy Administrator,
Public Works Administration,
Washington, D. C.

Subject: Pending Legislation in Missouri.

1. The attention of the Administration is directed to legislation now pending before the Extra-Ordinary Session of the Missouri Legislature, which will have an important bearing upon the Public Works program in this state.

2. There are four bills authorizing Cities, Towns and Villages of less than 75,000 population to issue plant revenue bonds for the construction of municipal waterworks, gas plants, electric light plants and sewerage systems. These bills were urged upon Governor Park by the State Advisory Board and were made a part of his legislative program. However, it is alleged that the utility lobby, which is very strong, is likely to defeat some or all of these bills. If it is the policy of the Administration to urge action regarding such legislation it is respectfully requested that the Administration use its influence in this situaton. Governor Park belongs to the dominant party and his party is in complete control of both houses of the legislature, but it is likely to be split on these bills.

3. Another part of Governor Park's program urged on him by the State Advisory Board, is a proposition for a $15,000,000 bond issue to be used principally for the penal and eleemosynary institutions of the State. Opposition in regard to this bond issue has not yet crystallized but is undoubtedly strong.

591B

4. Those matters are brought to your attention, not only because they vitally affect the public works program in the State but because I considered it my duty to advise the administration at Washington regarding them.

HUGH MILLER
State Engineer, P.W.A."

November 18, 1933

"Col. Hugh Miller,
State Engineer, Public Works Administration,
219 Buder Building, 705 Market St.,
St. Louis, Missouri.

Dear Col. Miller:

I have your letter of November 10 regarding pending legislation in Missouri.

I appreciate very much your keeping the Administration informed in regard to these matters. I feel, however, that it is entirely a question of local policy, to be decided by the citizens of Missouri acting through their authorized representatives, as to whether they do or do not want to pass a given piece of legislation.

I think that the extent to which the State Advisory Board should go is to inform the authorities that such and such acts would expedite the Public Works program in Missouri, that such and such a bill would simplify the legal situation, and the like. Beyond that, I feel that it is up to the people of Missouri to decide how far they want to participate in the Public Works program. I do not think that it is any part of the duty of the State Advisory Board to force Federal funds upon unwilling borrowers.

Sincerely yours,

(sgd) HAROLD L. ICKES, *Administrator.*"

591C "November 20, 1933

Hon. Harold L. Ickes,
Federal Emergency Administrator of Public Works,
Interior Building,
Washington, D. C.

Dear Mr. Ickes,

I wish to thank you for your letter of November 18 in reply to my previous letter regarding pending legislation in this State.

I appreciate your frank statement regarding the position that the State Advisory Board and the State Engineer should take regarding local legislation. It has been our policy to follow a similar course in this State.

A situation has arisen here, however, which is somewhat unusual, inasmuch as about thirty million dollars worth of Public Works is dependent upon action by the Legislature, a special session of which was called by the Governor for the purpose of expediting the Public Works program among other things. The Governor is campaigning for this program but the legislation has been held up chiefly by the Senate which is overwhelmingly of the same party as the Governor and the National Administration. Owing to the limitation of time, we have been obliged to accept applications contingent upon the passage of this legislation and some of these applications have already been forwarded to Washington, others are being held here, and still others are in the course of preparation or are being held back awaiting the action of the Legislature. You will appreciate, I think, my position in the matter as I am charged with the duty of having these applications forwarded quickly and all that I am asking is that legislation be passed or defeated in accordance with the wishes of the people of the State of Missouri.

The Kansas City Star recently said that the score
591D at Jefferson City is 0 to 0; Senate 0, House of Representatives 0. This reflects quite accurately the legislative situation after more than a month of special session.

Thanking you again for your kindness in taking the time to explain to me the attitude of the Administration in this matter.

Very truly yours,

(sgd) HUGH MILLER,
State Engineer, P. W. A."

The plaintiffs introduced and there was received
592 in evidence as Plaintiffs' Exhibit 266 a letter sent by Harold L. Ickes, Administrator, to Colonel Hugh Miller, State PWA Engineer for Missouri, as follows:

"November 28, 1933

Colonel Hugh Miller,
State Engineer,
Public Works Administration,
219 Buder Building,
St. Louis, Missouri.

My dear Colonel Miller:

Referring to your letter of November 20 regarding the pending legislation in Missouri, I am advised that such legislation falls into two categories. The first is confined to a proposal for a $15,000,000 bond issue for use primarily for construction of penal and eleemosynary institutions. This is entirely a question of local policy with which I feel the Public Works Administration should not concern itself.

The second part of the legislative program embraces enabling legislation authorizing municipalities with a population of less than 75,000 to issue revenue bonds for the construction of municipally owned utilities. I understand that cities with a population in excess of 75,000 already possess such power.

I am informed that several of the bills have been killed in Committee within the last day or two and that the opposition to these bills was confined almost solely to a utility lobby. While it is the policy of this Administration not to interfere with local questions, I feel that the people of Missouri should be advised that the Public Works Administration is ready and willing to aid in financing the construction of municipally owned utilities which meet with its engineering, legal, and financial requirements. The existing status of the law in Missouri renders it difficult, if not impossible, to assist municipalities desiring to construct such facilities.

Perhaps, the utility lobby is succeeding because
593 the Metropolitan Press has not advised the electorate of the situation. I understand that there are liberal newspapers in your larger cities which are sympathetic with the municipalities in their struggles against the utilities. The trouble probably is that these newspapers are not carrying on an active campaign for the legislation because the larger municipalities already possess the power to issue revenue bonds. Perhaps, if the cause of the legislative impasse is brought to the attention of the electorate,

the legislators will free themselves from the influence of the utility lobby. While it is not the function of the Public Works Administration or of the State Advisory Boards to force funds upon unwilling borrowers, I feel that we owe a duty to the people, to explain where the real responsibility rests and to advise them that the applications of municipalities desiring to construct utilities will receive every consideration from the Public Works Administration if their legislative representatives will enact the legislation necessary to enable such municipalities to issue revenue bonds.

The Washington Correspondents of the Missouri newspapers will be advised by me why under the existing state of law it is impossible to allocate any funds to the smaller Missouri municipalities for the construction of municipally owned utilities except where the municipality is in a position to issue general obligation bonds.

Sincerely yours,

(Signed) HAROLD L. ICKES
Administrator."

The plaintiffs introduced and there was received
594 in evidence as Plaintiffs' Exhibit 267 a letter sent by Harold L. Ickes, Administrator, to Colonel Hugh Miller, State PWA Engineer for Missouri, as follows:

"FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS
WASHINGTON

October 28, 1933.

My dear Mr. Miller:

I have your letter of October 26, and I thank you for your full and clear explanation with reference to applications for municipal electric light plants.

Undoubtedly, hearings ought to be held, but it seems to me that it could be taken for granted that power interests will oppose any municipal electric light project, and after one such protest has been heard all have been heard. My view is that hearings ought to be granted for the purpose of establishing whether the municipality itself desires a project. If a project is generally desirable, engineeringly practicable and legally sound, then it ought to be for-

warded with approval to Washington, notwithstanding certain interested opposition, although the existence of such opposition should be noted as a part of the recommendation made.

Sincerely yours,

-(SGD) HAROLD L. ICKES,
Administrator.

Mr. Hugh Miller,
State Engineer, Federal Emergency
Administration of Public Works,
219 Buder Bldg., 705 Market St.
St. Louis, Missouri."

595 The plaintiffs marked for identification as Plaintiffs' Exhibit 268 a handbill, which was as follows:

"STATEMENT FROM THE SELECTMEN

To the Residents of Brandon,
In Regard to

THE TOWN OWNED
LIGHT AND POWER PLANT

From our canvas of the Townspeople for subscribers to Town Electric Service now going on, we have found that there are certain misunderstandings regarding the project which we feel should be *cleared up by a statement from the Selectmen.*

1. Our project *has been approved,* not 'TENTATIVELY' as stated in the last issue of the Brandon Union, but as stated in the following telegram received by the Engineer for the Town of Brandon:

'YOUR PROJECT APPROVED BY PRESIDENT TWENTY FIFTH FURTHER DETAILS WILL FOLLOW BY LETTER'

H. J. LOCKWOOD ACTING STATE DIRECTOR 808A Sep 27

2. There is to be *no bonding of the Town* to finance this Power Plant. The total of $163,635.00 for construction is furnished by the United States Government. Of this total, $73,635.00 is an *outright grant, not to be repaid.* The Balance of $90,000.00 is a loan to be repaid *solely from the net*

profits of the Plant, and not out of any Tax collections or any other money of the Town.

3. *In no way can the Taxes of the Town be increased on account of this project.*

We wish to thank the people for the splendid response they are now making, and we urge all to get behind us to help make this Town project a success.

SELECTMEN OF TOWN OF BRANDON,
F. L. SMITH, P. L. BULRUS, R. W. BRESEE."

596 The plaintiffs then offered to prove "by the witness Edward Lawrence, who it is agreed need not be called into the court room for the purpose of this offer, that handbills like that marked for identification as Plaintiffs' Exhibit 268 were circulated by the town selectmen among the citizens of the Town of Brandon, Vermont, immediately preceding a vote by the citizens of that municipality on the question of issuing revenue bonds to be sold to the Public Works Administration for the purpose of financing a municipally-owned generating and distributing electricity system as a non-Federal Public Works project. It is agreed that neither the PWA nor anyone having any association with the PWA had any connection with the issuance of these handbills." The handbill was then exhibited to the Court and offered in evidence in connection with the foregoing offer of proof. The offer of proof was made to show the natural effect of an offer by the defendants to finance a municipally owned electricity plant by purchase of revenue bonds and a grant of 30% or 45% of the cost of construction.

The defendants objected to the evidence offered "as being utterly irrelevant and immaterial to any of the issues of this case". The objection was sustained and the plaintiffs were allowed an exception.

The plaintiffs then for the same purpose made the following offer of proof:

"By the depositions of Fred L. Hiss, of W. W. Harvey, of E. F. Bulmahn, of John R. Hoffman, and of R. R. Rowell, and by witnesses Cyrus Field and D. E. Byerley, who it is agreed need not be called into the court room for the purpose of this offer, the plaintiffs offer to prove that similar

handbills or newspaper advertisements were circulated under similar conditions among the citizens of the municipalities of Sandusky, Ohio, Jacksonville, Illinois, Delta, Colorado, California, Missouri, Eldon, Iowa, Devils Lake, North Dakota, and Morenci Michigan."

597 The defendants made the same objection as that preceding, which was sustained, and the plaintiffs were allowed an exception.

The plaintiffs marked for identification as Plaintiffs' Exhibit 269 a full page newspaper advertisement inserted in a weekly newspaper of Plainview, Texas, by the Council of that City, and signed by the members of the Council. The advertisement, exhibited to the Court, contained among other things the following passage:

"THE FREE GIFT OF FORTY-FIVE THOUSAND DOLLARS

The City must at some time provide wells and pumps and make the other improvements proposed to be made from the BOND issue. By doing the work now the City will receive from the U. S. Government $45,000.00 as a free gift. Is it good business to lose that offered gift and later pay the full cost of the improvements?

The State Engineer for the Public Works has extended the time to hold this election; but has made it positively clear that unless the bonds are carried at this election, the allotment, both the loan and the proposed gift of $45,000.00 will be cancelled and forever lost to the City."

The plaintiffs then made the following offer of proof:

"By the deposition of Herbert Dysart the plaintiffs offer to prove that the City Council of Plainview, Texas, which is one of the cities involved in the suit, had circulated in a newspaper of general circulation in the City of Plainview, Texas, the advertisement marked as Plaintiffs' Exhibit No. 269, immediately prior to an election to determine whether that city should acquire wells and pumping facilities for its waterworks, such acquisition to be financed by PWA grant of 45 per cent of the cost of construction and the purchase by PWA of the city's revenue bonds to cover the remaining cost."

598 The defendants objected to the evidence offered as being irrelevant. The objection was sustained and the plaintiffs were allowed an exception.

The plaintiffs marked for identification as Plaintiffs' Exhibit 270 and offered in evidence a handbill circulated in the Town of Russellville, Alabama, by the City Council and signed by the City Council. The circulation of the handbill occurred immediately preceding a vote by the citizens of the Town on the question of approving the electricity project which is one of those involved in this suit. The handbill states, in part:

"FACTS ABOUT THE COMING ELECTION

SHALL THE PEOPLE OF RUSSELLVILLE TURN DOWN THIS GIGANTIC OPPORTUNITY TO SECURE CHEAP POWER FROM MUSCLE SHOALS

On Monday, an Election will be held to determine whether the City shall take advantage of President Roosevelt's Muscle Shoals Program to develop the Tennessee Valley, and to decide whether our City shall secure the advantages of Cheap Electricity the same as our neighboring cities.

WHAT WILL IT COST THE PEOPLE OF RUSSELLVILLE TO OWN AND AN ELECTRICAL DISTRIBUTION SYSTEM, BUYING POWER FROM TVA?

Answer: It will cost them nothing. The government lends them money and assumes any risk which may be attached to the loan. The Government's security lies in the income from the sale of electricity, which will be more than ample to pay interest on the bonds and set aside a sinking fund to retire the bonds in 20 years thus, in 20 years the people will come into ownership of the Distribution System without putting up a cent of money.

HOW WILL THIS LOAN EFFECT THE CREDIT OF THE CITY?

Answer: It will improve it materially. The City will be able to make a gross operating profit from a distribution system after paying all operating expenses, interest and sinking fund. This operating profit will be greatly in access of the taxes and license now payed the City by the PUBLIC UTILITY.

599

HOW WILL THE CITY PAY FOR AN ELECTRICAL DISTRIBUTION SYSTEM?

By issuing income Bonds which will pledge the income from the Distribution System to the payment of interest and sinking fund. These bonds WILL NOT be a general obligation of City, and hence will not add one penny to the City's General Debt therefore will not effect Taxes in any way.

WHAT BENEFITS WILL THE AVERAGE CITIZEN OF RUSSELLVILLE SECURE FROM A MUNICIPAL ELECTRICAL DISTRIBUTION SYSTEM?

Answer: They will secure a very great reduction in the cost of Electric Power, which will go far to improve living conditions in the Home. Under the proposed rates Electricity will be so cheap it can be used for Cooking, Hot Water Heating, Refrigeration, Ironing, Washing and other Household appliances. In fact, the purpose of the President's program is to give a demonstration of the facts that Electricity can be sold in the Household at rates so low that no House Holder can afford to do without it."

The offer was made for the same purpose as the foregoing offers, the defendants objected on the ground that the evidence was irrelevant to the issues in the case, the objection was sustained, and an exception was allowed the plaintiffs.

600 The plaintiffs here rested their case.

Whereupon the case for the defendants proceeded
601 as follows:

Thomas A. Martin called as a witness on behalf of
602 the defendants and being duly sworn testified as follows:

I am the Mayor of Iowa City and have been since April 1, 1935. I was City Attorney for two years prior to that. I am familiar with the origin of the movement in Iowa City for a municipal light plant. October 11, 1932, there was a franchise election held in Iowa City, in which the Iowa City Light and Power Company, who then held a franchise, sought a renewal of the franchise. The election resulted in turning down the franchise by a rather substantial majority, about three to one, I believe. During that campaign for an electric franchise there was some discussion generated about what to do in looking ahead to electric service in Iowa City because the then existing franchise was to ex-

pire. January 13, 1934. When the franchise was turned down so decisively this discussion increased considerably.

The next city election after the franchise election
603 was in March, 1933. The witness was thereupon asked what, if anything, was put in the campaign in that election pertaining to a municipal light plant. Plaintiffs objected to the question as immaterial, irrelevant, not tending to prove any issue in the case and as calling for the conclusion and opinion of the witness as to what the issues were in a municipal election having nothing to do, itself, with franchises or municipal plants. The Court overruled the objection to which plaintiffs duly noted an exception. The witness thereupon answered that he recalled a questionnaire being placed before all the candidates for city council in the course of that campaign by the League of Woman Voters, and that a resume of their answers was published in the local newspapers just prior to the primary election. The election on the construction of a municipal plant was April 18, 1934. The Council elected in March, 1933, withdrew their application for PWA support in October 1934.

The next election after that was in March, 1935. I was a candidate for Mayor in that election. The only issue of any importance in that campaign was the question of the construction or establishment of a municipal electric light plant and distribution system in accordance with the authorization of the special election which carried on April 17, 1934.

Question. With reference to the candidates, who were pledged to the erection of the municipal plant, what was the result of the election?

Objected to as immaterial and irrelevant, objection overruled and exception noted.

Answer: There were two candidates for the city council, one in favor of proceeding with the establishment of the municipal plant and distribution system and one opposed; in each of the five wards; and in the two aldermen-at-large election there were two candidates pledged to the establishment of a municipal electric light plant and distribution system and two candidates opposed.

The result of the election was the election of five ward aldermen and two aldermen-at-large, all of whom were

pledged in the campaign to the establishment of the
604 municipal electric light plant and distribution system. All of the municipal ownership candidates were elected.

It is stipulated that the Simmer Law enacted in 1931 permitted municipalities under certain conditions to establish municipal light plants, and to pay for them out of
605 the earnings of the plant, by a method differing from that which now exists, but still limited to earnings.

I prepared the ballot for the election on the municipal ownership question in Iowa City and it was prepared under the Simmer Law.

The Public Works Administration did not ask or solicit or suggest that the City of Iowa City build a municipal electric light plant so far as I know.

On Cross Examination the witness testified as follows:

The election which occurred in March, 1935, was a regular, biennial municipal election at which candidates for the various city officers, including mayor and council, were to be elected, and at that election there was not any official submission of any question regarding municipal ownership. If there were any other issues and questions and other things which may have motivated some of the voters in that election aside from the question of construction of a plant, I don't know of them. I cannot say whether each candidate appealed in the same way to all of the voters. I suppose that I, like anyone else, had persons who would not have voted for me in that office in spite of any issue of municipal ownership and others who would have voted for me regardless of that question. I have never seen an election in which as much weight was placed on one question as that election. Approximately 8,000 ballots are cast as a rule at a municipal election in Iowa City.

606 Defendants offered Defendants' Exhibit No. 1, for identification, being a letter from the Tennessee Valley Authority by David E. Lilienthal, Director and General Counsel, addressed to Honorable J. A. Nelson, Mayor, Decatur, Alabama, and dated December 12, 1934.

Plaintiffs objected to the receiving of Defendants' Exhibit No. 1 for identification in evidence on the ground that it went to an entirely collateral issue, that it was a self-

serving declaration on the part of the Tennessee Valley Authority, and that it was entirely irrelevant to the issue involved in the case. Plaintiffs objection was overruled and exception noted and Defendants' Exhibit No. 1 for identification was received in evidence as Defendants' Exhibit No. 1, and reads as follows:

607 TENNESSEE VALLEY AUTHORITY

Knoxville, Tennessee

December 12, 1934

Board of Directors,
Arthur E. Morgan, Chairman,
Harcourt A. Morgan
David E. Lilienthal

Hon. J. A. Nelson, Mayor,
Decatur, Alabama.

My dear Mr. Mayor:

Over three weeks ago the Tennessee Valley Authority tendered to The Albama Power Company the sum of money agreed upon for the purchase and sale of electric distribution properties in North Alabama, including those within your community. The Company failed to convey the property. While the contract to purchase is still in effect for the time being, the Authority is bound to inform you that it no longer has an assurance that the Company will convey, as disclosed in the memorandum of facts attached to this letter.

Under these circumstances and in view of the fact that your community may be substantially prejudiced by further delay, the Authority does not feel justified in requesting your city longer to defer your original plans for the acquisition of an electric distribution system, plans which you agreed to forego last August in order that the Authority might endeavor to acquire those properties for you by purchase.

The Authority has not indicated it will reject these properties if they are tendered. If there should be a change in circumstances we shall immediately inform you. In the meantime we regard the possibility of the tender of these properties so remote as no longer to justify us in interfer-

ence with your plans in the interest of avoiding the
608 construction of additional distribution facilities.

Very truly yours,

TENNESSEE VALLEY AUTHORITY
By David E. Lilienthal
Director and General Counsel

Enclosure

609 Defendants offered Defendants' Exhibit No. 2 for identification which was the memorandum attached to Defendants Exhibit No. 1. Plaintiffs objected to the receiving of Defendants' Exhibit No. 2 for identification in evidence on the ground that it went to an entirely collateral issue, that it was a self-serving declaration on the part of the Tennessee Valley Authority, and that it was entirely irrelevant to the issue involved in the case. Plaintiffs' objection was overruled and exception noted and Defendants' Exhibit No. 2 for identification was received in evidence as Defendants' Exhibit No. 2, and reads as follows:

610 MEMORANDUM OF FACTS

1. *Policy of TVA to Avoid Competition*

In carrying out its policy to sell the surplus power produced by the Government properties at Wilson Dam rather than to permit it to be wasted, the Directors of the Tennessee Valley Authority, in August of 1933, adopted a policy of disposing of such surplus without competition with privately-owned utilities. In order to carry this surplus power to agencies desiring to purchase it, the Board adopted a policy of buying existing transmission lines at fair prices, rather than build duplicating transmission lines.

Pursuant to the same policy of avoiding competition, TVA has urged municipalities which have voted to acquire their own distribution systems to do so by purchase of existing facilities rather than the construction of competing facilities.

2. *The Contract of January 4 between TVA and Alabama Power Company*

On January 4, 1934, a contract was entererd into between TVA on one hand and Alabama Power Company and cer-

tain other subsidiaries of the Commonwealth and Southern Corporation on the other. Under this contract, among other things, TVA agreed to buy and Alabama Power Company to sell certain transmission lines in North Alabama extending from Wilson Dam to certain communities in Northern Alabama. These communities had theretofore voted to acquire their own distribution systems and had entered into contracts with the Tennessee Valley Authority for a bulk supply of energy. They had also voted bonds and initiated arrangements to borrow funds with which to construct new plants.

3. *Efforts of Communities to Buy Distribution Facilities from Alabama Power Company*

It was contemplated by the contract of January 4 that communities in North Alabama would seek to purchase their distribution facilities from the Alabama Power Company. Following the contract, negotiations were had
611 between the Company and the cities. These negotiations proved futile, inasmuch as the company's representatives not only asked excessive prices for the properties, but insisted that the payment must be in cash, although the communities could only pay for the properties in revenue bonds.

4. *TVA Urges Cities Not to Build Competing Plants*

These negotiations for purchase having failed, the North Alabama communities pressed their plans for the construction of new plants. Allotments for loans covering most of the communities were made by the Federal Emergency Administration of Public Works. At a time when the construction of new plants was imminent, TVA negotiated for an option from the Alabama Power Company for the purchase of the distribution facilities in North Alabama. After weeks of negotiations a price of one million dollars was agreed upon. This price was reached after a study of the properties and their value, in the course of which TVA engineers found the physical condition of the properties in North Alabama, particularly in the Tri-Cities where the Company's franchises had expired, to be very poor. The figure of one million dollars represented the full value which could reasonably be assigned to these properties in their then condition.

TVA then conferred with the officials of these communities and urged them to forego their plans for construction of a competing plant. The plan was for the Alabama Power Company to convey the purchased properties to TVA, with a later re-conveyance of the properties to the separate communities. A plan for the regional operation of the properties was worked out. This plan, under which competition with the Alabama Power Company would have been avoided, was adopted by resolution of the respective governing bodies of each of the communities involved. Thereupon being assured that this plan for the municipal acquisition of these properties through the TVA was satisfactory to the respective municipalities, TVA, on August 9th,
612 entered into the option contract for the purchase of these distribution facilities. A large sum was then set aside by the Authority to place the properties in good condition.

5. *The Proceedings Before the Alabama Public Service Commission and in the Federal Court*

Under the laws of Alabama, the approval of the Public Service Commission was necessary before the Alabama Power Company could convey these distribution properties to TVA. Application was made to the Public Service Commission for such approval on August 9, 1934.

Under an agreement with the Commission that the Authority's participation in the proceedings should not be construed as conferring any jurisdiction by the Commission over the Authority, the Authority was represented by counsel at the extensive hearings on this application, and made an elaborate presentation of evidence on the issue of public interest. In fact, though the application was that of the Company, the Auhority was compelled to assume and did assume virtually the entire burden of proof before the Commission.

On the 12th day of September, 1934, certain preferred stockholders of the Alabama Power Company filed an action in the Circuit Court for Limestone County seeking to enjoin, among other things, the transfer of the distribution properties, and joining as defendants these North Alabama communities. This case was removed to the Federal District Court, while the application for transfer was still

pending before the Public Service Commission. The plaintiffs in this action sought a temporary injunction restraining the transfer. Judge Grubb denied the motion for temporary injunction. No order in any wise restraining the conveyance of these properties to TVA has ever been issued.

613 6. *The Action of the Chemical Bank and Trust Company, of New York, Trustee Under the Alabama Power Company Mortgage*

Three months after the Alabama Power Company had agreed to sell the distribution properties to the communities, through TVA, the Chemical Bank and Trust Co., of New York, the trustees under a power company bond issue, indicated that it would require an "independent appraisal" of the properties to be conveyed to determine whether the interests of the bondholders were being protected in the transaction. This action was taken just before the close of the extended hearings before the Alabama Public Service Commission, and therefore immediately prior to the first opportunity for a conveyance to TVA pursuant to the contract. The trustee was promptly advised as to litigation initiated by preferred stockholders on September 12, 1934, in which the adequacy of the purchase price was challenged. However, it was not until November 7, that action in this respect was taken.

A few days after November 7, the Power Company employed the engineering firm of Ford, Bacon and Davis to conduct the appraisal requested by the Chemical Bank. Upon an inquiry as to the record of this firm we have been compelled to conclude that there was little likelihood that the purchase of these properties could be consummated. The firm of Ford, Bacon and Davis has been frequently employed by public utility companies involved in rate proceedings in which a high valuation must be established in order to sustain existing rate structures. At the present time this firm is engaged in supporting the existing rates of the Public Service Company of New Jersey before the New Jersey Public Service Commission. It was employed in this proceeding by Mr. Thomas N. McCarter, President of the Public Service Company of New Jersey and also President of the Edison Electric Institute. At the time of

the employment of this firm by the Alabama Power
614 Company, Mr. McCarter had taken steps whereby the organized utility industry was to make a combined attack upon the activities of the Tennessee Valley Authority and to have the Act of Congress declared unconstitutional. One of the trustees of the Edison Electric Institute is President of Commonwealth and Southern Corporation, which controls the Alabama Power Company. We have, then, the Alabama Power Company agreeing to cooperate in consummating the sale of its properties, and at the same time assisting in the effort to have the Tennessee Valley Authority's powers declared invalid.

Whatever the motive, we fear that the effect of the employment of Ford, Bacon and Davis in this situation is to serve notice that indefinite delay and eventual obstruction of the transaction is to be expected, and that if these communities in North Alabama propose to furnish themselves with electricity, through community plants, they can only buy those plants on the basis of the excessive appraisals of professional utility valuators.

7. Request by Authority for Performance of the Contract

On November 24th the Alabama Public Service Commission unconditionally approved the transfer of the distribution properties to the Tennessee Valley Authority. On that day, after having given appropriate notice, General Solicitor James Lawrence Fly, of the Tennessee Valley Authority, communicated with the attorney for the Chemical Bank, indicating that he was authorized to receive a conveyance of the property and to tender the condition, and that he was in a position to do so. The bank gave word that it would not release the properties at this time. Shortly thereafter Mr. Fly conferred with counsel representing the Alabama Power Company, and a representative of the Guaranty Trust Company, which is also a trustee under the mortgages of the Alabama Power Company. The Guaranty Trust Company indicated it was ready to release at once. Mr.
Fly stated that the Authority was then ready to pay
615 the full consideration and to close the transaction and that he was properly authorized to do so. Counsel for the Alabama Power Company stated that the company was not in a position to convey and no conveyance was made.

Conclusion

The Tennessee Valley Authority has spent a whole year endeavoring to protect the investors in the Alabama Power Company from the losses which would be incurred in competition between community electric plants and the plants of the Alabama Power Company. In this effort the Authority has had the full cooperation of the communities involved. The elected representatives of those communities and the people themselves have exhibited patience and a fine sense of fairness. Those efforts to prevent competition have failed under the circumstances above related.

Under the contract between Alabama Power Company and Tennessee Valley Authority with respect to distribution properties, the Authority may exercise this option at any time prior to February 12, 1935. While the option is therefore still effective the likelihood that the Alabama Power Company will convey this property within the option period seems to us to be so remote that the Authority does not feel justified in longer urging the communities to delay their plans in reliance upon eventual performance of this contract.

TENNESSEE VALLEY AUTHORITY

616 Whereupon

Julian B. Adler

was called as a witness for and on behalf of the defendants and having been first duly sworn was examined and testified as follows:

Direct Examination

I live in Birmingham, Alabama, and I am a member of the firm of Lide & Adler, consulting engineers. On behalf of the cities of Sheffield and Tuscumbia I conducted negotiations with Alabama Power Company with regard to the acquisition by those cities of the distribution systems of Alabama Power Company located within those cities. The history of those negotiations is as follows: After the cities voted to go into the municipal electric business, which was for Sheffield in April 1933, and for Tuscumbia, a month or two later, my partner and I suggested to the governing bodies of the cities that they attempt to purchase the existing utility systems and the officials of those cities addressed

a letter to the Alabama Power Company and asked them for a price. Subsequent to that there were a great many conferences and a certain exchange of letters. I attended most of these conferences on behalf of the cities, and my partner and I acted in an advisory capacity. Those conferences were with the officers of Alabama Power Company, one or two vice-presidents almost always being present. At Sheffield, the power company offered to sell its distribution system for approximately $164,000 and at Tuscumbia for approximately $104,000. The city of Sheffield offered the power company $126,000 and the city of Tuscumbia offered a little over $80,000. My partner and I suggested to the city of Sheffield the top price at we would be willing to recommend and stated that we thought that price was more than the physical property was worth. That was also true of the offer of $80,000 for Tuscumbia. We told the
617 cities that these prices were what we thought was the full value of the properties and took into consideration that they would get a going business. But it was made under the rather extraordinary circumstances that there was no franchise existing in those towns so that they were only buying the physical property. Of course the fact that the city could get a grant from Public Works Administration if it constructed its own plant was before us, but we told the cities that we thought those prices took into account the full physical value of the properties they could use in the existing facilities. In case of Sheffield that was not all of the utility property. In the case of Tuscumbia it was almost all of the utility property.

"Q. Well, when you named the figure of that top price, was that the price you would have recommended regardless of whether or not the city could have gotten a grant from the Public Works Administration? A. Yes.

"Mr. Turner. We object to that.

"The Court. I overrule the objection; I think that it fair.

"Mr. Turner. We except, if your Honor please.

"The Court. Very well

"By Mr. Frank:

"Q. There is in evidence a letter from your firm to the Alabama Power Company dated October 5, 1933, it being a part of Plaintiffs' Exhibit No. 1, page 18, in which you

stated to the Alabama Power Company, among other things the following:

"'The cities feel that since you have no franchise, they will be entitled to a 30 percent grant from the Government on a loan with which to construct a new system. They also feel that the depreciated existing systems cannot be worth more than the cost of new systems which with the Government grant could not exceed 70 percent of their con-
618 struction cost. They are therefore unwilling to pay for the usable portions of your distribution systems, as set forth in your tender, and as concurred in by the undersigned, more than 70 percent of the depreciated value as appraised by Messrs. J. E. Sirrine and Company. They will, however, pay that much.'

* * * * * * *

"Q. Have you had the letter read? A. Yes, sir.

"Q. What did you mean by that language which is different from what you testified? A. Well, that letter was predicated—

"Mr. Turner. If your Honor please, may I state that the letter is perfectly unambiguous.

"The Court. Then let it go."

I think I can reconcile the statement I made on the witness stand with the statement made in the letter just read. That letter was written in the course of a large interchange of correspondence between the power company and ourselves—written without any knowledge of the city officials who, of course, had the last say. We accepted for the purpose of negotiation the report of J. E. Sirrine. We accepted the Sirrine valuation for the purpose of negotiating only. And we did not think the valuation was correct, for we thought it was too high. Based on that valuation, we endeavored to reconcile by a series of sentences and to the base price which we had figured was a fair price for the city to pay.

Whereupon the Defendants stated that they had no further questions for the witness and there being no cross-examination by plaintiffs, the witness was excused.

619 **Winfield Holbrook**

was called as a witness for and on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

I live in Plainview, Texas. I am manager of the Texas Land & Development Company. I was graduated from the engineering school of the University of Colorado in 1904. Thereafter I was engaged in the engineering profession actively until I became manager of the Texas Land & Development Company in 1919, first on railroad location and construction, afterwards on irrigation work. I am manager of a corporation, that is looking after irrigated land. We operated the land through tenants, and are using 78 water wells for irrigating land. I am personally in charge of the maintenance of these wells. I am familiar with the cost of installation of a well in the vicinity of Plainview, and with the type of well that would be needed by the City of Plainview to furnish water for the city water system. You understand that I was not prepared to give you an opinion how many wells the City of Plainview needs in order to supply the city with water. I should say that they should have three wells—two wells to do the pumping, and one well in reserve. These wells are the same type that are under my personal supervision. I would estimate the cost of drilling the well, $560. Cost of the casing, $430. The cost of a pump, to pump the water from the ground and pump it against a head of 140 feet, or into a sand pipe—either one—would be $1,792. For seating pump and concrete base, $160. Developing well, $210. Motor, $1,111. Conduit and labor connecting motor, $75. Switchboard and starter, $410. Pump house and derrick, $252. A total of $5,000 for each well. The cost of the three wells would be $15,000. For this the city will have a water supply and will only need to provide electricity to pump the water in the mains.

Cross Examination

620 I am a graduate engineer and have practiced engineering. I have not practiced in Texas directly. My work is based on engineering knowledge, but I am not practicing professionally; I am working for a corporation. Between 1904 and 1919, I practiced professionally. In New York, Colorado, Idaho, Utah, New Mexico, Colorado again, Kansas and Texas. At first it was largely railroad engineering that I was in. Then I went into irrigation and

engineering. In northern Colorado I had charge of construction of ditch work and reservoirs; in central Colorado, of a large reservoir; in Pueblo, of the construction of an irrigation system. In Montezuma County, I was engineer for the County Irrigation District. In Kansas, I was engineer for the Garden City Sugar and Lime Company. All this work was in connection with water obtained from dams, except in Garden City, Kansas, about 200 miles from Plainview. We were drilling wells there. I was the supervisor. They had contractors to do it.

I am familiar in a general way with the requirements of Plainview, Texas for water. I have often been to the pumps. I would say their maximum draught there is something over 2,000,000 gallons per day but less than 3,000,000 gallons. I estimate that 3,000,000 gallons a day could be obtained from two wells. Everywhere close around the city, water is available, without any danger of not getting a well. The place where they expect to put the wells is owned by the City, and was bought some years ago. However, the neighboring land is all similar, within two or three miles. One of my company's wells was built right within a few hundred feet of the Texas Utilities plant, and was used by them temporarily at one time, to pump the water from. My estimate is for a well with an 18-inch casing for 120 feet, and 12 inches for the remainder. I had in mind 12 gauge casing—that refers to the thickness of it; and the type of casing is the type commonly used there, of welded
621 casing, and then perforated after you get below a certain depth. There is no item in my estimate for connecting the wells with the water system in Plainview.

622 Whereupon **Herbert Dysart** was called as a witness on behalf of the defendants, and, being first duly sworn testified as follows:

Direct Examination

I live in Plainview, Texas, am now and have for the past 11 years been a member of the City Council in Plainview. Some 7 or 8 years ago the Council entered into negotiations with the Texas Utility Company to secure a reduction in light and power rates in Plainview. These negotiations continued over a period of some two or three years, and

nothing was accomplished. At that time the officials of the Texas Utilities Company advised the City Council that the rates in Plainview were the same rates that were being charged in all towns served by the South Plains Division of the Texas Utilities Company, which includes the town of Lubbock. Our investigation over this period of years convinced the City Council that this was not a fact. On July 20, 1931, the Council of the City of Plainview, Texas, adopted a resolution favoring the erection of a municipal light and power plant. On November 15, 1932, the Council adopted an ordinance to the same effect and on the same date authorized the Mayor and the City Secretary to enter into a contract with Montgomery & Ward, Engineers, of Wichita Falls, Texas. On January 17, 1933, the Council adopted a resolution instructing the Mayor to write to Judge I. R. Kelso to ask him for a proposition for the sale of their Plainview properties, or rather their Plainview plant, to the City. That communication was never answered.

Q. Judge Kelso is president of the Texas Utilities Company? A. Judge Kelso was president of the Texas Utilities Company at that time.

Q. You may proceed, Mr. Dysart. A. On February 21, 1933, the Council adopted Ordinance No. 369. This
622A ordinance called for an election to approve revenue bonds in the amount of $450,000.

Q. You have referred to Ordinance No. 369. I show you a document which has been marked as Defendants' Exhibit 3, and will ask you if it is a true copy of the Ordinance No. 369, referred to by you. A. Yes, sir; that is a true copy of Ordinance No. 369.

Q. That is the resolution of the City Council with reference to the election on a municipal plant? A. Yes.

Mr. Sher. The defendants now offer in evidence Defendants' Exhibit 3, being Ordinance Number 369 of the City Council of Plainview.

Mr. Acheson. We have no objection.

There was received in evidence Defendants' Exhibit No. 3, being Ordinance 369 of the City of Plainview.

Mr. Scott. Reading from the exhibit:

And just let the record show that the ordinance was read into the record and copied into this record in toto at this point:

"Plainview, Texas, Feb. 21, 1933.

"On this day the City Council met in regular session with the following members and officers present, to wit: Mayor R. P. Smyth; Aldermen: D. Bowman, F. J. Hurlbut and E. M. Osborne; J. L. Gallaway, City Secretary; P. H. Bryan, City Tax Collector; and C. S. Williams, City Attorney, when the following proceedings were had.

"Upon motion of Alderman Dysart, seconded by Alderman Hurlbut, an ordinance ordering an election to determine whether or not revenue bonds should be issued for the purpose of providing the City with an electric
622B light and power plant, was adopted by Unanimous vote:

"Be It Ordained by the City Council of the City of Plainview:

"Section 1

"That an election be held on the 4th day of April, 1933, throughout the City of Plainview, Texas, at which election the following proposition shall be submitted; Shall the City Council of the City of Plainview, Texas, be authorized to issue revenue bonds in a sum not to exceed $450,000 . . . said bonds and/or the proceeds from any sales thereof to be used for the purpose of providing the City of Plainview with and electric light and power plant and electric distribution system."

On April 4, 1933, a muncipal election was held to determine whether the City Council should be authorized to issue revenue bonds for the purpose of erecting a municipal power plant. The result of this election was 438 in favor of the issuance of such bonds, and 100 against such issuance.

On May 8, 1933, the Council adopted a resolution
623 authorizing the Mayor to contact the engineers and have them prepare the necessary plans and specifications for the erection and construction of the plant. This was done, and on August 7, 1933, the City made application to the Public Works Administration for a loan and grant with which to finance the plant, provided we deemed that advisable. We thought we could finance the project through the sale of the bonds, but we though perhaps we might get a lower interest rate by getting the money from the PWA.

We had talked with various contractors and bond men and people who deal in those kinds of securities. We advertised for bids for the construction of the plant on September 18, 1933. In December 1933 we entered into a contract with C. S. Lambie & Company to erect a plant. Mr. Lambie and his associates were to build a plant in accordance with the specifications and were to take the bonds in payment for the plant. The Community Power & Light Company, that claimed to hold a majority of the bonds of the Texas Utilities Company, sued out a writ of injunction through the various courts, and we were finally enjoined. I believe that was in Federal court. The case was not appealed. We then prosecuted our PWA application with all possible diligence. Our loan and grant was approved in August, 1935. We made arrangements to let the contract, and this suit was filed, and we were stopped. At the present time the City owns the water distribution system except the wells. The wells belong to the Texas Utilities Company. The City pays the Texas Utilities Company for furnishing the wells and pumping the water, all under one contract. I am familiar with the contract. (A copy of said contract was offered in evidence as defendants' Exhibit 5.) We entered into a contract on February 1, 1936, with the PWA for the loan and grant of $100,000 for the purpose of installing wells and making improvements and betterments to the present system by way of enlarging the lines, and so forth, and for an additional standpipe. Prior to February 10, 1936, PWA made an offer to the City of Plainview for the $100,-
624 000 loan and grant. It was sometime in 1935, but I just don't recall when. It was pending for several months after the application was made.

The Council of the City of Plainview has given consideration to the question of water supply in the event anything should happen to this loan and grant of Federal funds. We have gone into it very thoroughly at various times to determine our ability to finance the wells and such equipment as might be necessary. It is all held up pending the final disposition of that case, because we were also enjoined there by the Texas Utilities Company. The City owns the ground on which to put the wells, a 5-acre tract in the west part of the town, on the highest point around there. That was acquired some years ago. The assessed valuation of

the City of Plainview is just a few thousand under 6 million dollars at this time. The bonded debt of the City is approximately $550,000. I know what it will cost to install wells for the water works. The basis of my knowledge is on information given to us by owners of wells and various people who are engaged in the sinking of irrigation wells and water wells in that territory. I have had expert advice on the cost. I have had discussions with the owners of wells and with persons engaged in the business of installing wells as to the cost of installation. I have talked particularly with Jim Cook and Artie Baker, each of whom has installed at least 50 irrigation wells in the immediate vicinity of Plainview. I have also talked with numerous farmers, including Jim Heard and Bebs McLaughlin, who are neighbors of mine, and various other land owners who have installed irrigation wells. My own opinion is that the cost will not exceed $12,000. I am familiar with the charter of the City of Plainview, adopted April 6, 1920. The City has power to engage in the distribution and sale of electrical energy, and also to own and operate its own municipal water system. No officer or employee of the Public Works Administration suggested to the City of Plainview that it should file application for a loan and grant for a
625 municipal power plant, so far as I know.

Cross Examination

The City Council determined to give notice that it would issue bonds for an electric light and power plant on October 16, 1932, and gave notice on November 20, 1932. When the City Council made application to PWA for a loan and grant, the grant was the motivating reason—one of them. We received formal notice about April 23, 1935, from PWA that our application and been approved.

The Texas Utilities Company in Plainview have three wells of their own, and the City owns one well, as I understand it. I have never known the exact status of that particular well. The wells are all in a small area and usually each well has just what we call a pump house around it. Then, of course, it has the necessary pump installed, and it is connected to an electric motor to pump the water. That is about the sum of the equipment. They are usually drilled some 50 feet to the first strata of water, and then they go on

down to 175 feet and strike several more strata. They start in about 14 inches in diameter, I believe—12 or 14 inches—and they are perhaps 8 or 10 inches at the bottom, as I understand it. They have hundreds of irrigation wells in the immediate vicinity of Plainview, and usually anyone owning a well goes down and gets an experienced driller and lets a contract for it, and he guarantees to furnish so much water at a certain price. The average well pumps 800 to 1100 gallons per minute and costs about $2,100 equipped. That is a well for farm use. Perhaps it would cost considerably more to furnish the electric motor, and so forth, that we would use in Plainview. As to whether we are planning to have three wells about the size necessary for farm use in order to supply the whole city, would depend upon our needs. We might get along with two wells. We might deem it advisable to have two larger wells instead of three smaller ones. The figures of cost which I have given
626 is not a figure based upon wells designed for farm use. We could drill three farm wells for $6,000, but I said $12,000. In my statement I had in mind that we would perhaps have three wells. My figure includes all of the machinery in connection with the city waterworks.

In November 1934, I came to Washington with the City Attorney. Mr. Rau was one of the persons with whom we talked. He was represented to us as a representative of PWA. When Mr. Williams and I were planning to return to Plainview, we came back to Mr. Rau's office to get such additional information as we could. We visited a little while, because we were preparing to leave. I said, "Mr. Rau, tell us, as nearly as you can, what our situation is and when we may expect some reply." He replied that in all probability the Texas Utilities Company would be given an opportunity to reduce their rate. I said, "Well, Mr. Rau, do you mean by that that if they reduce their rate down equal to the rate proposed in our application the loan and grant will not be made?" He said, "If the Utilities Company reduces their rate down to the point where your plant would not be self-liquidating, I should judge your loan will not be granted." We left him there.

Redirect Examination

By my statement that the grant offered by the Public Works Administration was a motivating factor in causing the City to file its application with the PWA, I meant that we had already determined to build a plant, Mr. Sher,
627 and we thought we knew how we could finance it all right; but if we could save some money, we just decided we would make the application with PWA.

Recross Examination

I presume you might say we had not taken legal action looking toward building the electric plant until we took action to issue the bonds, although the Council had definitely decided to build the plant if it could find any way to finance it. We had an election at which we were authorized, if we thought best, to issue some bonds. Then in October we took the action to issue the bonds. At that time we knew that such grants were available.

George F. Harley was called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

I am a civil engineer. I was graduated from George Washington University in 1905, with the degree of bachelor of science in civil engineering. My engineering experience has been: Four years in the Geological Survey and Reclamation Service out west. Then three years I was with J. G. White & Company on development of power plants in central Georgia. After that, in 1911, I was employed by Stone & Webster as district engineer in charge of construction in western and southwest Georgia for 20 years. After that time I was employed in the Supervising Architect's division of the Treasury, supervising the construction of post offices in Savannah, Brunswick, and other smaller jobs in the territory around Savannah. That was in 1932 and 1933. In 1933 I was employed by the PWA as engineer, and since that time I have been in that service. During that period practically all of my work has had to do with power developments, coming through the PWA office, and most of my work has been in connection with applications for loans

for municipal electric plants. I have had actual ex-
628 perience in the construction of hydroelectric generating plants and steam plants. I am familiar with the costs of labor and material that go into the construction of an electric light plant and with the costs of the operation and maintenance of electric plants after they are constructed. I have studied the application and accompanying data submitted by the City of Plainview, Texas, to the Public Works Administration for a loan and grant for the construction of a municipal electric project and have prepared during the past week a schedule showing the dollar revenue of the proposed municipal plant over the loan period.

(Whereupon Statement entitled "Plainview, Texas, Summary of Operating Results, Proposed Municipal Plant", was received in evidence as Defendants' Exhibit No. 7, reading as follows:

Plainview, Texas Summary of Operating Results, Proposed Municipal Plant.

(4 per cent sinking fund, amounting to the cost of the plant at end of its estimated useful life, 25 years).

	Gross Revenue	*Total Expense*	*Surplus*
1937	$89,000	$69,200	$19,800
1938	90,800	74,400	16,400
1939	92,600	79,300	13,300
1940	94,400	79,100	15,300
1941	96,300	78,900	17,400
1942	98,300	78,700	19,600
1943	100,200	83,500	16,700
1944	102,200	83,200	19,000
1945	104,300	82,800	21,500
1946	106,400	82,500	23,900
1947	108,500	87,200	21,300
1948	110,700	86,700	24,000
1949	112,900	86,300	26,600
1950	115,100	88,800	26,300
	$1,421,700	$1,140,600	
Accumulated Surplus			$281,100

I arrived at the figure of $89,000 as estimated gross revenue for 1937 by taking the statistics of operation of the Texas Utilities Company in the town of Plainview that were submitted with the application for the loan, analyzing them and estimating that the division of business be-
629 tween the two competing organizations would be as follows: Municipal lighting, 100 percent to the proposed municipal plant; Municipal power, for pumping, 100 percent to the proposed municipal plant; Residential light and power—that is, residential service—I estimated that 60 percent of that would go to the municipal plant. For the other two items, commercial lighting and industrial power, I used 50 percent, the same figure used in the plaintiffs' exhibit. By that calculation I arrive at a [redacted] which includes all municipal light and power, and a weighted average of 54 percent of the private load. I have estimated that the city will procure 54 percent of the private business, and the private company 46 percent of the private business. That, then, would give me the result of the operation of the plant if it had been in operation in the year 1933. I then assume that there will be an annual increase of two percent in the gross revenues of the business in Plainview, the division between the two being as I have indicated. I estimate an increase of two percent per annum in the total business, because I lack information from the city. We could not get all of it we wanted, because the data were a year or two old, but in my study of it I used these figures as a basis. According to the Federal statistics in the United States, the average annual increase during the last 16 years in the production of electricity is six percent; in the State of Texas, for 16 years, nine percent. In the United States, during the past two years, eight percent; and in Texas, six percent. Coming down to Plainview, and taking the figures that have been submitted in this case by the plaintiff here, I find that the average increase during the past two years in private sales in the city of Plainview is five percent. I assumed that the city has not yet entirely got out from under the influence of the depression, and that there will be a tendency to reduction of rates by increase in per-customer consumption; and so I summed that up in a
630 two-percent estimate of the average annual increase in revenues over the 14-year loan period. Then,

starting back with 1935, I used that figure to get the 1937 estimate of gross revenues for the proposed municipal plant, and get $89,000 for the first year of operation.

Plaintiffs' Exhibit No. 72 shows an average annual increase of slightly over one per cent over the life of the loan. I have estimated that the increase will be slightly over two per cent. I have used Plaintiffs' Exhibit No. 72 as a basis, except that I assigned the $11,364 for pumping water to the city instead of to the utility, and four per cent more of the private load to the city. Those two differences make up the difference between the first year's gross as shown in Exhibit 72, and my first year's gross of $89,000. There is a difference of four per cent on the total of private sales, or $5,000. The pumping load is approximately $12,000. That makes the difference of $17,000. I have prepared an estimate of the cost of operation of the proposed municipal plant, based upon the gross revenues shown in Defendants' Exhibit No. 7.

Whereupon, statement entitled "Plainview, Texas, Estimate of Operating Results, Proposed Municipal Plant," was marked Defendants' Exhibit No. 8 and received in evidence, reading as follows:

Plainview, Texas

Estimate of Operating Results, Proposed Municipal Plant

	Operating Year			
	Base	Fourth	Ninth	Fourteenth
Gross Revenue	$86,200	$94,400	$104,300	$115,100
Expense				
General Superintendence	1,500	1,500	1,500	1,500
Clerical help	1,600	1,600	1,600	1,600
Line Foreman	1,500	1,500	1,500	1,500
Linemen	1,800	1,800	1,800	1,800
Chief Engineer	1,800	1,800	1,800	1,800
Watch Engineers	3,600	3,600	3,600	3,600
Plant Maintenance, Material & Labor	3,500	3,820	4,430	5,140
Line Maintenance, Material & Labor	1,000	1,090	1,270	1,470
Relief Operator	600	600	600	600
Miscellaneous Labor	400	400	400	400
Commercial Expense	1,000	1,000	1,000	1,000
Service Truck, Operation & Maintenance	700	700	700	700
Fuel Oil	11,300	12,850	14,890	17,250
Lubricating Oil	1,130	1,280	1,490	1,730
Miscellaneous Plant Expense	500	550	630	740
Insurance	2,080	2,080	2,080	2,080

	Base	Operating Year Fourth	Ninth.	Fourteenth
Depreciation (4% Sinking Fund)	$9,600	$9,600	$9,600	$9,600
Uncollectible accounts	2,000	2,000	2,000	2,000
Total	$45,610	$47,770	$50,890	$54,510
Debt Service Requirement		31,320	31,920	34,320
Total Expense		79,090	82,810	88,830
Surplus		$15,310	$21,490	$26,270

Comparing the figures contained in Defendants' Exhibit No. 8, with the figures shown in Plaintiffs' Exhibit No. 70: The first item is General Superintendence, $1,500. I used the same figure. Clerical help, $2,400. I used $1,600. This is not a new organization. It is an addition to the city's present organization, and $1,600, providing two clerks, will amply care for the additional clerical work. The next item is Solicitor, $1,200. Solicitor of new business. In this Exhibit No. 70 of the Plaintiffs, if you look at the bottom of the sheet, it shows the plant operating at an annual deficit in excess of $20,000 throughout. This solicitor starts in at $1,200 and his pay is steadily increased until, at the end of the 14-years, when the bookkeeping deficit has risen to $330,000, his pay has been doubled. Throughout this whole table everybody gets a raise. Whenever there is a figure shown in here, the employees get higher pay than they did the year before, and it is rather notable that the difference between the total deficit in the first and the total deficit in the 14th year just balances the raise in wages throughout that period.

632 I have allowed nothing in my estimate for solicitors, because I think that while that would be a perfectly legitimate charge for a utility going into a town to develop business, it is not a legitimate charge against a municipal plant where the business is already there and it is merely a matter of getting its share of the business. Besides that, the city government and all the city local organizations and every taxpayer would be interested in the success of this plan, and I think the combined efforts of those would far exceed the service requirement of a single solicitor at $1,200 or $2,400 a year. For that reason I leave him out. Besides that, I have not found any other costs of operation which carry any such large figure as that for municipal solicitor.

Line Foreman, $1,500. I use the same figure, but I do not increase the cost for Line Foreman over the 14-year period. I leave it flat throughout that time.

Linemen, $2,400, that provides for two linemen at $1,200. I have cut that to $1,800, one $1,000 lineman, and an $800 ground man—in other words, three men to operate the distribution system, which is entirely adequate and, summing up all these things, compares favorably with the total cost of operation in other places. Chief Engineer, $1,800. I use the same figure. Three Watch Engineers, $3,600. I use the same figure, but likewise I leave that pay at that rate throughout the 14-year period.

Plant Maintenance, Material and Labor, $5,100 the first year, increasing to $6,620 in the 14th year. I used $3,500, or two dollars per kilowatt of installed machinery, or $3,000 for the three units, plus $500 for the balance of the station, making $3,500, where the Plaintiffs' figure is $5,100. That figure of the Plaintiffs amounts to $3.32 per kilowatt of installed machinery. My figure is $2.28. The record of
633 two plants I have, which I believe is unbiased, shows 70 cents. Then, figured on a per kilowatt-hour basis, the cost on the Plaintiffs' figure is .26 of a cent per kilowatt hour. Mine is .18; and the record of eleven plants is .10. Eleven plants that I studied in connection with preparing this data are taken from the records of the Wisconsin State Public Service Commission.

Line Maintenance, Material and Labor, $1,500. I cut that to $1,000. All the line maintenance is done by the regular linemen. There would be no additional charge except possibly a book entry on that point. I am allowing $400.00 there for light renewals of the lighting system, and $600.00 for miscellaneous material that might be required in the maintenance of the line.

The next item which I have inserted, which is not in the Plaintiffs' list is a relief operator, part time, $600, and miscellaneous labor $400.00. As I see it, these three watch engineers, on an eight hour shift, would have to work seven days in the week unless there was somebody to relieve them, and so I am allowing that much time for relief of those men for a day off each week, and whenever they have a vacation.

Commercial Expense, $2,550. My figure is $1,000. Going back to the detail of that, there are in Exhibit 63 these

items: commercial expense, printing, postage, and office supplies, $300.00; publicity and advertising, $750.00; miscellaneous expenses, $1,500. I eliminated the miscellaneous expenses, $1,500. I do not know what it is. It might be $15,000.00 or $15.00. I do not know of any reason for it, so I left it out.

The next one is Service Truck, $1,000.00. I cut that to $700.00, because the depreciation of the truck is included in another table, another item of expense, and I have had a great deal of experience in the cost of operating trucks, and I make that on my own experience entirely.

634 With respect to fuel oil, the Plaintiffs' figure is $10,710.00. I used $11,300.00, because my estimate calls for a larger output of current. I used the same figure for cost of fuel oil and the cost of other oil—lubricating oil—that are used in this table.

The next one is Miscellaneous Plant Expense, $500.00. I use that, but carry it flat, throughout the table.

The next is Insurance, $2,080. This insurance item goes up to $2,250 in the fourteenth year, when the plant has been depreciated, according to this table, about 70 per cent. There seems to be hardly any reason for an increase there. I was not able to get the information needed as to the Texas rates, and I used $2,080 throughout in mine.

The next depreciation, $19,000. I used $9,600. This depreciation item of $19,000 represents 27 per cent of the gross revenues of the plant in its first year of operation. My figure of $9,600 is the amount which, set up as a sinking fund, will amount to $400,000 at the end of my estimate of the useful life of the plant. As to my estimate of the useful life of the plant, there is a wide difference between my figures and the Plaintiffs' in that respect. Plaintiffs' Exhibit 64 figures the $19,000 depreciation annually on the basis of an estimated life of the various divisions of the plant property. They start out with an estimated life of the buildings as 50 years. I agree to that figure. The next item is oil engines and auxiliaries. Your figure is 15 years; mine is 21 years. For electric plant equipment, your figure is 20 years, mine 25 years. For poles and fixtures, your figure is 18 years, mine, 25 years. For overhead conductors, your figure is 20 years; my figure is 47 years. For transformers, your figure is 20 years; mine is 25 years.

There are several items down there with respect to
635 which I was unable to find any unbiased data, and so I accepted them as they are in your exhibit, from "Services" down to "autos and trucks", the last item. My computed weighted average life of the whole plant is 25 years. In 25 years $9,600, as a sinking fund at four percent, would amount to the total first cost of the plant.

As a basis for those figures as to the life of the vari-
636 ous structures, I have an Interstate Commerce Commission allowance for wire which allows for the life of wire 100 years, as against 20 years in the Plaintiffs' figures and 47 years in mine, but my figures are practically taken bodily from the Wisconsin Public Service Commission's report on depreciation, because I have found them the most widely quoted and I believe them to be the fairest of the State commissions that I know anything about. According to my figures, $9,600, set aside on a sinking fund basis, will repay the entire cost of the plant, including the amount that the city receives as a grant from the Government. The last item on my list is uncollectible accounts, according to plaintiffs' figures, $4,850, rising to $5,920 at the end of the loan period. I was unable to find enough reliable information. My own experience, in my own town was that the uncollectible accounts were very materially below one per cent. This figure represents almost exactly 7 per cent throughout the period. I used $2,000 flat, throughout the period. In my opinion that is an ample figure. Defendants' Exhibit 8 also contains figures for the fourth, the ninth, and the fourteenth year of operation which were obtained in substantially the same manner as the figures for the base year. The total figures shown on Defendants' Exhibit 7 were arrived at by the method just described. The increase in revenue shown for each year is arrived at by taking a two per cent increase in business. I have also prepared a bond and interest table for the Plainview loan which is substantially identical with Plaintiffs' Exhibit 66. My opinion, as shown by Defendants' Exhibit 7 is that the proposed plant will be able to pay the costs of operation and maintenance, set aside a reasonable sum for depreciation each year, pay principal and interest on the bonds when due, and leave a surplus besides.

637 *Cross Examination*

In Defendants' Exhibit 8 the base is the year 1935. I have included in the estimate of revenue an item of some $12,000. for the cost of electricity used in pumping water. I got the figure of $12,000. from the Plaintiffs' Exhibit No. 62, which shows a total for water of $11,364. I increased that over the loan period by 2 per cent per annum, although my average over the loan period is a little over $12,000. The figure which I used in 1935 is $15,753, which I got from one of your exhibits. That is the figure shown in the base year on Exhibit 8. No, I did not understand that that figure from Plaintiffs' Exhibit 62 was the cost of water to the city. I understand that that is the amount that the City paid for the pumping of the water. I believe I had read that the plaintiff Texas Utilities Company owned the wells and sold all of the water used by the city to Plainview and, as well, furnished the current to pump it, but I did not consider it in preparing these figures.

If it be a fact that the figure in Plaintiffs' Exhibit 62, $11,364, shown beside the heading "Total for Water," includes not merely the cost of pumping water, but also includes the cost of all water used by the City of Plainview and its inhabitatns, Defendants' Exhibit 7 is in error to that extent.

I am connected with the Engineering Division of the PWA asigned to power projects. I worked on the application of the City of Plainview in connection with a revised or supplemental report. I never prepared any estimate of operating revenues of Plainview before the one about which I have testified here. I wrote a supplemental report to the original PWA engineers' report on Plainview, but did not include an estimate on the operating revenues of the company. It was based on the other estimate. This is the only operating estimate I ever made. I have included

638 nothing in any of the exhibits offered here today to reflect any costs of amortization or operating expenses for wells. That would have nothing to do with my estimate. I would not allow a dollar for it.

1933 was the last year for which I have any classification of the services rendered by the Company. In arriving at the assumed division of business between the proposed municipal plant and the private utility I applied certain

factors derived from the data which I had for 1933 to get my percentages. I then took the estimate of probable revenue for 1935, shown in Plaintiffs' Exhibit 62 and applied my percentages to that figure. There is nothing on Plaintiffs' Exhibit 62 which gave me the split between the municipal water pumping revenue and the residential, commercial, and industrial revenue. I computed the distribution on the basis of the 1933 figures, which I have, which show not only the gross revenue from each classification of customers but the total sales in kilowatt hours. I estimated that there would be no change in the proportion of revenue attributable to the various classifications of customers.

Those proportions were taken from Plainview's application for a loan and grant. I have no way of knowing that they are absolutely correct. I asked the Company for figures and they were declined. I have read somewhere that certain decreases in rates were put into effect between 1933 and 1935. That would affect the ratio between various classes of consumers. That might affect the dollar ratio between various classes of consumers, but I have no reason to know it would. My ratio was based on dollars and on kilowatt hours. The rates, which I applied to the kilowatt hours for the purpose of obtaining the total revenue for 1935, were the average at the consumer's meter. The average cost not based on the rate scale but the average cost at the consumer's meter, as shown in these tables that I used, that came with the application.

639 I have no information as to the number of customers in the City of Plainview. I used the kilowatt-hour basis and the revenue, and that shows an average cost of over 4.7 cents for the whole load in the year 1933. That is verified by figures that I secured from the Federal Power Commission, reports sent in by the Texas Utilities on the Plains Division, which show an average cost in 1932 of 5.1 cents; in 1933, 4.9 cents; and in 1934, 4.8 cents for the whole load on that division based on those reports. I did not know that there had been several rate reductions during that period. I did assume 5 per cent. I assumed that 5 per cent on the basis of the difference between the total gross in 1934 and the total gross in 1935, which appeared to be $151,695 for 1934 and $145,718 for 1935. I just allowed that 5 per cent; I can't support it. They are gross revenues

in Plainview. That is a reduction in gross; I do not know whether it is a reduction in rate or not. In my Exhibit 7 I have taken a flat change between 1933, when the gross was $133,000 approximately, and jumped to 1935, where it is $145,000. The difference between those two is 10.57 percent. My figures reflect the trend exactly as I did find the facts for those two years, because the gross difference between the two years shows a change of $133,000 in the first year, 1933, to $145,000 in 1935, an average increase of 5 percent per annum. The fact that there is a rise and fall in between there, does not affect the mean figures per annum which I have mentioned. Taking the years 1934 and 1935, my estimate does not exactly run counter to the trend for those two years. I assume there was a decrease in rate, because there was a decrease of 5 percent. That was the latest data I had.

In Defendants' Exhibit 7, I did not take into account at all possible decreases in rates over the 14 year period. The average rates I have used here decrease from 4.4 to approximately 4 cents mean over the period of 14 years.
640 That is because of a change in the amount of consumption per customer. That is the way I assumed it. I did not have enough information to go into it in detail, and I assumed a 3 percent increase in the gross consumption of current and a 2 percent increase in the gross revenues. That is taking care of a gradual decrease in the rate due to the consumption per consumer rising and the rate getting into the higher brackets.

I did not have the number of customers, so I could not go into the average consumption per customer. All I have done is to take the gross figure, computed as, described, for 1935 and increased that 2 percent per year.

I referred to some statistics on increase in generation of electric current. Those increases are all based on kilowatt hours, and do not reflect anything about the increase in earnings or indicate whether there was any increase in earnings.

My basis for my division of the residential business, 60 percent to the municipal plant and 40 percent to the private utility, is my own experience and observation and study of many applications to the PWA for proposed loans and grants and many reports of municipalities. The applica-

tions to the PWA include the protest of the utility which generally covers all that anybody could think of as objectionable in the project.

641 I arrived at that in this way: Ordinarily I would say that where the public was not so much in favor of a municipal plant, the 50-50 division that is used in these plaintiffs' exhibits would be a fair proportion. In this case the evidence seems to me to warrant a larger assignment to the—I believed a larger proportion would go to the municipal plant, because 81 percent of the voters in the election to determine whether they would have it or not voted in favor of the plant, and on that basis I estimated 60 percent of those voters would take the municipal current.

My first item in expense, on Defendants' Exhibit 8, is general superintendence, $1,500. I assumed that the City would want about a $3,000 or a $3,600 man and that his time would be distributed between the various city business and that this plant would get $1,500 of his time. I considered that that would be the city manager or a person in a position somewhat similar to that. He would exercise the superintendence over the City's business, including this waterworks, the sewers, and so forth. I assumed that he would spend no more time on the municipal electric plant in the fourteenth year, 1950, than he would in the first year. If the utility pulled up stakes and moved out, then I would say that there would be an additional cost for supervision and for labor all down the line; but an increase of 2 percent per annum would not require an appreciable increase. I think in the beginning they would have more because of the supervision and labor and everything, than they would in the later period of those fourteen years, for the reason that they are starting out with a green organization, and I am assuming that that organization would function more efficiently as time goes on. My own experience is that there would not be any addition at all. I am sure that a good man can be secured at that rate at any time in those 14 years.

642 The item "linemen, $2,400." on Plaintiffs' Exhibit No 70, I have reduced to $1,800, on Defendants' Exhibit No. 8. I think I stated that they would have, as a force to operate this line, one foreman, one lineman, one ground man—three men. And my lineman and ground man I esti-

mated at $1,800, respectively, the foreman holding the same pay as you have here, $1,500. That difference makes the difference between that. I did not make any investigation of the rates of pay for linemen in Plainview. I do not know as a fact that the going rate for linemen is $8 a day in West Texas.

My item of plant maintenance, material, and labor, which is $3,500, on Defendants' Exhibit 8, is based on a cost of $2 per kilowatt hour of machinery installed in that plant, plus $500 for the balance of the plant, exclusive of the generating units. That makes a total of $3500, there being 1500 kilowatts of generating units installed—an average per kilowatt of $2. And I assumed an increase in those items as the plant grows older because there will probably be greatly higher maintenance than in the earlier years. I started with $2.38 per kilowatt for maintenance, and I increased that over the period, just as a matter of being sure there was ample money there to take care of the plant—largely on the theory that the plant's maintenance would increase as the plant grows older.

I accepted the plaintiffs' figure for insurance for the first year, although it seemed about 20 or 30 percent higher than the figure that I had for other sections of the country. And I just assumed that that might be true, due to the greater danger from tornadoes in that section than in the section where I had what I considered reliable information. So I considered that that covered fire insurance on the power station, and public liability, and pay roll insurance, and

643 everything that would normally be included in an insurance like that, in the operating of this plant. In making my computation of the cost of operating expenses per kilowatt hour, delivered at the meter, on the basis of the plaintiffs' figures, I took five hundred thousand kilowatt hours and annual expenses shown on Plaintiffs' Exhibit 72 of $87,520. This includes the debt service payments to the PWA. That is part of the cost of delivering the kilowatt hour to the consumer's meter—the debt service and the depreciation is a part of that cost.

I have been through Texas; never stopped off very long—just gone through on the train. I have had nothing to do with operating utilities in West Texas.

My item for depreciation of $9,600 per year, is the amount

which upon a sinking fund 4 per cent basis, would at the end of the useful life of a plant equal the total cost of the plant. I simply have made an arithmetical calculation as to what amount of money, set aside each year for 25 years, at 4 percent interest compounded, would produce $400,000. This is the item that I checked by some report of the New York Power authority—State of New York. I used the Wisconsin Public Service Commission report on depreciation as one of the sources used in the table of useful life of various items of property. I did not make any allowance for West Texas conditions. I have never personally investigated operating conditions in West Texas. I have never had any experience with dust storms in West Texas. If it be a fact that actual experience in West Texas shows that the life of the Diesel engine is 15 years rather than 21, I would think that that experience should be substituted for the data which I obtained in examining the reports of the Wisconsin Commission and the New York Commission. I would qualify that by stating that all the estimates of the useful life of such machines as Diesel engines and generators are based on the experience of 15, 20 and 30 years ago, when those engines were nothing like so well built and so strong as they are at the present time.

644 I used the table of the Interstate Commerce Commission as supporting data on life of electric conductors. The Interstate Commerce Commission says that they allow the wire companies 100 years for the life of their overhead copper conductors. Yet I used 47, taking it from the Wisconsin table, which is supported also by the Internal Revenue and the PWA tables prepared for the same purpose.

So far as my life expentancies' figures are concerned, it is correct to say that none of them is based on any West Texas experience and data. I did not check my conclusions by consulting a report of Wisconsin Public Service Commission. I took the data from an editorial analysis of data secured from the Wisconsin Public Service Commission, published by the Electrical World. I could not check the analysis of the Wisconsin Commission; I never saw that. But the analysis made in the Electrical World, I thought was very clear and fair. I did not think anyone would suspect the Electrical World of being a proponent of munic-

ipal ownership. The Plainview plant is not built to serve the entire demand of Plainview. If the private utility were to leave Plainview, the proposed municipal plant would not be adequate to serve Plainview. In this particular case I think the load factor would favor the municipal plant if—as I think—the City got the pumping and lighting load, which would be—a large part of it—an off-peak load. Under my estimate, this plant could take care of the load for the whole 14-year loan period, assuming the division I have set up in my estimate. The figures which I used as a check, from the Wisconsin Commission relating to per kilowatt hour cost, included no sum for amortization, as do the figures which I have charged to the plaintiffs. Assuming that a Diesel engine would operate for 25 years, it might but I do not think it would complete as to costs of operation with a new
645 Diesel engine for, say, the last ten years. That would depend on several unknown factors. Its efficiency would decrease at the end of the 25 years. I happen to know that the first plant I built has been in operation 25 years and is turning out just the same—three years ago when I visited it—as when I turned it over to the operating company at the same or less cost per kilowatt hour because it is turning out more current and I can cite any number of instances just like that in my own experience.

Whereupon the following occurred:

646 Mr. Scott. At this time we offer in evidence the document marked "Defendants' Exhibit 10 for identification," which purports to be a letter from the Administrator of Public Works to the Congress, containing a report which was requested by a resolution of the Congress concerning the activities of the Public Works Administration.

Mr. Acheson. What is the purpose of the offer?

Mr. Scott. The only purpose is to show the policy of the Public Works Administration, its functions under the act of Congress to establish a comprehensive program of public works, which was engaged in. It is a public document, and it has been submitted to the Congress in pursuance of the request of the Congress and purports to be an official communication from Mr. Ickes in his official capacity to that body.

We take it that your Honor could take judicial notice of this, but we should like to offer it in evidence here.

Mr. Acheson. I have no objection to it as a report. I assume, of course, that it is not proof of the truth of everything stated in it.

The Court. No, but it may be available as a declaration of policy.

Mr. Scott. As to policy and as to program. It demonstrates exactly what happened.

The Court. Well, I will receive it.

Whereupon defendants' exhibit 10 for identification was received in evidence as defendants' exhibit 10. The said exhibit is attached to this statement and made a part hereof.

647. Whereupon **Harold L. Ickes**, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

I am Secretary of the Interior and Federal Emergency Administrator of Public Works. The fundamental purpose of the Public Works Administration was to put as many men to work as possible of those who were not then employed. A secondary purpose was to stimulate industry, to stimulate the demand for goods of all sorts, so that that stimulation in turn would give employment; it was to aid in the economic recovery of the country through the employment of men out of employment. Wherever the PWA were proposing to make a grant only to aid in financing municipal power projects, and no loan whatever, I did not take into account the rates to be charged by the city and the competing private companies. Also, where money was lent on general obligation bonds to a city of good credit, PWA was not concerned about rates. But where the money lent was evidenced by revenue bonds then PWA did concern itself with the rates to be charged by the city and by the competing companies for the purpose of being assured that the rates charged would yield sufficient revenue to operate the plant, take care of overhead, and leave a surplus to take care of the loan.

The press releases of September, 1934, Plaintiffs' Exhibit 33, in general stated my policy with respect to municipal power projects, although our policy was naturally more or less subject to change. It was variable. We were

embarking on a new field, but in general, the release sums it up here, "We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities". The statement I made in response to your question as to my concern with rates more accurately expresses the policy than the Press Release of September 27, 1934. That press release was not designed as an administrative order. It was merely run-of-the mine publicity. The press releases put out by PWA run
648 into the thounsands. A press release is merely to advise the public in general what we have done or are doing or propose to do—very few of the latter, because our policy has been not to predict.

Under the order dated May 9, 1934, (Plaintiffs' Exhibit No. 32), an Electric Power Board of Review was set up to be advisory to the Administrator with particular reference to applications which had not been approved by the three reviewing divisions. Its authority was never enlarged. It had no power to formulate policies. I never authorized it to make determinations as to action to be taken by me or anyone for me. The Board was dissolved March 16, 1935. I was not satisfied with the way it was functioning. It seemed to me to have taken unto itself powers which it had never been intended it should have. I so admonished the Board. I had called for special reports from time to time. I had sent for Mr. Hunt and talked matter over with him. The photostatic copy of a memorandum dated January 30, 1935, from me to Mr. Hunt refreshes my recollection as to an occasion when I discussed such matters with Mr. Hunt. Whereupon, the following occurred:

By Mr. Frank:

Q. Will you tell the Court, on the basis of that refreshed recollection, what happened at that time?

Mr. Jackson. Just a moment. We object to this, solely upon the ground that in the case of the plaintiff we were excluded from showing any communications between the Administrator and any of his agencies.

It is our position that the defendants may not now show such part of those communications as they deem helpful, having caused the Court to exclude ours.

The Court. That is not the question here. The question is, What did he do? His recollection is refreshed by a document now. The question is not what the document
649 is, but what did he do, as I understand it.

Mr. Frank. More than that, your Honor, I do not want to let go unchallenged the statement that your Honor ruled, on the basis of our objections, that directions and instructions from the Administrator to his subordinates could not be introduced in evidence. There was a persistent effort on the part of the plaintiffs to show memoranda coming to the Administrator. What I am asking him about is what he did, and what he told a subordinate.

Whereupon there was argument by counsel. The defendants' counsel pointed out that the memorandum in question was written to Mr. Hunt and related to Mr. Hunt's correspondence with reference to the application of the Village of Hiram, which the plaintiffs had introduced in evidence. Counsel for the plaintiffs pointed out that the Hiram letter was admitted subject to a motion to strike as a foundation for a line of testimony which, upon being offered, was objected to and all the testimony was excluded. There then occurred the following:

The Court: I will overrule the objection to this question. I think this question is proper.

Mr. Jackson. I object to the form of the question, as it seems so indefinite.

Mr. Frank. There was a previous question.

Mr. Jackson. May I have an exception to your Honor's ruling?

The Court. Certainly.

By Mr. Frank:

Q. On the basis of that refreshed recollection, will you state to the Court what action you took concerning correspondence by Mr. Hunt with respect to the city of Hiram, Ohio?

Mr. Jackson. We would like to interpose the same objection and upon the further ground that it attempts to prove a policy by a question dealing with a particu-
649A lar situation when the Secretary has already covered it generally.

The Court. Very well.

Mr. Jackson. We note an exception.

The witness resumed his testimony as follows:

If the court please, in order in make my answer intelligible it will be necessary for me to give just a bit of background with respect to this particular project.

The City of Hiram, Ohio, had applied for a loan,
650 I think, and grant,—I am not clear on that at the moment—for a power plant. That had passed all our examining divisions and had been submitted to me as Administrator. I had approved it. It had gone through the board and had been approved there. It had been approved subsequently by the President. I learned later that there has been correspondence between the town officials and Mr. Hunt, in which he had raised certain questions as to whether or not the allocation should be rescinded. When that was brought to my attention I wrote him this memorandum, in which I recalled to him that the Electric Power Board of Review had merely advisory powers, and that in any event he had no authority to overrule the Administrator and the President of the United States. I do not appear to have advised him in this memorandum as to what the functions of the board were to be thereafter. The last sentence of this memorandum refreshes my recollection that I told him that in the future the powers of the Electric Power Board of Review were to be restricted to the original grant of power, which was advisory only. I identify the paper which has been referred to in my recent answers as a photostatic copy of a memorandum which I executed and sent to Mr. Hunt. Whereupon, Photostatic copy of memorandum, January 30, 1935, Ickes to Hunt, was marked Defendants' Exhibit No. 11 for identification, and offered in evidence as defendants' exhibit No. 11.

Mr. Jackson. The plaintiffs object, as not a competent method of proof. We now have a direct offer of an intra-Departmental communication of a character which we understand to have been consistently excluded when offered by the plaintiffs. It has been used over our objection, under the guise of refreshing the Secretary's recollection, and we think it would also be incompetent to offer it in the form of refreshing the Secretary's recollection.

The Court. I will overrule the objection. I do not
651 think it is inconsistent with what I have done. I thought that I had admitted the definite action that was taken. The Administrator's conduct must be judged by what he did, his acts, and not by what led up to them.

Here is a definite act which was performed by the Secretary with respect to a certain board which he had created, and which, according to his testimony, had done something in violation of his wishes. I think it is perfectly proper. I will overrule the objection and you may have an exception. Whereupon, Memorandum, January 30, 1935, Ickes to Hunt, heretofore marked Defendants' Exhibit No. 11 for identification, was received in evidence.

652 *Defendant's Exhibit No. 11*

Federal Emergency Administrator of Public Works

Washington

January 30, 1935.

Memorandum for Mr. Hunt:

On June 20, last a PWA allocation was made on Docket No. 3412 for a power plant for the Village of Hiram, Ohio. This allotment was approved by the President on June 27. Subsequently the loan agreement was executed, both by the Village and myself, and apparently all requirements for putting through this loan have been complied with.

Meanwhile, it appears that on December 18 you wrote to the Village recommending the withdrawal of the application. This was without my knowledge and in spite of an order that I issued several months ago to the effect that no one on the staff had the power to overrule the President.

In setting up the Electric Power Board of Review, it was my thought that it should pass upon power projects and report to me in case of disagreement with the action taken by the PWA staff. I never for a moment supposed that I was creating a body that, without consulting me, would overrule not only me, but the President, and assume the right of direct negotiation with the municipalities involved.

I would be glad to have you submit to me any facts which you think would make it my duty to rescind this allotment.

In the future the powers of the Electric Board of Review will be strictly confined to what I originally intended them to be, namely, the review of power projects and the making of reports and recommendations to me for my decision.

ADMINISTRATOR.

Enc: Papers re PWA Docket No. 3412, Village of Hiram, O., electric power plant.

653 The witness then resumed. In the case of several of the cities whose contracts were involved in this litigation, there was an original contract and subsequently a new contract was executed which was substituted for the old contract. As the result of two court decisions some doubt was raised as to whether or not the Federal Government was assuming or had reserved continuing rights with respect to the carrying out of the contract itself, and, with respect further to the regulation of rates. It seemed to be sound from the Administration's point of View to make certain revisions. We did not agree with the rulings of the Court, but they were there and we thought we had better amend in certain particulars. My order dated July 31, 1935, Plaintiffs' Exhibit 144, created the Power Division. I had abolished the Power Board of Review, but still felt the need of some division in PWA that would be charged with particular responsibility with respect to power applications, so I set up the new division.

Referring to orders in evidence directing that preference should be given by state officers to the examination of municipal power projects, I felt that, whether or not there had been some clever sabotaging in my own organization on power applications, they had not had a fair break. They had been retarded for one reason or another, and it was to bring them up to parity with respect to time with other applications that I issued that order.

There are now many letters received in PWA each day addressed to me as Administrator. During the height of the season there were several thousand a day. Such letters are not invariably read by me. Any communication that is marked "Personal" comes to my desk. Those I handle personally. I do not mean that I read all of those. Some of them are obviously not personal, from the appearance of the envelope. Those go out to take their chances with the

ordinary run of mail. The ordinary run of mail is handled by men on the staff. A great deal of it is routed and never comes to my desk. Some of it does come to my desk,
654 even communications that are not marked "Personal," when they seem to involve questions of policy, when what seem to be legitimate complaints of the operation of the organization are made. Those come to me, and they are handled either personally by me or are routed directly by me. If a letter written to me is answered by one of my subordinates, I do not invariably read the answer before it is sent out. I do not usually do so. The fact that a letter is signed "For the Administrator" by one of my subordinates does not mean that I have read that answer. I believe that most letters written in P.W.A. are thus signed. I couldn't say that as a fact because that would mean that I had looked at all of them, and I certainly have not. My orders are that letters should be signed by my subordinates followed by the words, "For the Administrator." I know in general the routine of handling applications for P.W.A. projects under title II of the Recovery Act. The application either for a grant or for a loan and grant was filed originally with the State Engineer. That was under our old set-up. If the State Engineer thought it was a good project, he submitted it to an advisory board in the State. Then it came in to Washington. My recollection is that they all came in but with a notation as to whether it had been favorably received or not by the State Advisory Board. I may be in error as to that, but that is my recollection. It was submitted for examination to our three divisions, legal, engineering, and finance.

If the reviewing divisions had found favorably, the Projects Division took another look at it. If it still thought there was no reason to send it back for the questioning of any of the findings of the reviewing divisions, then it came to me. I passed upon it first. Then it went to the Special Board of Public Works. If it passed there, then the projects or group of projects were made up in what we call the President's book, and I took that book to the President, and he either approved or disapproved.

The various divisions were not final. They had no
655 power to reject or accept finally. I made the determination. In reaching my determination that any

particular project should or should not be approved, I did not rely solely upon written data. I can not now tell the Court with respect to the particular projects which are involved in this litigation what particular data I relied upon in reaching my conclusion to approve those projects. I have approved all of those projects, and the President has approved all of those projects.

By the Court:

Q. You have no independent recollection of what you relied upon in reaching your conclusion except what is shown by the record? A. Oh, there were thousands of them and of course I could not carry them in my mind.

The Court. Oh, I know that.

The Witness. There are one or two outstanding projects that I do remember, but none of these happened to be in that category.

The witness continued his testimony as follows;

I know that in reaching my conclusion I did not rely solely upon written data. The discretionary power granted by section 203 (d) of title II of the National Industrial Recovery Act was never exercised. The phrase "social desirability" is not found in the statute. It is hard to say what the phrase means with respect to public works projects in general and, in particular, with reference to competitive municipal power projects. It savors of a general benediction at the end of a speech or a sermon. It was not capable of precise determination, but in general we held it to mean that, so far as it controlled our actions, a project in order to be approved was to be one that would be of some general benefit to the economic and social life of the community. I might add that considering the program was undertaken to put men back to work, there was a presumption of social desirability if a project did have the effect of putting
656 men back to work.

Referring to the comprehensive program of public works, mentioned in Sections 202 and 203 (a) of Title II of N.I.R.A., we had two duties to perform, as I saw it. One was to prepare a comprehensive program of public works. The other was to get men in as large numbers as possible to work as quickly as possible. In any conflict between the two, we felt that the latter took precedence.

We soon realized that to prepare a comprehensive program of public works would require months—perhaps a year or two—and that if we literally set about the preparation of a comprehensive program of public works, the very purpose of the Act itself would be defeated. So, we satisfied ourselves by developing the program of desirable public works as we progressed. We did not treat it academically at all, but practically.

657 Cross Examination.

The idea that I meant to convey, in what I have just said about the comprehensive plan, was that we did not sit down and as an academic proposition work out a program of public works. We took such projects as came to us as seemed desirable, as seemed designed to carry out the purposes of the Act—to put men to work—and we either allowed them or disallowed them, and out of that grew a comprehensive program of public works.

Q. In advance of the approval of projects from time to time you did not delay but laid out on paper a comprehensive program of such works? A. No, we had the idea in our minds, and we tried to conform to that idea.

The program from time to time was made of such projects as had been approved from time to time. The comprehensive program fluctuated from day to day, according as we approved or did not approve further projects. That was the only comprehensive program that we had. We offer now a comprehensive program of public works. It had been developed. It is there.

The term "social desirability" is not in the statute, as I recollect it. It was, however, included in Circular No. 1, "The Purposes, Policies, Functioning and Organization of the Emergency Administration, The Rules Prescribed by the President", under date of July 31, 1933. (Plaintiffs' Exhibit 119)

658 But there was no statutory mandate, and we could have changed our rules. This criterion meant, as a test for public works project, that a project must be of some general benefit to the community from the economic and social point of view. There was a presumption of social desirability if the project would put men back to work. The statement in Circular No. 1, Plaintiffs' Exhibit

119, that "No project will be considered which is a mere makeshift to supply work" was and is a correct statement of PWA policy in that regard. Dealing specifically with an application for a duplicating and competing municipal power project, there might be several elements of social desirability which governed the action and decision of PWA. You might put the municipality in the position of being able to supply current to its citizens at a lower rate. It certainly gave employment in constructing and in operating the plant, and it might have the effect of removing from the municipality the heavy, and in some cases the corrupting, hand of a public utility. All those were criteria which were proper to be considered by PWA in determining the social desirability of an application for a loan and grant for competing municipal projects. I think, in a general way, they were considered.

Independently of the question of social desirability, an application for a loan and grant for a municipal power project had to be approved as financially sound by the Finance Division, as feasible and technically sound by the Engineering Division, and as legally sound by the Legal Division. When these tests were met there was a presumption of social desirability. We had a right to assume that the community in applying for a loan and grant, or a grant, considered that the municipal life would be improved. We left that up to them largely. It is true that social desirability, at least as applied to the community, required that the project should bring some general benefit to the community from an economic and a social point of view. Upon
the hypothesis that I have just stated, we would not
659 necessarily have to go into the economic benefit to be
brought to the community by operating a competing power plant. The community sat as a jury and passed upon the facts and said, "We consider this especially desirable. This will benefit our community. Will you help us finance it?" The community had to decide in the first instance whether or not the project would be socially desirable, and in the absence of conclusive proof to the contrary, why, we did not attempt to overturn their finding.

Q. Mr. Secretary, in the case of an application by a municipality for a sewer system, did you consider the element of social desirability? A. We did. We assumed in that

case that it was socially desirable. I think we had a right to take it for granted that a municipality was not looking for a chance to spend its money for a sewerage system that was not needed.

Q. Did your engineers examine the projects to see— A. (Interposing)—whether or not it was engineeringly practicable.

Q. Did you or your agents examine the project to determine whether or not there was any need for a sewerage system? A. No, that was taken into account.

It is difficult for me to say whether we examined the project to determine whether or not there was any need for a sewerage system, or whether or not the sewerage system was adequate or inadequate for the purposes to be served. We may have and we may not have. I think, generally speaking, we assumed that during the days through which we had passed, when municipal credit was almost nonexistent and where a bond issue had to be in many cases approved by the vote of the people, they would not come
659A in and apply for a sewerage system or a waterworks system unless they needed it. The regulation in Circular No. 1, Plaintiffs' Exhibit 119, page 7, that the first test to be applied by the Administrator or the State engineer of PWA or the State Advisory Board is the relation of the particular project to coordinated planning, and its social desirability, was followed by PWA in a general way. After all, it was our own self-imposed regulation. This regulation was submitted to the President but even so, it was a self-imposed regulation. There was no statutory mandate. It was imposed by the President. But it is not quite as impressive as it sounds, after all, because even the President delegated his power to me, under the Act,
660 as Administrator. I do not happen to recall whether I subsequently prescribed any rules and regulations to supersede the President's rules and regulations; I may have. I had authority to do it. There were a great many press releases issued by PWA. Those releases, generally speaking, were issued by the PWA to inform the public of what PWA was doing. They were newspaper aids. That is a newspaper term. They were put up in the form in which a newspaper man would write articles in a newspaper. They were running comments on the news that was

coming out of PWA. They were truthful and accurate, but they were not always meticulous. When they quoted me I hope they were meticulous. I tried to be meticulous in the statements which I authorized to be given to the public about what I was doing in PWA. But even Jove nods occasionally.

The book, Plaintiffs' Exhibit 123 for identification, is a copy of a book published by me in 1935. The preface was written by me under date of May 15, 1935. The statement at the botom of page vii of the preface is a correct statement of my purpose, or at least one of my purposes, in publishing this book. It is as follows:

"In the circumstances it seems appropriate to render to the people some general accounting of what PWA has done and been during the almost two years of its existence and to give some indication of what it may be able to do during the next two years on the basis of the wider experience, the better technique, and the broader vision that it has acquired during its short but eventful life."

The attention of the witness was directed to the following statement, on pages 124 and 125 of Exhibit 123 for identification:

"In addition to the fundamental studies which are
661 being made by the Federal Power Commission by means of its PWA financing, a grant of $100,000 was made at the President's suggestion to the National Power Policy Committee. This committee was established for the 'purpose of developing a plan for the closer cooperation of the several factors in electric power supply, both public and private, whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic, and particularly to agricultural consumers; the committee is to be advisory to the President.' To this committee has been assigned the task of drawing together all the conclusions of the various commissions and experiments. 'It is not to be merely a fact-finding body, but rather one for the development and unification of national power policy.'"

The statements of fact in that quotation relate to an activity that was not a PWA activity at all. They are correct in the connection in which the statements are made. I have answered to the best of my ability. They are correct

in connection with the matter to which they relate. The National Power Committee was not established in PWA at all. It was merely financed by PWA and had nothing to do with PWA. I was the chairman of the National Power Policy Committee, I hold a good many positions. I am on the Migratory Bird Commission. Merely because I may be chairman does not tie the two together or interrelate them.

662 The attention of the witness was directed to the following contained in Plaintiffs' Exhibit No. 138, entitled "President's Letter Creating the National Power Policy Committee":

"In the following letter from the President to Secretary Ickes under date of July 9 the purpose and duties of this committee are outlined:

"'I wish to establish in the Public Works Administration a committee to be called the "National Power Policy Committee".'"

I think the language means just as it says. It was financed out of money granted by PWA, but we never considered it a part of the PWA organization. It is an independent outside unit. I do not challenge the statement read from the President's letter as to how the committee was created. I am answering the question from the point of view of how the committee has operated.

The attention of the witness was directed to the following statement at page 122 of his book, Plaintiffs' Exhibit 123 for identification:

"This wasted flow of water and the whole problem of cheap electricity in the United States engaged the attention of President Roosevelt long before the people sent him to Washington as Chief Executive. Repeatedly he has emphasized the importance of a more thorough development of our water resources and a more widespread distribution of electric power. Through PWA he has begun a double-barreled campaign to secure both for the Nation."

If the statements quoted are regarded by counsel as statements of fact, they are accurately interpretative of the actions of another man.

When I have to reply under oath whether there is anything untrue in the quotation, I would have to say that it is a general impression I had. I believed it to be true; and

still believe it to be true. When I referred to the power policy enunciated by the President "long before the people sent him to Washington", I don't know just what I
663 did mean. I do not know how long before. It was just a general impression I had of the President's attitude on power matters of which I had no personal knowledge. I think what I referred to must be taken from the language.

This book was a book written for general reading. It was in no sense a pracise treatise. If it had been, I would have quoted exactly from President Roosevelt. In a footnote I would have given the proper references. It was in no sense a legal brief. It was merely a discursive and perhaps not any too accurate statement in some particulars of current events. The question put to me whether I was referring to the power policy enunciated by the President in the campaign of 1932 is not a question capable of being answered except as I have answered it. If counsel is trying to find out what was in my mind and is scrupulous about getting the truth I have answered the question.

By Mr. Jackson.

Q. I think I am entitled to a direct answer. A. Unless the court directs me to repeat my answer, I submit that I have answered it.

The Court. I think he has answered it.

Mr. Jackson. I submit, he has not answered it at all, your Honor, and I ask for a direct answer.

The Witness. Unfortunately, I cannot give the answer that counsel wants.

By Mr. Jackson.

Q. All I want is the truth, Mr. Secretary, and I am sure you can give that.

Mr. Jackson. Does the Court decline to require the witness to answer?

The Court. I decline to direct him to answer any further than he has already answered.

663A Mr. Jackson. May our exception be noted?

The Court. Yes.

The attention of the witness was directed to a statement attributed to the witness in Plainiffs' Exhibit No. 143 for identification, being PWA Release No. 468, as follows:

"At present, rural electric rates are almost prohibitive. President Roosevelt is leading the effort not only to make cheap current more widely available, but to lower the cost of distribution and of electrical appliances. If any such dream is to become a reality, it will be under governmental leadership and supervision, insuring a development planned and carried out with advantage to the consumer,
664 rather than to the power companies, as the first objective."

My statement that the President is leading the effort to made cheap current more widely available and to lower the cost of distribution in electric plants is correct, as I understood, yes; but I did not quote him with authority.

The attention of the witness was directed to the following on page 125 of his book, Plaintiffs' Exhibit 123 for identification:

"Moreover, practical experiments, such as the huge power projects inaugurated and supported by the President under the other branch of his program, will throw valuable additional light on the problem, which, in turn, will be availed of by the National Power Policy Committee and the National Resources Board. Five hundred million dollars have already been allocated by PWA for definite projects to harness a portion of our potential water power. As we have seen, in the far Southwest, out of a deep canyon of the Colorado River has arisen Boulder Dam; in the Northwest human ants are building the Grande Coulee and Bonneville Dams on the Columbia River; in the Valley of the Tennessee the wartime Wilson Dam has been brought into fuller use and the Norris and Wheeler dams are being rushed for completion in 1936.

"Mammoth power plants, with intricate generators large enough to supply whole cities are being erected beside the dams; land is being cleared for huge reservoirs and thick transmission lines are being strung up to carry to home and factory the low-cost electricity that is to come.

"This activity is only the beginning of a national plan to increase the supply of electric power and to bring down its cost."

So far as the statements contained in that quotation are statements of fact, to the best of my knowledge and belief they are true and correct—with this qualification,

665 however, that I am not a competent witness to testify on the question of a national policy. As to whether the national plan referred to in this quotation is the same as the national power policy referred to at page 124, 125 of my book, I can only answer that by saying that the expression "national plan" is very loose language. There is no plan, so far as I know, in the sense of there being blueprints and engineer reports and a determination by the Administration itself that it is a national plan. It is not the same kind of a national plan to which I refer as the National Power Policy on page 125 of the book. There could be a national plan irrespective of a national power policy. A national power policy might merely be a question of adjusting and correlating rates as between existing power plants. I cannot answer the question directly. I regret that I cannot always give the answer that counsel wishes that I might be able to give. I answered to the best of my ability. Counsel knows that that particular question cannot be answered yes or no.

The attention of the witness was directed to the following on page 135 of his book, Plaintiffs' Exhibit 123, for identification:

"This TVA enterprise has appealed particularly to the public imagination because of its magnitude and on account of the broad social concept that underlies it. Yet this is not the only front upon which the Government, under its PWA program, has been advancing against those utility interests that have been exacting unconscionable tribute from the people of the United States for so many years."

That is obviously an expression of opinion. It is correct for what it is worth. Of course all of these statements are merely excerpts from two full chapters dealing with power. The whole thing ought to be read together to get the proper meaning. I testified in the case of the Duke Power

666 Company v. Greenwood County, on December 12, 1935, and I remember being asked that same question. I also remember that the book was put in evidence as a book, and not merely self-serving statements from the book. I was asked about that quotation and I said that it stated the facts as I understood them. That is what I say now.

The attention of the witness was directed to the following statement on page 134 of his book, Plaintiffs' Exhibit 123, for identification:

"This is the picture in broad outline of TVA at the present time. Soon, it is to be expected, the idea will be extended to other sections of the country. Moreover, TVA—and this is one of the main reasons for its establishment—will provide a 'yardstick' for the measurement of similar rates in other parts of the Nation, with the result of forcing pretty generally a reduction of private utility charges."

I think that has been regarded as a yardstick long before TVA came into existence. I think that was the point of view taken originally by Secretary Baker when the original development went in there. That states the facts as I understand them.

The attention of the witness was directed to a further statement at page 130 of his book, Plaintiffs' Exhibit 123, for identification:

"All together, it is expected that up to three hundred million dollars will be spent in the Tennessee Valley in the course of the next six years, including power development and land renovation. PWA approved the loans and grants to cities which wish to build transmission and distributing systems so that they can make use of cheap TVA power. Ten million dollars have been earmarked for this purpose, and one city, Knoxville, has been allotted $2,600,000 for the improvement and extension of its own system. Additional appeals for aid have been received from scores of towns and cities whose local governments are wistful for low-cost TVA power, but which are unable to raise enough money to build a distribution system or buy out the existing utility that continues to charge unduly high rates."

667

The quotation states a belief. I do not think that the statement that PWA set aside $10,000,000 for that purpose is an accurate statement of fact. We may have had that round sum in mind, but it was never definitely earmarked. We did not earmark money except in very rare cases. As a matter of fact, it says it is expected that up to $300,000,000, et cetera. There were definite allocations there. Those are statements of fact. I do not know it to be a fact that two

of the cases in suit here before the court involve seven towns in northern Alabama.

It would take one man's time to follow up this litigation, and I have never been able to do it. If my counsel agrees that that is the fact, I accept it.

I think we were willing to make gifts and loans of Federal funds to municipalities in this north Alabama area which sought to take TVA power for the construction of distribution systems and where the municipalities were unable to finance those systems but I think we have been held up by injunction proceedings in most of those cases. So it is not a fact that we have done it. We made allotments for that purpose. I cannot recall offhand just what they were.

I am willing to admit that Decatur, Florence, Sheffield, Tuscumbia, Russellville, Guntersville and Hartselle, Alabama, are located in that area.

I cannot testify as a fact that those are among the towns to which we made loans and grants for the purpose described in the quotation from my book which was read to me. I cannot testify to that as a fact, because I have not refreshed my recollection. It was a long time ago.

668 The attention of the witness was directed to the following contained in Plaintiffs' Exhibit No. 33, PWA press release number 989.

"Achievement in certain instances of the Administration purposes of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration."

I would not designate that as a statement of fact. It says lead to a clarification of the policy. The reference to the achievement of the Administration's purpose of making electrical energy more widely available at cheaper rates is correct for whatever it may mean.

The attention of the witness was directed to the following from Plaintiffs' Exhibit 33, in quotations following the statement that Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable."

That is a correct statement; but it should be borne in mind that there is a background to it. Any government which is based on politics naturally claims the credit for whatever is done. There was no misrepresentation in that statement at all. But I think that should be clarified. In no instance did we stimulate these applications. They came in voluntarily, and I do not think it is accurate to give the impression that we went out deliberately to establish this kind of a policy. We merely took the applications as they came in. We accepted them or we rejected them. I do not want to leave the impression that I went out and stimulated applications. There should be taken into consideration the time in which the statement was made in that connection.

The attention of the witness was directed to the
669 following from Plaintiffs' Exhibit No. 33:

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation."

I do not think that is an accurate statement of what our policy finally crystallized into. We were working out this thing as we went along; and that statement taken in connection with a sentence in the concluding paragraph—"We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities"—that, in the final analysis, was our policy.

The statement just read to me would be an error if taken by itself; yes. The whole thing is to be considered together as a statement of policy.

The statement that unless the municipal utility could offer lower rates there would be no social betterment, is not an application of my criterion of social desirability. That was just a general statement which, taken with the entire statement, I think, does not have the meaning that counsel

seeks to place upon it. I was not writing one sentence; I was writing a complete statement, and the complete statement is here, and that complete statement I am perfectly willing to let stand.

As to the passage:

"To make loans and grants to finance projects
670 where the competitior offers rates which are lower than those possible by the city plant would duplicate facilities without any social betterment"—

I mean what I mean on the basis of a fair interpretation of the entire statement. That is the only answer I can give.

The attention of the witness was directed to the following from Plaintiffs' Exhibit No. 33:

"PWA will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect."

My answer to the question whether that quotation is a correct statement of the facts is the same as to the preceding question. It is a correct statement when taken and interpreted with the entire statement.

I cannot recall that we ever did cooperate with cities to prevent rates rising on an indication municipal plants may not be built. As I say, our whole power policy was a developing thing. It was new. We did not know from day to day just what would be the best ultimate policy. What the ultimate policy was is capable of quite precise determination.

I think in the case of Florence, Alabama, we took the position that since TVA, which was another government agency created under a separate statute, was trying to work out its problem, we ought to cooperate with it, and I did, as a matter of fact, do whatever I could to help TVA work out its problem.

Our power policy never really was changed, but there was a development there. There were various factors that we considered from time to time as perhaps calling for a variation or modification; but all through ran the idea that it was up to the municipality in the final analysis to determine whether or not it wanted a competing power
671 plant where it already had one.

The attention of the witness was directed to the following statement on page 136 in his book:

"It has been the policy of PWA to make loans for municipal power plants when such projects are sound from a legal, economic and engineering point of view. The question of public policy involved is left to the municipality concerned. However, we have applied certain general rules. We have decided not to approve a project unless it is self-liquidating at rates lower than or approximately equal to those of the utility company serving the community, and we have determined that the earnings of the proposed system must be applied to the system itself wherever possible under the state law and not siphoned into the general tax fund except in amounts not greater than the taxes which would be paid in case the system were privately owned. Where the existing private system has transmission lines or plant equipment that can be merged into the proposed municipal enterprise, we have encouraged its purchase at a reasonable figure. Finally, we have always given the private utility an opportunity to meet the city's proposed rates, and, if this is done, the city is afforded a second chance to lower still further its anticipated charges. But we have uniformly reserved the right to help a city which desires its own power plant even if the suggested rates will not be lower than those of the private utility."

That is a correct statement of our policy as of the date when the book was written.

The attention of the witness was then directed to the following on page 137 of his book, Plaintiffs' Exhibit 123, for identification:

"It has been my position that there are definite intangible values flowing to a community that owns and operates its own utilities. A strong case can be made for the proposition that if the people of the community want to
672 own their own public utilities and are able to finance them, they should not be denied that opportunity merely because the rates necessary to be charged in order to pay overhead and to liquidate are equal to or perhaps even slightly in excess of rates already currently charged by privately owned utilities. We do not attempt to dictate to another what he may buy within his means, even if we regard him as being extravagant; in addition to which there

is a considerable price which a municipality can afford to pay in order to rid itself of the domineering tactics and corrupting influences too often resorted to in the past by private utility interests."

I would not call that a statement of fact. It is a correct statement of my opinion.

It does not say it reflects PWA policy. It is my own personal belief. It does not reflect PWA policy. PWA policy is evidenced by the acts and written commitments of PWA —by that alone.

I recall testifying in the case of Duke Power Company v. Greenwood County, at Spartansburg, South Carolina, December 12, 1935.

At that time the paragraph you have just read was read to me and I then testified that that correctly states the PWA policy, in contradistinction to what Mr. Rose said our policy was. However, it is not, and has never been, PWA policy in the sense that it was set down as a formulation of PWA policy. I think it is fair to say that it is my own personal opinion and, as such, necessarily has some relation to what we were carrying out as PWA policy.

I do not know that I can answer specifically whether there has been any change in the power policy of PWA since I published this book, Plaintiffs' Exhibit 123 for iden-
673 tification. As I said this morning, the policy of PWA was an evolving policy and, in the end, the policy was that in the final analysis it was up to the municipality to determine whether or not it wanted a plant of its own, provided, of course, it could finance it. That is the policy that, generally speaking, we have been working on. When that became the definite final conclusion of policy I could not say precisely, but all the time we were working towards that.

I have answered the question whether there has been any change in our power policy fully and completely.

If counsel did me the courtesy to listen to my previous answer, I said I could not fix the precise date, which is as direct an answer to the question whether there has been any change in the power policy of PWA since I published this book in May, 1935, as is possible for anyone to make.

My answer is the same to the question whether there has been any change in the power policy since Plaintiffs' Exhibit 33, PWA release 989 was issued.

I do not see how it is possible for me to say more clearly than I have that I cannot fix any precise date when the final policy was finally arrived at.

It was an evolving policy, out of which has come what is now our present policy. When that was crystallized I cannot say. There would be no object in my evading the question if I knew, but I do not know.

There followed the following questions and answers:

"Q. I have the feeling that we may not be understanding each other. I am not asking you for any date, Mr. Secretary. I want to know whether, regardless of any date, there has been any change in your power policy since plaintiffs' exhibit 33, PWA release 989, was issued. A. It seems
674 to me obvious that I cannot—

"The Court. That involves the date of that release.

"Mr. Jackson. That is true, sir, but that date is fixed as August, 1934, as I recall it, or September. Mr. Frank supplied it this morning.

"I am asking him if anything that has happened since that time—

"The Witness. I have said that I could not fix any date. If I cannot fix any date, I necessarily can not say whether there has been any change since any particular date."

In the case of Duke Power Company v. Greenwood County, on December 12, 1935, I was asked certain questions and made answer as follows:

"Q. Your attention has been called by your counsel to what is known as release No. 989 having been produced by Colonel Hunt, but it was introduced by us. That release states that 'Achievement in certain instances of the Administration's purpose of making electric energy more widely available at cheaper rates today leads to a clarification of the policy on power by the Public Works Administration.' Has there been any change in that policy or that purpose since August 26, 1935? A. It was not written by—it was released by itself, and as an entire document, taken in connection with subsequent releases and enunciation of policy.

"The Court. But you have to go back to answer whether there has been any change. You can ask if there has been any change in the purposes or policies of the Administration in reference to the power rates before.

675 "Mr. Robinson. And I understood him to say there had not been.

"A. That is correct."

In the same case of Duke Power Company v. Greenwood County, I was asked other questions and answered them as follows:

"Q. Now, Mr. Ickes, what I have read from your book correctly states the Public Works Administration's national power policy, as applied to all loans and grants for power projects, does it not? A. The Public Works Administration's policy is incorporated in the passages that you have read.

"Q. And there has been no change in that policy, as stated in your book, since August 26, 1935, when the final decree was entered in this case? A. No; that is correct.

"Q. And no change in your purpose and aims as Federal Emergency Administrator in carrying out that policy? A. No."

Those were my answers, but they may relate to an entirely different situation than is here presented. If all the passages in the book relating to power policy were taken together and considered as a whole, I think that it is fair to say that they do, as I say—that the policy is incorporated in the passages. That was my answer.

I would have to read chapter 6 of my book before I could answer the question whether that chapter if read as a whole, would fully reflect our power policy. The book has not assumed that importance to me yet, that I memorized it.

I understand there are two chapters on power here. I am not sure the two chapters correctly reflect our policy. I am just trying to determine. I think the preceding

676 chapter deals largely with power—chapter 5. Substantially, there are two chapters dealing with power, most of which, however, deal with Federal water-power projects. Only about 10 pages deal specifically with municipal-power projects. I would have to re-read them, but my impression would be that the policy, as formulated and determined upon up to that date, is expressed there. There is also a very broad general discussion of related matters, which are not necessarily statements of policy.

This book, taken as a whole, was, after all, my own interpretation, for popular consumption, of what the Government was trying to do under this relief program.

PWA was a going concern, and spoke officially, not only on matters of policy, but on other matters. I was the official charged with its administration, and with fully delegated powers from the President, but, nevertheless, I am not speaking officially here.

I do not want to give any impression that because I am not speaking officially I fail to state the facts as carefully and as accurately as I can. It is just like a lawyer discussing a lawsuit. Where he is discussing it in Court, he is very precise. When he is discussing it outside, he may descend to the vernacular, and discuss it from the popular point of view, in order to reach the understanding of the people for whose benefit he is discussing it.

The attention of the witness was then directed to the following from Exhibit 33.

"In all allotments made for municipal power plants by the Public Works Administration, proposed rates have been well below existing private-company rates. Consequently, the fact that the companies in some instances have met those proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of
677 the public-works program."

The whole statement covers what I was attempting to cover. The whole statement should be read together. If you take any paragraph or any chapter out of the Bible, you can make it appear to be entirely different from what it appears to be in the proper context. That was an interpretation by someone else. It may or may not be accurate. Standing alone, it does not represent the facts. Moreover, it does not even purport to quote me.

The following question was then asked, an objection sustained and an exception noted by plaintiffs.

"Q. You recognize, Mr. Secretary, I did not suggest it quoted you. Did you take any step to correct that statement, Mr. Secretary?"

The attention of the witness was then directed to a statement in Plaintiffs' Exhibit 141 for identification, which is a release of the Federal Emergency Administration of Public Works, quoting an article written by the witness entitled "Jobs Versus Dole"; published in the magazine Today, of the issue of November 17, 1934.

"This is not the place for a detailed discussion of the power policy of Public Works, but that policy also conforms to the general purpose to strengthen private enterprise. There is nothing, with the possible exception of the comprehensive housing program, that holds more promise for the future of industry in this country than the development and utilization of cheap power. Great natural water-power sites are being developed for the benefit of the communities they serve. Private companies serving these communities will, where sufficient power is developed, have an opportunity to purchase the cheap power if they are willing to share its benefits with their consumers. Loans for municipal power plants have been granted only upon application of the municipality concerned and upon a clear
678 showing that the existing rates can be substantially reduced after adequate provision for interest and amortization. Private companies furnishing adequate service at reasonable rates have nothing to fear from the power policy of PWA."

I assume it is a correct quotation, and it correctly states the facts as of that time; but, as I have said, over and over again, the power policy of PWA with respect to municipalities was an evolving policy, and the policy now and for some time has been that the question of rates did not enter into our decisions necessarily. It was a matter for local determination.

In reply to the question whether as of that date, I meant by the statement that "private companies furnishing adequate service at reasonable rates have nothing to fear from the power policy of PWA", that they were warned that otherwise I would supply funds to construct competing plants, my answer is that I stand on the statement as of that date.

On page 136 of my book I said: "The question of public policy involved is left to the municipalities concerned". That is right.

Q. As I recall it, in exhibit 33, that is, your press release No. 989, you say, at the end, that the question of whether there should be municipal competition is a public policy settled by the States, or something to that effect. Is that substantially right? A. Settled by the municipalities.

Q. Well, acting under the jurisdiction of the State. Am I substantially right? A. I have never made any such statement as that. They act under whatever legal authorization they are acting under. That is a question of law that I am not competent to testify on.

678A In my investigation of this subject, or my connection with it, it is not true that I found that many States authorized municipalities to compete with privately operated utilities. I did not look into it. I have just a general impression on it. I did not make loans and grants to municipalities for competing utilities without determining whether they were permitted to compete under

679 state laws but those questions were determined in the legal division.

I never made any investigation to find a state that had a policy of providing a gift or subsidy of 30 or 45 per cent of the cost of a municipal utility whenever it should desire to compete with an existing utility.

On my direct examination I said that where a loan was made on general obligation bonds we were not concerned about the rates of the existing utility. I think that is what I said. In the case of general obligation bonds, generally speaking, we did not examine, consider, or investigate the rates of the existing utility. I believe we did make a loan to the city of Coeur d'Alene, Idaho, or enter into an agreement with it, or make an allotment. When I say "I believe we did" I do not know whether that is still an outstanding obligation or not, or whether it has been rescinded. I just do not happen to remember. It is correct that at one time we did have an allotment to Coeur d'Alene whether or not it has since been rescinded.

It is not within my knowledge whether that was an allotment for a loan upon general obligation bonds of the city of Coeur d'Alene. I have not refreshed my recollection on it. It is true that I quite recently authorized the dismissal of our appeal in the Ninth Circuit Court of Appeals at San Francisco.

The attention of the witness was then directed to a copy of Plaintiffs' Exhibit 232 for identification, which purports to be a telegram to the President of the Washington Water Power Company, signed "Harold L. Ickes, Administrator." I have no means of telling from this whether it is a copy or

not. I think there was some telegram sent. Whether it went over my desk or not, I am not sure. If the records of PWA show that I signed it, I would not question that. The copy of page 60 of the transcript of record in the Coeur d'Alene case in the Court of Appeals for the Ninth
680 Circuit which has been shown me does not refresh my recollection as to my having sent that telegram. This does not do any more than the other did. It went out over my name, but whether it went out over my desk and I saw it, I cannot determine from this.

The attention of the witness was then directed to the following from page 146 of his book, Plaintiffs' Exhibit No. 123 for identification:

"By January of 1935, 12 municipal power projects had been completed. Forty-eight others were under construction. Thirty-four more had been approved by the Power Board, and about 71 were under consideration. The total amount allotted at that time for this purpose was $48,784,300." That undoubtedly correctly states the facts as of that time.

The next paragraph is likewise correct:

"One of the most important accomplishments of PWA, although an indirect one, has been a saving to consumers of millions of dollars through the lowering of rates by the private utilities to meet the charges proposed by applicants for public power projects. This rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant."

When I refer there to applicants for public power projects, and the 200 applications, I refer to applications for construction of power projects by municipalities or some other public corporation of that character. It would appear those were competing projects, where I refer to the reduction in rates. I think that is a fair conclusion. I cannot state it as a fact.

I believe the next paragraph on page 147 correctly states the facts as of that time.

"These yardsticks provided by both municipal and Federal enterprises are so valuable that they alone would
681 warrant PWA's expenditures for power undertak-

ings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the Federal projects have brought about rate adjustments over still larger expanses of territory."

When I refer to yardsticks provided by municipal enterprises, I refer to publicly owned power projects constructed by municipalities and similar state corporations, public corporations, through the aid of loans and grants from PWA. I am talking here of PWA expenditures alone, in this paragraph. The municipal enterprises I refer to here are those competing power plants which PWA financed in whole or in part. That is what I referred to. I do not know whether I do or do not there deal with municipal projects that we did not finance; but to the extent that we did finance them, then the statement is correct, from my point of view.

682 It was our intention to make loans to municipalities for competing power projects when, and only when, those projects would be self-liquidating. I don't know whether where there was an application for a loan and gift of Federal money for the construction of a duplicating and competing municipal utility, it was necessary for the proposed municipal utility to obtain all or a substantial part of the business of the existing utility in order to be self-liquidating. I have examined a document which has been handed me marked "Plaintiffs' Exhibit 235", entitled "Non-Federal Public Works that are deemed desirable, List No. 53, recommended by the Special Board for Public Works." This particular one is marked "Confidential" and is dated February 1, 1934. On every project there was a very large docket, which does not appear at all. The findings were based upon that docket, but the findings were not written findings. There were no written findings.

I did volunteer the statement in the course of my cross examination that PWA never did anything to stimulate the filing of applications for projects. Shortly after PWA was organized in 1933, and I was confronted with the problem of getting projects upon which to expend this large appropriation for public works, I did give out to the press of the country the information that PWA would make a gift to municipalities of 30 percent of the cost of certain public works and would lend the balance if the municipalities would undertake such public works, but that was not

what I meant by stimulation. We did do that. May I correct that? I don't know; we probably did do that, but necessarily news went out through the customary agencies the minute the law was passed, before PWA was really set up, that this law had been passed and that that would be the effect.

It is further a fact that I, for instance, made an address before the Conference of Mayors at Chicago in 1933 in which I told all of the Mayors that I stood ready or
683 PWA stood ready to lend 30 percent of the cost of such projects, or to give, rather, 30 percent of the cost of such projects and lend the balance. But since I used the word "stimulation," it might not be improper for me to be permitted to say what I mean by stimulation. What I mean by stimulation was sending people to the municipalities direct, to try to interest the municipalities in particular projects. This other was just a general invitation; and invitation, if they had anything, to come to us.

Necessarily we were trying to carry out the mandate of Congress to put this money to work in order to help in the industrial recovery. We did give out these general statements giving publicity to the offer to make a gift of 30 percent and to lend the balance. That is what the money was for.

The attention of the witness was directed to the following from page 67 of his book: "To explain the machinery that was developed to cope with the emergency, let us take an imaginary project through the mill. Naturally we cannot find one that will contain every problem, but we can, at least, show in general our processes and the safeguards we have set up."

"Then the Public Works Act is passed. Nearby towns are given allocations for municipal projects. A State engineer of PWA comes into the city and calls on the mayor.

" 'Why haven't you got some business for us?' he asks. 'You don't mean to say your city is perfect?'

" 'Far from it,' the mayor replies sadly, 'but where are we going to get half a million dollars for a new sewage system?'

" 'You can get $150,000 from the PWA as an outright grant, and we will lend you the rest.'

"The mayor asks, 'How can we borrow any more money? We've already issued bonds up to our legal limit, and our municipal finances are in a pretty bad way.'

" 'You still have a good chance to borrow money
684 from the PWA. If legally you can lay a service tax on the new sewage system, say by charging the user so much for every tap, toilet, and bath tub, so that the revenue produced will pay off the loan in not to exceed 30 years at 4 percent interest, then you can get the money, both $150,000 grant and $350,000 loan. Otherwise, under the law, we have no power to let you have it.'

"After several such talks, the mayor becomes enthusiastic."

That is very far from being an accurate description of a typical problem of a project by PWA. We had one State engineer—

The Court (interposing). Do not continue. I would not go on. You have answered the question.

Redirect examination.

The routine procedure under the Emergency Relief Appropriation Act was more complicated than under Title II of the Recovery Act. I have a memorandum here that, with the court's permission, I would like to refer to.

After the passage of the Act in 1935 the procedure was substantially as follows:

The Assistant Administrator, after being satisfied from the advice of the heads of the several divisions, and after conferences with them and with others, that there should be an allotment for a project, would send to the Division of Applications and Information of the National Emergency Council an application for allotment of funds. There was a regular form for that. This was pursuant to Executive Order of the President, No. 7034. The Division of Applications and Information would then transmit copies of these applications to the Bureau of the Budget and the Works Progress Administration. When they had been reviewed by the Budget and the Works Progress Administration the Division of Applications and Information would transmit to the chairman of the Advisory Committee on Al-
685 lotments the recommendations thereon. The Division of Applications and Information would transmit

them to the chairman of the Advisory Committee with recommendations that had come back from the Budget and the Works Progress Administration. The applications which had been approved by the Director of the Budget and the Administrator of the Works Progress Administration were then put on the agenda for consideration by the Advisory Committee on Allotments. The Advisory Committee on Allotments, of which the Administrator of Public Works was chairman, would then confer with the President, and after presentation of data, both documentary and oral, some of the projects were approved by the President, and after they were approved the President would write a letter to the Secretary of the Treasury requesting that funds be transferred from the appropriation made under the Emergency Relief Appropriation Act of 1935 to the Public Works Administration for a state amount to cover the specified projects. That deals with the procedure after it had been either approved or disapproved. After they were disapproved they were out. If they were approved there was a certain procedure in which the Treasury and various departments and individuals were involved.

There was a change after August 27, 1935, so that instead of going to the chairman of the committee the projects went direct through to the President with my approval. There was no meeting of the Advisory Committee. But other than that the routine was substantially the same.

The loan portion of an allotment which supplements a grant under the Emergency Relief Appropriation Act of 1935 is approved by me and the President from the fund realized from the sale of securities held by PWA. That was the revolving fund, known as the Deficiency Revolving Fund. After there had been approval, if an agreement could be arrived at, then a contract with the applicant was signed, either by me or some one authorized to sign
686 contracts. Technically it was a contract, and it consisted of an application and an acceptance, an offer and acceptance.

In my cross examination I spoke of the activities of the Special Board of Public Works. That board had only advisory functions, and, after a time, it ceased to meet with me altogether. I have data before me showing the number of PWA non-Federal projects.

We made allotments on non-Federal PWA projects to the number of 7,957 for a total amount of $1,222,636,961. Of these 260 are electric power projects. The total amount allotted by PWA for such projects is $70,082,656. That is 3.3 per cent of the total allotments. That is not the proportion of the amount of money but is the proportion of the number of the projects. The proportion of money allotted is 5.7 per cent. Of these electric power projects, 85 are for publicly owned electric power plants or distribution systems in places where there were privately owned facilities at the time of the allotment. That is 1.1 per cent of the total number of allotments. In amount of money the total allotment for that category of projects is $58,768,800. That is 4.8 per cent of the total amount of allotments.

In every county in the United States except three we have PWA projects today.

I interpreted "comprehensive program of public works" to mean that we were to make as wide and even a distribution as possible of these projects, taking into account the populations of the various states and communities, and particularly the unemployment situation in the states and communities.

I spoke of the power policy as an evolving policy on my cross-examination, and earlier in my direct examination I explained to what extent I did and did not consider rates with respect to different types of competitive municipal projects, dividing them into those where there were
687 grants, general obligation bonds and revenue bonds.

The policy as described in my direct examination describes correctly my present policy.

On cross-examination I made the statement that my findings, and the President's, so far as he made them, were based upon the docket. On direct examination I said I relied not only upon documentary data but also upon conferences and oral communications. The statement in cross-examination was not testified to to destroy or correct what I said upon direct examination. I stated in the preface of my book "In the pages of this book, therefore, I am trying, in broad outline, to tell the people"—and then I went on with what PWA was doing. That correctly describes the character of the book. The jacket of the book says that I

am giving in this book "in readable form the full history" of the organization.

That was the intention. I do not know whether it was given effect or not. It seems to interest some people on some occasions.

Mr. Frank. In order to avoid a false impression that might be created by taking sentences from pages and skipping about throughout the book, and not for the purpose of proving the facts therein stated, we now offer the entire book in evidence.

The Court. That is what suits you, is it not?

Mr. Jackson. I tried to get Mr. Frank to accept it.

The Court. There cannot be any controversy over that, then.

Mr. Frank. Let it be marked in evidence as Defendant's Exhibit No. 12.

Book entitled "Back to Work", by Harold L. Ickes, was marked "Defendant's Exhibit No. 12" and received in evidence.

The said exhibit is attached to this statement, and made a part hereof.

688 *Examination of the Witness by the Court*

Q. There has been evidence here and there has been some discussion and some argument along the line of tending to show that in the making of these grants for these public utilities projects the real underlying purpose was not so much the relief of unemployment as it was the coercion of the public utilities companies. I would like to hear what you have to say on that. A. That was not the purpose. We considered these projects just on the same basis that we considered every other project. I think that a showing can be made that they were justified from the point of view of the employment—direct employment and indirect employment. It just happened that that was one of the by-products. There did evolve—call it a yardstick if you want to—a measuring of rates, an opportunity, perhaps, to reduce rates in various municipalities for the benefit of the people who used electric current. Whatever may be said about some of the big water power projects, I think it is accurate to say that that was not the primary purpose in making these particular allocations. If the court will

consider that we made allocations for the building of all sorts of things, schools, sewers, waterworks, public buildings, roads, anything conceivable in the way of municipal service or a means by which municipal service could be rendered, it is not surprising that in the big list that I have made there are comparatively few allocations for power plants. There were very few, relatively.

Q. I realize, of course, that we are all of us human beings and that we all make mistakes, and so forth, and I do not know that I ought to say that there has been a direct allegation, but it is pretty close to dealing with the charge that the making of these grants to towns where there were electric lighting plants was not with an accidental purpose, but with the primary purpose not to relieve unemployment but to coerce the plants to reduce rates. A. We in no
689 case stimulated application. By stimulate I mean direct solicitation for particular projects at particular times. Of course we did hold out to the country that this money had been voted for this purpose. If it had been one of our major policies, instead of having comparatively few municipal power projects in number we would have had a great many. Our policy from the beginning, without variation—although, as I say, it was an evolving policy—in the final analysis we always felt that primarily it was up to the municipality to determine what it wanted. We did not inquire into the motive of the municipality, any more than we did when they wanted a library.

Q. One of the cases here shows that after the application had been made, and perhaps after it was granted, the local utility company reduced its rates. You know what I mean? A. Yes.

Q. And in some of the press releases that have been received, or in some of the documents, there is the statement that where the utility company agreed to transact its business at a reasonable rate, the PWA would not make a loan? A. And there were instances where, following a reduction of rates, the municipality withdrew its application. We always gave it the full right to do that.

Q. The main point that I wanted to hear what you had to say on was whether your policy was that of coercion of the utility companies, or the relief of unemployment. A. I think the fact is that we were willing to, and during the

carrying out of the program we did, take into account a reduction of rates, and if the municipality wanted to withdraw we permitted it to do so. We offered no greater inducement in order to build a competing plant.

690 *Redirect Examination Resumed*

The following question was then put to the witness by counsel for Defendant:

Q. Your purpose in making these contracts for those competitive projects always was to increase employment quickly as the statute required, and these other considerations were only incidental and collateral?"

To which counsel for Plaintiffs interposed an objection as follows:

We either want to object or move to strike out the answer on the ground that the question is improper; it is leading and, further, it calls for a conclusion which invades the province of the court. It is a material issue of fact to be determined by the court.

The objection was overruled and the witness answered: "That is right." Counsel for the Plaintiffs excepted to the ruling.

691 Whereupon, **Herman Bailey Byer** was called as a witness for and on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct examination

I am chief of the Division of Construction and Public Employment, in the Bureau of Labor Statistics of the United States Department of Agriculture and have been for five years. I have been in the Bureau of Labor Statistics since 1919, in various positions, and have just gradually been promoted until I occupied my present position. The Bureau of Labor Statistics collects information on a wide variety of subjects of interest and value to both labor and industry. We collect data concerning employment, prices, construction, cost of living, and various other allied matters. The Division of Construction and Public Employment of that Bureau collects information concerning the volume of construction each month, as evidenced by the permits issued in all cities having a population of 2500 and over. And we collect data concerning pay rolls, monthly

pay rolls, and man-hours of work in all construction activities financed either wholly or partially from Federal funds. The maintaining of statistics of employment throughout the United States is one of the functions of the Bureau of Labor Statistics. The average number of persons gainfully employed in the United States for the 36 months' period from 1923 to 1925 was approximately 41 million, over the age of ten years. That is the basis of the census figures. That includes agriculture. Something over 8 million were employed in manufacturing. We subdivide persons employed in manufacturing, into two groups, those manufacturing durable goods and those manufacturing consumers' or non-durable goods. In the durable goods' group we include the firms manufacturing such products as iron and steel, machinery, transportation equipment,
railroad repair shops, non-ferrous metals, and other
692 products, lumber and allied products, stone, clay and glass products. Those are the durable goods.

In the non-durable goods' group are textiles and their products, such as clothing; leather and those things manufactured from it, such as boots and shoes; food and kindred products; tobacco manufactures, paper, printing, chemicals and allied products, and rubber products.

During the period from 1923 to 1925 the average number of persons employed in the durable goods' group and in the non-durable goods' group, were approximately equal. The durable groups were slightly in excess. There was something over 4 million in each group, during that period.

Whereupon a Chart entitled "Employment in the durable and non-durable goods groups, three-year average, 1923 to 1925," was marked Defendants' Exhibit No. 13 for identification.

The chart which has been marked Defendants' Exhibit No. 13, shows in graphic form the fluctuations of employment in the durable and non-durable goods groups. It was prepared in the Bureau of Labor Statistics. The index numbers at the left and at the right of the chart are intended to show the deviations from a normal period, or what you might speak of as a normal period; that is the three-year period from 1923 to 1925. In other words, we took these 36 months and found the average employment

and the employment for each month of the 36, and then divided the total employment for the 36-month period, by 36, to get the average monthly employment over the period, and called that 100 per cent. And then the index numbers, on either side, and the lines of the chart, show the deviations from that period. The years are marked at the bottom of the chart. From 1923 to 1929, there is a very small variation in the movement of employment in the durable and non-durable goods groups. Beginning with the latter part of 1929, the employment in the durable goods
693 industries decreased much more rapidly than in the consumers' or non-durable goods industries. The non-durable goods and consumers' goods industries also reached the bottom considerably earlier than the durable goods group. By June, 1932, they had reached the bottom of the trough. This was not true of the durable goods. Employment continued downward in that group until March 1933. The gap continued to widen until the middle of 1933, when it reached its widest point.

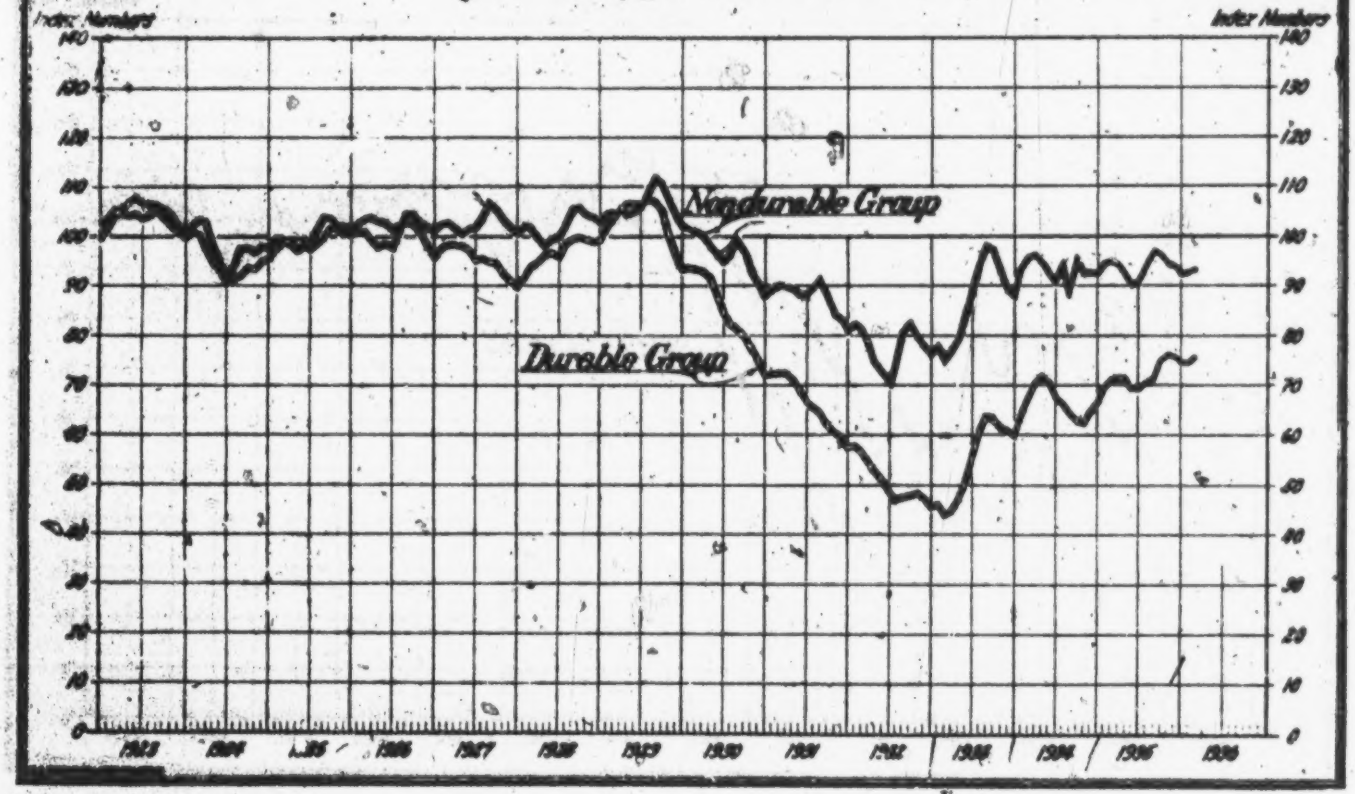
Employment in the non-durable goods group reached the bottom in June, 1932, and started upward. Of course, like all movements, it was not in a straight line; there were fluctuations. But the trend was upward from 1932.

In contrast, the employment in the durable goods group did not start upward until April, 1933. It moved upward quite swiftly during the latter part of 1933, and it has been gradually closing the gap between the two series until in March 1936 they were closer together than they had been at any time since the latter part of 1930 or the early part of 1931.

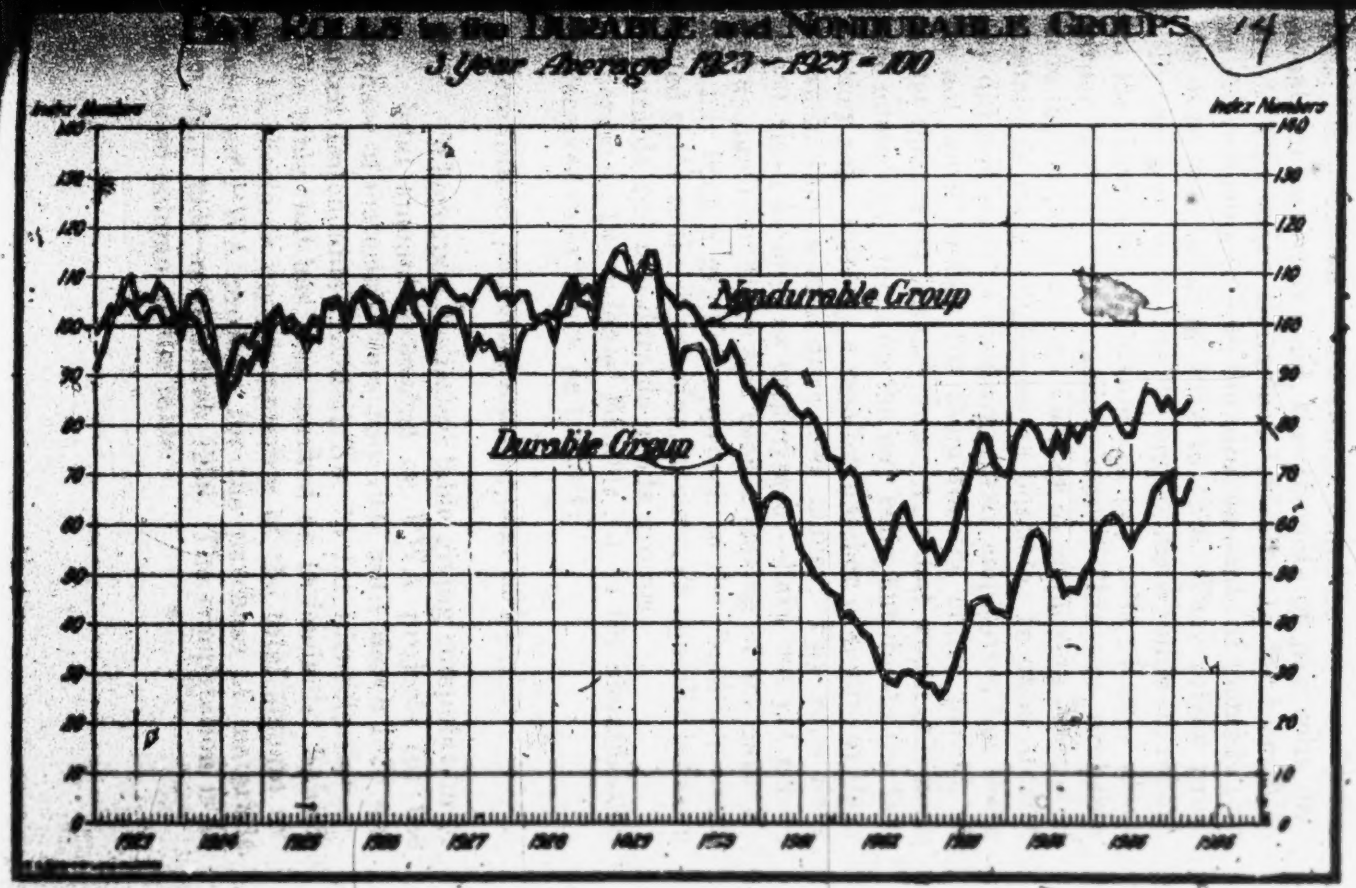
Whereupon Defendants' Exhibit No. 13 for identification was thereupon received in evidence, as follows:

EMPLOYMENT in the DURABLE and NONDURABLE GROUPS

3 Year Average 1923 - 1925 = 100



Difficulty Ex. 13



Defendant Ex Art

696 Whereupon Chart entitled "Pay Rolls in the durable and non-durable goods groups, three-year average, 1923 to 1925, equals 100" was marked Defendants' Exhibit No. 14 for identification.

Employers of labor, in manufacturing industries, send to the Bureau of Labor Statistics each month, on our own forms, information concerning employment and the amounts of pay rolls paid, the amounts of pay rolls disbursed. This chart, Defendants' Exhibit 14 for identification shows fluctuations in the total amounts of monthly pay rolls over the period of 1923 to 1936. They follow practically the same lines that the employment followed, except that the drop was accentuated in pay rolls. It was much sharper than it was in employment. This was probably due to the fact that a large number of employers attempted to retain as many employees as possible. In other words, they did not want to discharge their employees, but there was not work enough for them for the entire period, so they let them work a short time. And that would still keep large numbers of them on the pay rolls, but due to the fact that they were working a smaller number of hours, or days per week, they would draw less money. Pay rolls have not yet risen as high as employment—have not yet recovered as much but there has been a closing of the gap. So there has been a gradual approach to the condition which existed prior to the depression, namely, an equality between the durable and non-durable goods groups.

Whereupon Defendants' Exhibit No. 14 for identification was received in evidence, as follows:

(Here follows photostat marked page 696.)

697 Whereupon statistical table giving computation of total amount expended on PWA projects for the purchase of materials from July 1933 until March 1936 was marked Defendants' Exhibit No. 15 for identification.

The table that has been marked as Defendants' Exhibit No. 15, discloses my computation of the total amount expended on PWA projects for the purchase of materials from July 1933 until March 1936. The computation is in the second column of the table.

Every Government construction contract, inclu
PWA contracts, includes a clause making it mandatory
the contractor to report to the Bureau of Labor Stati
the number of people on his pay roll and amount of
roll, the man-hours of work at the site of the constru
project, and the expenditures for construction mater
When the Government purchases any materials direc
they sometimes do in the construction of, we shall
battleships, and places an order direct with the Steel
poration, the Government agency making the purc
reports the value of the material purchased, to the Bur
All these figures come to the Bureau of Labor Stati
and the computation contained in the table marked
fendants' Exhibit 15 is made up from the figures so
ceived. The total is $1,177,000,000.

Whereupon Defendants' Exhibit No. 15 for identi
tion was recevied in evidence, as follows:

Type of Material	Total	PROJECTS				
		Public Works Administration 1/	Reconstruction Finance Corporation 2/	Regular Governmental 3/	The Public Buildings Administration: Federal Construction	The Public Buildings Administration: Operated by W. P. A. 3/
...rials	1,465,136,906	1,177,082,508	52,217,983	876,146,314	56,297,722	8191,392,358
...and their products:	1,735,250	1,470,421	124,467	42,940	97,422	5/ -------
..., tents, canvas, etc.	294,290	235,693	1,332	3,709	13,556	-------
...and rugs	62,537	62,537	------	------	------	-------
...and twine	376,039	293 33	9,137	22,135	51,434	-------
...goods	275,791	159,[illegible]	109,400	1,960	9,140	-------
...ods	184,301	178,363	4,447	69	1,422	-------
...ods	71,752	71,583	------	------	169	-------
...	315,195	284,279	151	12,590	18,165	-------
...al bags	33,235	31,189	------	121	1,925	-------
...ering materials, n.e.c.	132,492	132,005	------	------	487	-------
	29,688	26,188	------	1,956	1,544	-------
	4/					6/
...ducts:	86,604,525	62,995,259	1,822,036	2,992,397	6,538,810	12,256,283
...ducts	212,577	190,717	11,270	6,921	3,669	-------
...and timber products, n.e.c.	64,253,158	54,057,912	1,800,447	2,377,698	6,017,101	-------
...mill products	9,755,585	8,622,150	10,319	606,286	517,230	-------
...and door screens and weatherstrip	126,782	124,480	------	1,492	810	-------
...and Allied Products:	15,107,042	10,937,731	1,585,837	637,478	1,057,829	1,788,567
...tion and related products	1,085,536	1,085,144	------	------	392	-------
...le, miscellaneous	417,422	354,035	------	6,922	56,465	-------
...ed and liquified gases	498,468	332,351	97,191	9,499	59,427	-------
...ves	7,323,083	5,080,380	1,449,905	219,043	573,755	-------
...and varnishes	5,782,533	1,185,921	38,741	196,014	167,190	1,788,567
	1/					8/
...ay and Glass Products	417,408,249	339,781,673	7,288,156	15,949,440	16,690,495	37,698,285
...e products, n.e.c.	95,428	93,884	41	686	817	-------
...hollow tile and other clay products	29,244,307	20,839,472	379,589	854,117	597,695	6,573,434
	175,754,801	144,848,406	4,135,472	6,573,829	10,303,067	9,893,027
...e products	36,415,877	26,642,597	1,948,406	621,704	1,068,955	6,134,215
... stone	51,929,385	43,042,904	44,868	2,354,937	1,261,520	5,225,156
	1,662,085	1,495,803	3,159	117,391	45,732	-------
	284,754	238,253	8,981	5,545	11,875	-------
...granite, slate and other stone products	23,076,362	20,727,363	145,278	1,160,319	1,043,402	-------
...s and earths, ground or otherwise treated	140,899	124,573	------	7,583	8,743	-------
...d gravel	86,639,581	73,881,530	603,179	3,636,381	1,930,870	6,387,621
...floor and wall, and terrazzo	3,701,832	3,292,255	9,143	185,642	214,792	-------
...aster, wall board, insulating board and floor composition	4,998,106	4,554,833	9,080	231,206	203,087	-------
	7/					7/
...d Steel and their Products, not including Machinery:	386,678,626	301,114,586	29,617,613	21,412,186	11,907,363	22,620,878
...nuts, washers, etc.	4,080,632	3,629,479	12,644	221,594	216,915	-------
...ron pipe and fittings	36,476,336	27,169,693	498,594	375,482	627,964	7,804,601
...shutters, window sash & frames, molding & trim(metal)	9,589,068	8,729,644	15,950	1,030,978	112,596	-------
...ne	813,468	813,468	------	------	------	-------
...gs, iron and steel	7,509,703	6,078,762	13,413	3,125,424	292,104	-------
...re, miscellaneous	10,019,866	7,810,545	988,982	513,004	707,335	-------
...g and ventilating equipment	19,645,393	17,411,821	100,386	919,153	382,887	831,146
...nd spikes	1,554,683	1,338,743	2,352	62,888	150,700	-------
...enings, excluding spikes	6,576,729	6,564,340	------	9,044	3,345	-------
... steel	21,964,061	21,857,056	50,383	16,838	39,786	-------
..., steel	619,824	619,671	------	102	51	-------
...works and rolling mill products, n.e.c.	102,165,609	74,014,041	20,378,410	5,824,045	1,949,113	-------
...and ranges, other than electric	379,616	376,407	------	732	2,477	-------
...rod and reinforcing steel	134,463,133	108,303,801	4,990,060	10,236,713	4,859,336	6,073,223
...s, railway	771,549	768,619	------	------	2,930	-------
...other than machine tools	10,626,881	5,505,841	97,342	259,219	1,094,869	3,669,010
...ducts, n.e.c.	10,873,605	6,623,139	8,469,197	734,405	1,046,864	-------
... pipe	3,000,812	1,499,963	------	82,465	418,684	-------
						9/
...s Metals and their Products:	10,374,999	6,444,864	2,180,792	874,920	674,883	-------
...manufactures	409,169	328,190	116	80,787	96	-------
...products	3,118,099	805,069	2,196,894	193,852	22,284	-------
...ducts	331,488	315,977	1,790	72,366	1,355	-------
...rmetal alloys and products, n.e.c.	1,[illegible],919	1,839,748	13	288,416	11,735	-------
...tal work	3,388,985	3,401,000	82,079	246,479	699,369	-------
...ducts	60,299	60,280	------	80	48	-------

including Transportation Equipment	264,511,426	222,148,879	6,057,909	23,490,436	8,917,983	3,896,259
chinery, apparatus, and supplies	64,688,423	54,953,721	1,628,931	4,867,734	1,422,901	1,815,136
elevator equipment	3,012,605	2,606,899	4,946	361,518	39,242	----------
ines, tractors, and waterwheels	29,809,874	20,185,335	----------	7,878,989	1,745,550	----------
achine shop products, n.e.c.	139,890,391	120,159,249	4,375,862	8,280,318	5,216,799	1,857,963
	7,130,185	6,719,807	2,128	286,256	121,994	----------
ater,etc.) and gas generators	805,452	803,603	----------	260	1,589	----------
ining equipment	17,661,903	15,508,902	46,042	1,739,772	367,187	----------
s and refrigerating and ice-making apparatus	1,289,633	1,211,363	----------	75,589	2,681	----------
Equipment, Air, Land and Water:	88,397,690	86,793,886	151,778	83,380	1,321,143	47,503
)	5,764,705	5,764,705	----------	----------	----------	----------
s	5,086,400	5,086,400	----------	----------	----------	----------
and wooden (small)	1,407,681	1,376,365	----------	4,758	26,558	----------
wheels	55,020	34,242	----------	3,160	17,618	----------
other than steam	11,818,333	11,818,333	----------	----------	----------	----------
steam	6,856,914	6,837,076	----------	----------	19,838	----------
nd parts	274,395	274,395	----------	----------	----------	----------
s, passenger	563,406	525,657	----------	1,911	35,838	----------
s, trucks	10,600,727	9,107,504	151,778	73,551	1,220,391	47,503
, freight	36,647,366	36,646,466	----------	----------	900	----------
mail and express	429,443	429,443	----------	----------	----------	----------
passenger	8,893,300	8,893,300	----------	----------	----------	----------
	194,525,139	146,295,689	3,389,195	10,669,557	11,091,834	23,078,864
ellaneous	37,212	35,233	----------	815	1,164	----------
	2,385,188	1,179,694	53,384	321,296	220,814	----------
	544,066	543,551	----------	325	190	----------
ng and fixtures	15,103,824	12,830,497	59,795	1,419,222	794,310	----------
cluding store and office fixtures	6,760,987	5,412,439	3,108	131,059	199,722	1,014,659
professional and scientific	2,085,183	1,988,929	----------	54,617	41,637	----------
d bed springs	89,690	88,863	----------	205	622	----------
tterns	29,038	27,115	----------	1,335	588	----------
s	86,962	81,772	93	650	4,447	----------
als and mixtures, n.e.c.	28,247,092	17,726,426	38,077	1,050,596	640,780	8,789,213
ducts	44,986,692	36,038,863	747,240	3,552,906	2,693,979	1,953,704
apparatus and materials	254,090	217,188	815	4,813	31,274	----------
plies n.e.c.	16,726,392	14,152,434	254,918	688,114	696,783	934,143
ue and supplies	1,004,442	946,918	----------	----------	57,524	----------
ials, n.e.c.	5,289,809	4,582,842	6,714	308,468	391,785	----------
	811,558	591,170	94,513	12,408	113,467	----------
er packing, pipe and boiler covering, and gaskets	1,394,080	1,239,821	70,511	52,212	31,536	----------
stery and stage equipment	70,626	70,626	----------	----------	----------	----------
and fixtures	216,516	209,533	----------	91	6,892	----------
ls	68,401,692	47,719,775	2,060,027	3,070,415	5,164,320	10,387,155

value of material orders placed on P.W.A. projects financed from the Emergency Relief Appropriation Act of 1935.
material orders placed on projects financed from R. F. C. loans from March 15, 1934 to March 15, 1936. Includes R.F.C. Mortgage Company projects.
material orders placed on projects financed from E.C.A. from July 1, 1934 to March 15, 1936.
material orders placed on P.W.A. projects financed from E.R.A.A. 1935 funds, included under P.W.A.
material orders placed from beginning of program to March 31, 1936.
in "Other Materials".
materials for projects operated by the W.P.A. which are not classified in detail.
materials in this group which are not classified in detail.

VALUE OF ORDERS PLACED

Type of Mater
All Materials
Textiles and their products:
Awnings, tents, canvas, etc.
Carpets and rugs
Cordage and twine
Cotton goods
Felt goods
Jute goods
Linoleum
Sacks and bags
Upholstering materials, n.e.c.
Waste
Forest Products:
Cork products
Lumber and timber products, n.e.c.
Planing mill products
Window and door screens and weath
Chemicals and Allied Products:
Ammunition and related products
Chemicals, miscellaneous
Compressed and liquified gases
Explosives
Paints and varnishes
Stone, Clay and Glass Products
Asbestos products, n.e.c.
Brick, hollow tile and other clay
Cement
Concrete products
Crushed stone
Glass
Lime
Marble, granite, slate and other s
Minerals and earths, ground or et
Sand and gravel
Tiling, floor and wall, and terra
Wall plaster, wall board, insulatin
Iron and Steel and their Products
Bolts, nuts, washers, etc.
Cast iron pipe and fittings
Doors, shutters, window sash & fr
Firearms
Forgings, iron and steel
Hardware, miscellaneous
Heating and ventilating equipmen
Nails and spikes
Nail fastenings, excluding spike
Rails, steel
Springs, steel
Steel works and rolling mill pro
Stoves and ranges, other than el
Structural and reinforcing steel
Switches, railway
Tools, other than machine tools
Wire products, n.e.c.
Wrought pipe
Nonferrous Metals and their Produc
Aluminum manufactures
Copper products
Lead products
Nonferrous-metal alloys and prod
Sheet-metal work
Zinc products
Machinery, not including Transportation
Electrical machinery, apparatus, and
Elevators and elevator equipment
Engines, turbines, tractors, and wat
Foundry and machine shop products, n.
Machine tools
Motors (gas, water, etc.) and gas power
Pumps and pumping equipment
Refrigeration and cooling equipment

Machinery, not including Transportation Equip
Electrical machinery, apparatus, and supplie
Elevators and elevator equipment
Engines, turbines, tractors, and waterwheels
Foundry and machine shop products, n.e.c.
Machine tools
Meters (gas, water, etc.) and gas generators
Pumps and pumping equipment
Refrigerators and refrigerating and ice-maki

Transportation Equipment, Air, Land and Water
Aircraft (new)
Airplane parts
Boats, steel and wooden (small)
Carriages and wagons
Locomotives, other than steam
Locomotives, steam
Motorcycles and parts
Motor vehicles, passenger
Motor vehicles, trucks
Railway cars, freight
Railway cars, mail and express
Railway cars, passenger

Miscellaneous:
Belting, miscellaneous
Coal
Creosote
Electric wiring and fixtures
Furniture, including store and office fixtur
Instruments, professional and scientific
Mattresses and bed springs
Models and patterns
Paper products
Paving materials and mixtures, n.e.c.
Petroleum products
Photographic apparatus and materials
Plumbing supplies n.e.c.
Radio apparatus and supplies
Roofing materials, n.e.c.
Rubber goods
Steam and other packing, pipe and boiler cov
Theatrical scenery and stage equipment
Window shades and fixtures
Other materials

1/ Includes value of material orders placed
2/ Value of material orders placed on proje
3/ Value of material orders placed on proje
4/ Value of material orders placed on P.W.A
5/ Value of material orders placed from bo
6/ Included in "Other Materials".
7/ Includes materials for projects operate
8/ Includes materials in this group which

699 I have been given by the Public Works Administration a list of the completed municipal power projects which involve the construction of new plants or complete plants, and I have computed the amount spent for labor and materials on those projects.

Whereupon a table entitled "Brief Summary of the Economic Effect of PWA Expenditures for Diesel and Steam Power and Light Plants" was received in evidence as Defendants' Exhibit No. 16, as follows:—

Prepared in the Bureau of Labor Statistics
Division of Construction and Public Employment

A BRIEF SUMMARY OF THE ECONOMIC EFFECT OF P.W.A. EXPENDITURES FOR DIESEL AND STEAM POWER AND LIGHT PLANTS

Scope:
6 Power and Light Plants Located in
Illinois, Minnesota, Missouri, Ohio,
Oklahoma and Virginia

-o-

Total contract prices—$529,262.00

Ratio of labor and material costs:

Labor	$61,046.00	13.2%
Material	400,582.00	86.7%
Total	$461,628.00	

Ratio of labor, materials, and profit and overhead costs:

Labor	$61,046.00	11.5%
Material	400,582.00	75.7%
Profit and overhead	67,634.00	12.8%
Total	$529,262.00	

Man-hours of labor created—

At the site	85,529	18.4%
In factories, mines and transportation	380,000	81.6%
Total	465,529	

For every man-hour worked at the site, 4.4 were created in factories, mines and transportation.

Cost per man-hour, based on contract price	$1.137
Cost per man-hour, based on labor and material	0.992
Average earnings of wage earners employed at site	0.714

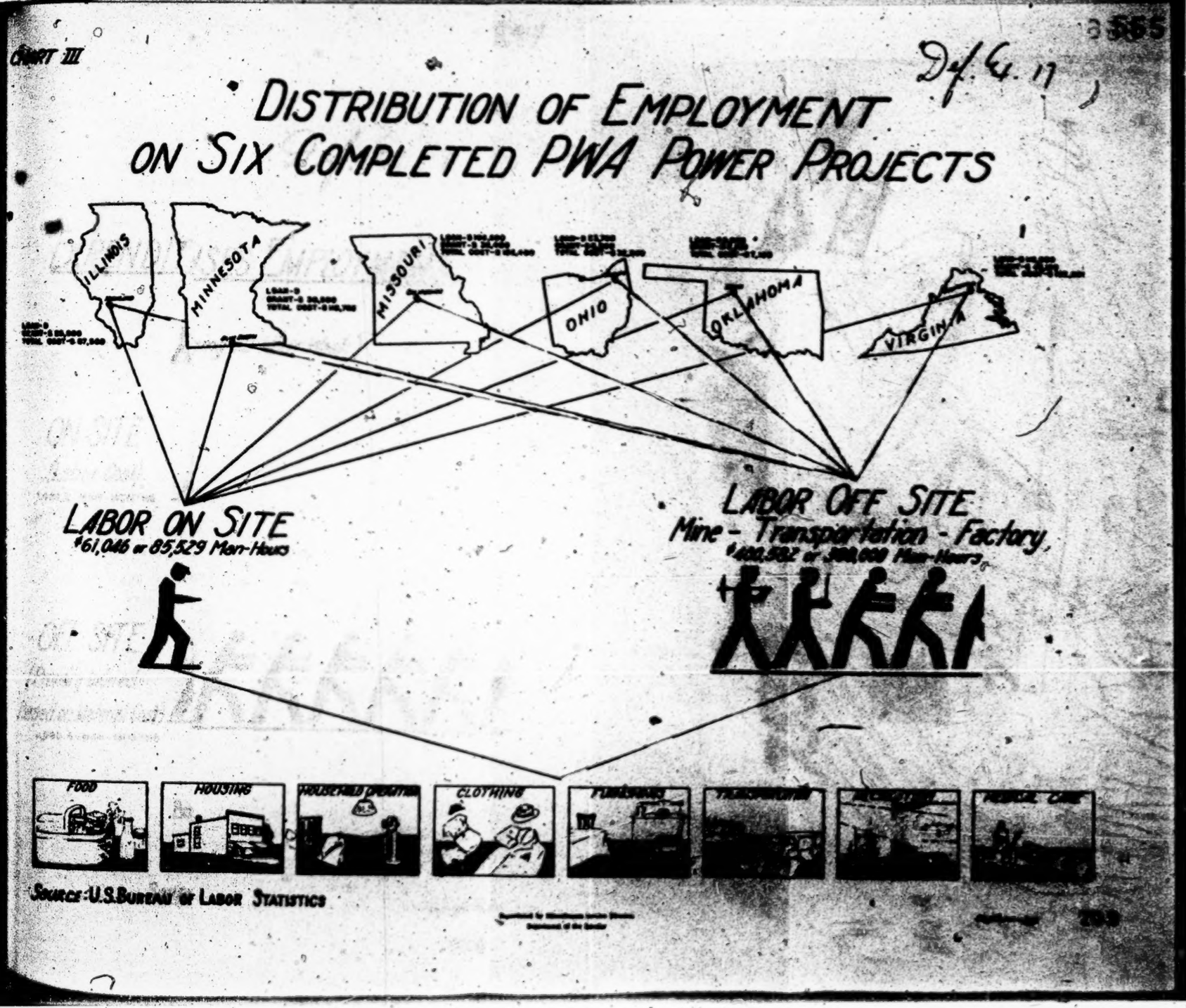
700 The type of projects referred to in Defendants' Exhibit 16 were four Diesel plants and two steam plants. They are all municipal electric light plants.

On these six projects $461,628 were spent for labor and material—that is on labor at the site, and on materials to be used at the site. Labor at the site therefore accounted for 13.2 per cent only of this total expenditure for labor and materials, and materials accounted for 86.7 per cent. At the site, from the reports received by the Bureau from contractors and subcontractors working on these projects, there were 85,529 man-hours of labor created.

There were approximately 380,000 man-hours of indirect labor created away from the site in fabricating and transporting and mining these materials. Labor at the site accounted for 18.4 per cent of the total labor created. And indirect labor amounted to 81.6 per cent. For every man-hour created at the site, there were 4.4 man-hours created indirectly.

Whereupon a chart entitled "Distribution of Employment on 6 Completed PWA Power Projects" was marked Defendants' Exhibit No. 17 for identification.

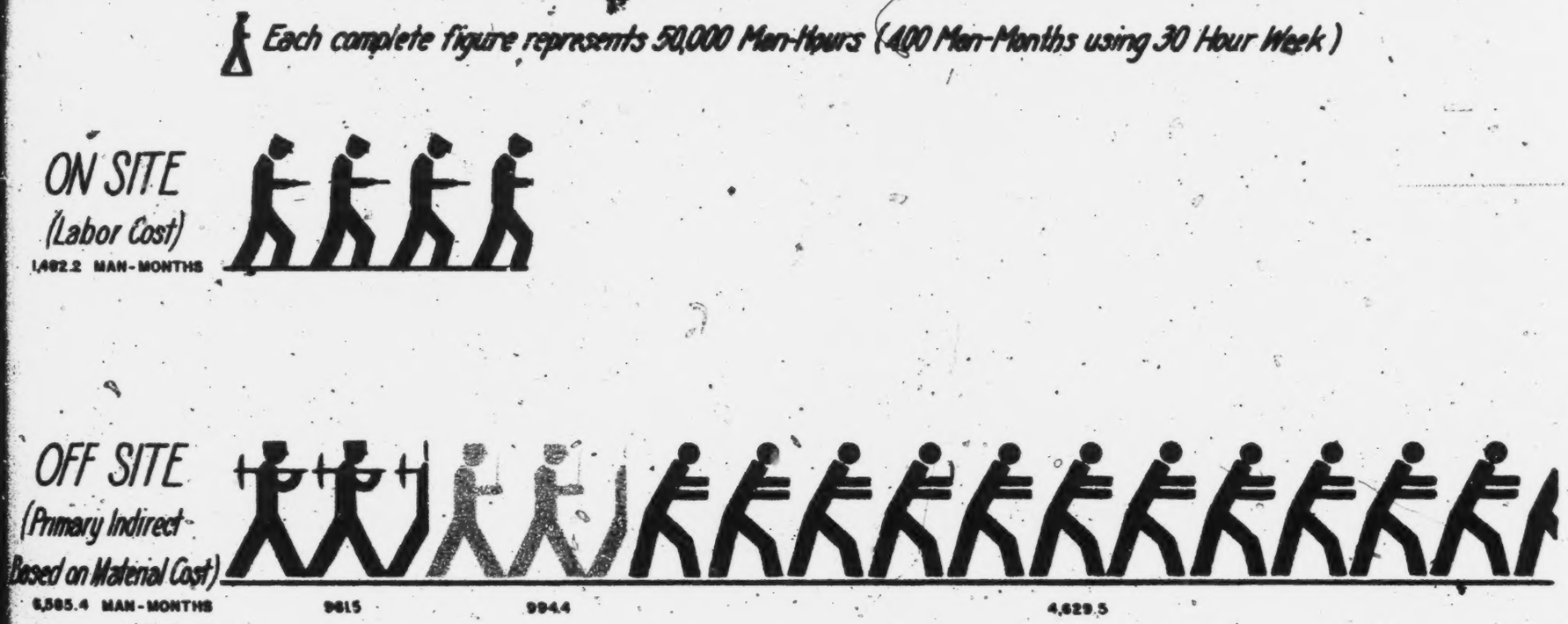
Defendant's Exhibit No. 17, for identification, shows in graphic form practically the same information that was shown in the table previously offered. It shows the location of the power plants, the two steam plants being in Illinois and Minnesota, the other four being Diesel plants. It shows the total man-hours, the amount spent for labor at the site, $61,000, and the number of man-hours of labor created at the site. It shows the off-site labor. And the figures on the right hand side of the chart, under the heading "Labor Off the Site" show roughly the amount of labor in mining, transporting and fabricating the materials. The blue figure with the pick over his shoulder is



$ 1,000,000

Def. Ex. 18

EXPENDITURE FOR LABOR & MATERIALS WHICH CAUSES EMPLOYMENT:



Based on figures derived from Six Completed P.W.A. Power Projects

SOURCE: U.S. BUREAU OF LABOR STATISTICS

—Mary E. Spear—B.L.S.—

supposed to represent a miner; and the orange-
701 colored figure with the oil can in his hand, a transportation employee; and the green figures, employees in factories fabricating materials. The drawings at the bottom show what the laborer spent his money for. We make no attempt to show in what proportion he spent his money for these materials, although we have that. But we do not have it for these particular employees.

But it shows, for example, that labor buys food, housing, spent money for telephones, refrigerators, laundry, for clothing, for furnishings, for transportation, for recreation, and for medical care. And of course when he buys those things, it gives employment to people who are producing and selling those goods.

Whereupon Defendants' Exhibit No. 17 for identification was received in evidence as follows:

(Here follows photostat marked page 702.)

703 Whereupon chart similar to Defendants' Exhibit No. 17, predicated upon expenditure of one million dollars for the erection of power plants, was thereupon marked Defendants' Exhibit No. 18 for identification.

Defendants' Exhibit 18 is an attempt to reason from the particular to the general, in that if we had a million dollars to spend for the erection of power plants—we just took a million dollars, because it is a round figure, and you can multiply it by any number you want to, to get the total power-plant program: If those six plants are typical, this is what would happen if you spent a million dollars for the erection of power plants.

Whereupon Defendants' Exhibit 18 for identification was received in evidence over objection by counsel for plaintiffs and an exception noted.

(Here follows photostat marked page 704.)

705 This chart just assumes that if the proportions for any power plants of a similar nature, that you were to spend a million dollars for, followed the same lines as those six plants did, that the ratio of material and labor, on the expenditure of a million dollars, would follow the

same lines; for every million dollars spent for material and labor, there would be 1,482 man-months of labor created at the site, and 6,585 man-months of labor created in mining, transporting and fabricating the materials used in the construction of those plants. This indirect labor would be distributed to mining approximately 960 man-months; transportation, approximately 994 man-months, and to fabrication approximately 4,630 man-months. That is based on the man-months using the 30-hour week. The conclusion as to how many man-hours of labor are created by a specified amount of expenditure for materials is reached as follows:

When contractors send in their reports to us, they show the amount of money spent for each of the different types of materials. That was brought out in Defendants' Exhibit 15.

Now, there has been a great deal of talk about indirect labor. And many people wanted knowledge as to what happened when the Government was financing construction projects. And we have very accurate information regarding the labor created at the site, from the report of these contractors. We then wanted some information as to the effect of the Government's construction program, in mines and factories.

I will take this report as typical of what we did in the steel industry (indicating a paper). In order to get information regarding labor created in steel mills and, back of that, in mines, we went to representative steel concerns throughout the United States and found out just what happened when they manufactured a ton of steel. For example, we show that to manufacture a gross ton of pig iron, it creates labor, we shall say, in the Mesabi
706 Range or in the limonite and hematite mines in Alabama; and in mining this ore, the records of the Steel Company showed that on the average the amount of ore needed to create a gross ton of pig iron, provided 1.8 man-hours of employment.

In the coal mines, the coal needed to produce this gross ton of pig iron, provided 2.4 man-hours of employment.

The fluxing materials which were mined, such as limestone, which are mined in various parts of the United

States, and practically all over the United States, provided 0.2 of a man-hour.

In the transporting of that material, there are boats across the Lakes, hauling the ore from the Mesabi Range to the ore docks in various parts of the United States, and there are railroads that transport the iron ore from other parts, where they do not come across the Lakes; and the fluxing materials are transported by rail.

Most of these steel companies have records which show the amount of money spent and the man-hours of labor created.

We show that in transporting the iron ore needed to produce a gross ton of pig iron, that created 2 hours of employment; the transportation of the coal created 1.6 hours, the transportation of the fluxing materials created 0.5 of an hour.

Then the next process is putting that ore in the blast furnace. In blast furnace operations there were 2.3 man-hours created for every gross ton of pig iron produced.

Converting the coal into coke, the coke that is used in the blast furnace, taking an average of new ovens and the old bee-hive type, created 1.2 man-hours of labor.

I did not make similar studies of all of the various industries, but of the principal industries entering into the supplying of materials.

707 Cross examination

Defendants' Exhibits 13 and 14 show the depth of the durable goods depression to have been in March, 1933.

After March 15 the curve starts up and goes on up with fluctuations. The general trend was up.

Defendants' Exhibit 15 includes all purchases for PWA projects, either Federal or non-Federal, used in a construction project. They would not include purchases for desks in the Interior Building, but everything that is used on a construction project.

The proportion of money spent on labor at the site of the steam projects shown on Defendants' Exhibit 17 was almost the same as on the Diesel projects included. The labor at the site was less on the Diesel plants than it was on the steam; that is, the relationship.

The six power and light plants referred to in Exhibit 16 are the same ones that are referred to in Exhibit 17. On Exhibit 17 in each case the amount of total cost means the entire cost of the project to the city, and the amount of that total cost which came from PWA is also shown on Exhibit 17. And the figures shown on Exhibit 16, 529,262, are the total contract price made between the city and whoever built the plant. The ratio of labor on and off site is computed from the figures on Defendants' Exhibit 16.

On Defendants' Exhibit 17 labor on the site is $61,040 and expenditures off the site is put as $400,582. Those are the same figures which are shown on Exhibit 16.

This $400,582 is the amount of money spent for materials —not the amount of money spent for labor off the site. It is spent for materials, and the manufacture and transportation and mining of those materials created
708 380,000 man-hours of labor. But that does not mean that labor was paid all that money. There might have been other things. I have not shown anywhere the amount of money which was paid to labor off the site. On Defendants' Exhibit 16, in the middle of that page, I have ratio of labor, materials, profit and overhead costs. Labor on the site is shown as receiving 11.5 per cent of the contract price. But it would not be 11.5 percent of the total cost of the project. It would, apparently, be a good deal less from those figures on Defendants' Exhibit 17. I am the author of a study produced by the Bureau of Labor Statistics, United States Department of Labor, entitled "Relative cost of Material and Labor in PWA Construction" relating to building and water and sewerage construction. That was a study of the relative cost of labor off the site and of materials on P.W.A. projects which involved building and which involved water construction and sewerage construction. In that study I found that in P.W.A. building construction, labor on the job received 27 cents out of every dollar. That was an average figure. The lowest being 12 per cent on a machine job in California, and the highest 49 per cent on a school house in Kentucky. In water and sewerage construction on P.W.A. projects, I found that labor at the site there received 26.3 per cent of the total cost. Those percentages are comparable with my conclusions on the six electric projects, that labor at the

site received 11.5 per cent of the total cost. There was also a study called "Labor and Material Costs involved in the construction of a large apartment building", prepared under my direction as the Chief of the Division of Construction and Public Employment of the Bureau of Labor Statistics. In that study we found that labor at the site received 32.49 percent of the total cost of the project, and that that part of the labor which was engaged in grading and excavation received 43.76 per cent. The proportion of the total cost which goes to direct labor on road work would be higher than on the six P.W.A. elec-
709 tric projects. I think it would be higher on dams, too. My study on labor in the steel industry was the first study which the Bureau of Labor Statistics made on this subject. Before that study there was no reliable information. In that steel study, the Bureau of Labor Statistics stated that in the past there were no reliable criteria on this subject. That study was published by the Bureau of Labor Statistics in May, 1935. Subsequent to that, in the Monthly Labor Review for March, 1936, there was a similar study made in the cement industry. In the steel study, and in the cement study, we brought out the fact that the number of man-hours which might be involved in manufacturing may vary considerably with the process used by a particular company. In all these industries there may be considerable variation depending on what type of equipment a manufacturer had. Then in the cement study we pointed out that another variable came from the rate of operation. Whether the plant was operating at 20, 40, 60, 80 or 100 per cent; there might be a tremendous variation in cement. More man-hours are created roughly speaking, in a plant that is operating at a small proportion of its time, than in a plant that is operating near capacity. Then there is another variable which enters into this, and that depends not on the rate at which the plant is operating, but the total capacity of the plant. In other words, a large plant, in order to turn out a given quota of work, may employ less man-hours than a very small plant because they usually have better equipment, more up-to-date equipment. So all of these three items, variations due to manufacturing processes, variations due to rate of operation and variations due to plant capacity, introduce an unknown element

in any given situation. In any general study, all one can do is to take averages. There is one other variable due to the location of the plant. I do not mean to infer that that is because of geography. It is probably because of
710 - other conditions; but it remains that plants in some sections do create more labor than others.

In these particular studies which I made here of the six P.W.A. projects, I did not go to the particular plant that produced the steel or cement. We simply took a general average; we knew the rate of capacity at which steel mills generally were operating at that time, but not the rate at which those particular plants were operating. So that the most that I wish to say about this particular study is that I have applied general principles to it; the actual man-hours of indirect labor might vary from the figures shown on Defendants' Exhibit 17; the man-hours at the site would not vary. In addition to these studies of steel and cement, we are making studies in the machinery and lumber industries. They are not wholly completed yet. Conclusions drawn from them are subject to check. In addition we have a number of incomplete studies of others which are arrived at in a different manner from these other studies. That is, when a manufacturing concern gets an order that is financed from Federal funds we send him a form and ask him how much labor is created in his plant in manufacturing that order. So that our men have not actually gone out to take the cost records off the books. but we have his replies, and I have used those also. I cannot say that the employment either on the site or off the site, shown on Defendants' Exhibits 16 or 17 or 18, is employment of theretofore unemployed persons. We can say that that is the man-hours of labor created. I have seen, or read, economic theories which hold that all costs of everything go to labor sooner or later. It certainly is not my theory. I indicated on Defendants' Exhibit 17 that in addition to employment off site there is further employment from the purchase of materials illustrated at the bottom, such as food, clothing, etc. You would not have to let your imagination run particularly to say that the employment
711 created was far more than the amount spent on this project. You would if you said everything went to labor; but how does the entrepreneur pile up his surplus

in the bank. There has to be imagination in any work, any creative work; there must be imagination. There is not imagination in the part of this study that shows the direct and indirect labor. The part that is conveyed by those pictures at the bottom, yes.

In these various graphic presentations where we have the little figures representing man-hours, a man-month means four and one-half 30-hour weeks.

Redirect examination

Counsel on cross-examination referred to the variations due to separate plants. We did not take those into account in the calculations, because, as I say, we did not trace these materials back to any given plant. That would probably be impossible. Steel, of course, is the largest item—steel and machinery. But we did take into consideration the variation in general plant capacity as shown at the particular period in which the orders were placed. In making calculations on a large scale there is a tendency, I suppose, for variables to balance or offset each other to a certain extent. I think that is true. There is a tendency. I was interrogated on cross examination in reference to studies of labor costs on certain projects on which it appeared that the labor created at the site, represented a somewhat greater percentage of expenditure than on some of the projects here involved.

It is true that if the proportion of money spent for labor at the site was larger, the money spent for material must have been smaller. I can say there was more money spent for materials on the six electric projects which I studied. We have not traced back the materials to find out whether there was more indirect labor, but reason would in-
712 dicate that if you spent more money for materials, it would create more labor. I could not be absolutely definite, of course.

713 Whereupon there were received in evidence as defendants' exhibits 19 to 22, inclusive, certain Executive Orders of the President as follows:

Defendants' Exhibit 19.

ADMINISTRATION OF PUBLIC WORK

Pursuant to the authority of "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

FRANKLIN D. ROOSEVELT.

The White House
July 8, 1933.

Defendants' Exhibit 20.

Authorizing the Federal Emergency Administration of Public Works to Continue to Perform Functions under Title II of the National Industrial Recovery Act and to Perform Functions under the Emergency Relief Appropriation Act of 1935.

Pursuant to the authority vested in me by the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (Public Resolution No. 11, 74th Congress), I hereby authorize the Federal Emergency Administration of Public Works, under the Federal Emergency Administrator of Public Works:

(a) to continue after June 16, 1935, to perform all of the functions which it was authorized to perform prior to June 16, 1935, under Title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200);

(b) subject to the rules and regulations heretofore and hereafter prescribed by the President to carry out the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, to perform the following functions under said Act:

(1) make loans or grants, or both, for projects of states, territories, possessions, including subdivisions and agencies thereof, municipalities and the District of Co-
714 lumbia, and self-liquidating projects of public bodies thereof, where, in the determination of the

President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project;

(2) carry out projects for slum-clearance or low-cost housing, or both;

(c) to sell any securities acquired under Title II of the National Industrial Recovery Act, approved June 16, 1933, or under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and all moneys realized from such sales shall be available for the making of further loans under the said Title II of the National Industrial Recovery Act or the said Emergency Relief Appropriation Act of 1935, in the performance of the functions herein authorized.

To the extent necessary to carry out the provisions of this Executive Order, the Administrator is authorized to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

(Paragraph relating to personnel omitted.)

The unobligated balances on June 30, 1935, of allotments of funds made pursuant to Title II of the National Industrial Recovery Act, approved June 16, 1933, to departments and agencies of the Government which continue to exist after June 16, 1935, for the performance of functions of the Federal Emergency Administration of Public Works, are hereby reallocated for use by said departments and agencies, respectively, after June 30, 1935, for the purposes for which originally allocated thereto: Provided That upon completion of the project or work any unexpended balances of the aforesaid reallocations shall be reported by the departments or agencies concerned to the Secretary of the Treasury who will cause such balances to be placed to the credit of the appropriations from which said allotments were made.

FRANKLIN D. ROOSEVELT

The White House
June 7, 1935.

715 *Defendants' Exhibit 21.*

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

A. Delegation of Functions and Powers.

Pursuant to the authority vested in me by section 201(a) of the National Industrial Recovery Act, approved June 16, 1933, I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities, and tenure.

2. Under the conditions prescribed in section 203 of said Act, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act; upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

3. In deciding to extend any aid or grant to any State, county, or municipality, to consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof.

4. In his discretion, and under such terms as he may prescribe, to extend any of the benefits of Title II of said Act to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

B. Regulations.

Pursuant to the authority vested in me by section 209 of the National Industrial Recovery Act I hereby prescribe the following rules and regulations as necessary to carry out the purposes of Title II of said Act:

1. No convict labor shall be employed on any project constructed in whole or in part under the provisions of Title II of said Act. No materials manufactured or produced by convict labor shall be used on any such project.

2. No contractor or sub-contractor on any such project who is subject to a code adopted pursuant to Title I of said Act shall permit any employee to work in excess of the hours of labor prescribed in said code. No other contractor or sub-contractor shall permit any employee to work more than 30 hours in any one week, except by authority of the Administrator; provided that working time lost in any week because of inclement
716 weather or unavoidable delay may be worked within the succeeding 20 days; provided further, that in localities where a sufficient amount of labor is unavailable in the immediate vicinity of the project a maximum of 130 hours of labor in any calendar month may be authorized by the Administrator; provided further, that in localities so remote and inaccessible that employees must be housed in camps the Administrator may authorize labor not to exceed 8 hours in any one day and 40 hours in any one week.

3. No employee on any such project shall be paid less than a just and reasonable wage which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. All such wages shall be paid in lawful money of the United States, in the full amount earned by each individual at the time of payment, not less often than once each week, and without deduction on account of goods purchased, rent, or other obligations which obligations shall be subject to collection only by legal process.

4. Each contractor or sub-contractor on any such project shall post in a prominent and easily accessible place at the site of the work a legible statement of all wage rates paid.

5. Should it appear that any individual employed on any such project has been or is being paid less than hereinbe-

fore prescribed, the Administrator shall notify the employer of such individual to pay him all wages due according to the prescribed rate. Upon 10 days default on the part of such employer he shall be liable to the penalties provided in said Act for violation of these regulations.

6. Any violation of these rules and regulations may be notified by the Administrator to the District Attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for such violation.

FRANKLIN D. ROOSEVELT

The White House,
August 19, 1933.

Defendants' Exhibit 22.

DELEGATING CERTAIN FUNCTIONS AND POWERS TO THE FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the "Act"), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. In his discretion, and upon such terms and conditions as he may prescribe, to sell, assign, transfer, and deliver all securities or any part thereof purchased under the authority of section 203 of the said Act and of Title II of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, 48 Stat. 1021, and to apply the proceeds as prescribed by section 203 of the said Act and said Emergency Appropriation Act, fiscal year 1935.

2. To alter, amend, or waive any or all rules and
717 regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment

under the said section 209 shall become effective until approved by me.

FRANKLIN D. ROOSEVELT

The White House,
December 26, 1934.

Whereupon the Defendants Rested.

718 *Evidence for the Plaintiffs in Rebuttal.*

D. L. McDonald

was called as a witness on behalf of the plaintiffs, in rebuttal, and being first duly sworn, testified as follows:

Direct Examination

I live in Amarillo, Texas. My business is water development, water supplies developed from ground-waters or wells. I dig wells. I have put in wells for city water supplies, in the part of Texas where Plainview is situated—all over the Panhandle, in Pampa, Panhandle, Amarillo, Hereford, Clovis—that is in New Mexico—Lubbock, Floydada and Delia. Those are about all the towns in that section of the state that required water supplies. I have been in the business of developing water supplies for cities since 1910, and have put in wells for cities costing something in the neighborhood of $2,000,000.

In August, 1934, I made a bid to the Texas Utilities Company for a new well in Plainview, Texas. There was a drought in Texas in 1934 and the water supply in Plainview was running short. I don't know positively that mine was the lowest bid, but I imagine it was, because it was indicated that I was to do the work. It was a competitive bid. To dig a well in Plainview, Texas, which would be adequate for the city water supply would cost $14,760. That would be a gravel-wall well—a well of large diameter in which the casing is inserted and the space between the casing and the side of the hole is filled with washed, screened gravel. The gravel is used largely to hold formations in place which are inclined to cave or break down—either sand formations or soft clay or shale formations. The geological formation in this part of Texas is largely sand, sand that produces the water. If you just put a pipe down in the ground and begin to pump, those sand formations pump out and leave large

cavities, and very often cave, and you very often lose the well. So you put in gravel to hold the formations in
719 place and prevent cave, and also to control the sand formation.

I have prepared a statement showing the various items of cost in building a well adequate for the city water supply at Plainview, Texas.

Whereupon estimate of cost of construction of well at Plainview, Texas, was marked "Plaintiffs' Exhibit No. 271" and received in evidence.

Plaintiffs' Exhibit No. 271

Plainview, Texas

Cost of Construction of Well Equal to Present Texas Utility Company Water Supply Well

Transportation—Tools		$ 620.00
45 days—12 men @ $60.00 per day		2,700.00
60 ft. of 28" x 3/8" welded casing @ $12.00 a ft.		720.00
280 ft. of 16" byers pipe @ $6.50 a ft.		1,820.00
250 tons screened gravel @ $6.00 a ton		1,500.00
100 ft. Toncan iron strainer		1,723.60
Fuel—gas 45 days @ $10.00 a day		450.00
Tools—45 days @ $10.00 a day		450.00
1 6 Stage 14" L set of pump bowls	$ 568.40	
100 ft. pump column 10" x 3" x 1-11/16"	571.20	
1 100 h.p. 1800 R. P. M. 220—440 volts 60 cycles 3 phase motor with pump head	1786.40	
120' 10" suction pipe	268.80	
1 Green suction strainer	33.60	3,228.40
1 starting switch		128.00
pump base 6' x 6' x 12"		60.00
Developing well		600.00
Brick pump house and steel derrick		760.00
Total		$14,760.00

720 One of the wells at present in use in Plainview Texas is of the type, the cost of which is shown in Plaintiffs' Exhibit 271. The last well installed some six o

seven years ago is of that type. They have two other wells that are not. The wells which I have put in in other cities in this part of Texas are of the type shown on Exhibit 271. This type of well is used for city water supplies in that part of Texas on account of its dependability and efficiency. Nobody has ever lost one of them, and they produce water as long as there is any water in the formation.

I have examined the estimate for a well which was made by Mr. Holbrook showing various items totaling $5,000. That is the kind that is commonly used on a farm for irrigation. It consists principally of a hole cased with light casing and is not strong enough to stand the work of a municipal well. The casing is too light. If you get a cave it is likely to collapse it or break it, and when that happens you usually lose the pump. Ninety days would be quite a long period for pumping irrigation wells. The city water supply well is used continuously. If you use the type of well estimated on by Mr. Holbrook, you will likely lose it through a cave that would collapse the casing and probably lose the pump. That type of well is not used for water supply of a city on account of the danger of that happening. Nearly all cities use the gravel type of well. In my opinion, after the number of years I have spent in this business, the well estimated upon by Mr. Holbrook is not a safe and
721 adequate well for a city water supply. I would not consider it so.

The application of the City of Plainview, Texas, made to the Federal Emergency Administration of Public Works for a loan and grant of $100,000 to build wells in the city of Plainview, in exhibits A and B describes the farm or irrigation type of well. It is not the type of well that I regard as necessary for a city water supply. They have now two of those wells, of a similar type, with much heavier casings. These are 12-inch steel casings, and they do not have the strength to resist pressure from caving formation that you find in those fine water-bearing sand formations. The recent well which was built some years ago in Plainview is the gravel wall type. The well on which I was asked to estimate was to replace the earlier wells. In addition to the cities of this district using gravel wall wells, the railroad companies—I have installed a great many of those for the Santa Fe Railroad Company of the same type. Also for the

oil companies, and the Rock Island Railroad Company—in other words, the large users of water down there invariably use the gravel type of large diameter.

Cross Examination

The farm or irrigation type of well very often break down in process of development. If that happens you have to drill a new well. One difference is that the gravel wall type lasts longer than the farm or irrigation type; and then they are more efficient. Two of the wells now in use at Plainview are rather a cross between the farm or irrigation type and the type I have described, on account of the fact that the casing used is very much heavier than in the irrigation well. Other than the casing they are the same as the irrigation well, just a hole cased with pipe. There is a lot of difference between the cost of this heavier casing and the casing used in the ordinary farm or irrigation type of well. I think you can get 12-inch sheet steel casing for a couple of dollars a foot—200 feet of casing at two dollars a foot
722 would be $400—and the casing we use in this well that I bid on is Beyers wrought iron 16 inch. There is also a string of 28-inch casing used that is set from the surface of the water level. I don't know what the size of the pipe is in the two old wells in Plainview and of course I couldn't tell you the difference in cost. It would not be a very big item. The gravel wall well which I have described will produce a thousand gallons a minute, about a million and a half gallons per day. I think three wells of that type should be used in Plainview. If you used the farm or irrigation type of well, probably the same number would be needed. As far as the quantity of water is concerned, they produce the same amount. The type of well I describe is more efficient and more dependable.

723 *Plaintiffs' Exhibit 272*

Counsel for plaintiffs offered and there was received in evidence as Plaintiffs' Exhibit 272 a document dated January 15, 1936, signed "United States of America Federal Emergency Administrator of Public Works by Horatio B. Hackett, Assistant Administrator," in which it was recited that the United States agreed to aid in financing the construction of extensions and additions to a municipally owned

waterworks system in Plainview by making a loan to the City of $55,000 at 4% interest, and a grant of $45,000, the loan to be repaid $2,000 on November 1, in each of the years 1936 to 1940, inclusive, and $3,000 on November 1 in each of the years 1941 to 1955, inclusive.

Plaintiffs' Exhibit 273

Counsel for plaintiffs offered and there was received in evidence as Plaintiffs' Exhibit 273 "Application for Loan and Grant" of the City of Plainview to the Federal Emergency Administration of Public Works, for extensions and additions to an improvement of the water system of the City, attached to which were the following exhibits:

Exhibit "A"

This project will consist of three wells of about 1500 GPM capacity from which water will be pumped by 1500 GPM pumps, motor driven turbine, mounted on concrete bases and protected with brick pump house and steel derrick built integral.

This water will be delivered to a circular, covered, reinforced concrete, surface reservoir, having a capacity of 500,000 gallons from which it will be lifted by means of three 1500 GPM centrifugal motor driven service pumps to a 500,000 gallon steel tank on a 100′ tower and to the distribution system, which will consist of about 1725′ of 12″ cast iron pipe to Quincy St. where it ties into the present system and then 6050′ of 10″ cast iron pipe to Broadway and tie into the present system. There will be included in this project the taking up of 1500′ 8″ line, the taking up of 2250′ 6″ line, relaying 400′ 8″ line, and the relaying of 850′ 6″ line. This system will give fire protection to section of town, which is now penalized by the State Fire Insurance Commission and will give credits, so that Fire Insurance Rates can be reduced over the entire town. Fire Hydrants will be put one block apart and crosses will be put in on every block of line.

All service connections will be of copper and will be metered.

724 Exhibit "B"

Break Down of Cost.

3—1500 GPM wells and pumphouses complete...		$19000.00
3—1500 GPM Service pumps complete and pumphouse		4500.00
1—500,000 Gal. Tank and Tower 100′		30000.00
250—Cu. Yds. Conc. @ $15.00 for base of Elev. Tank		3750.00
1—500,000 Conc. Surface Reservoir		9350.00
1725′—12″ CI Pipe in place	@ $ 2.736—	4720.41
6050′—10″ CI Pipe " "	@ $ 2.168—	13117.96
400′ — 8″ CI Pipe relay	@ $ .5856	234.24
1580′— 8″ " " take up	.50	750.00
2250′— 6″ " " " "	.50	1125.00
850′ — 6″ " " relay	.555+	471.83
8.24 Tons CI Fittings	160.365+	1331.41
12—Hydrants	71.467	957.60
3 —12″ Valves & Boxes	89.95	269.85
10—10″ Valves & Boxes	71.82	718.20
3 — 8″ " "	40.283	120.85
15— 6″ " "	27.683	415.25
Contingencies		12000.00
		92043.00

Lee Schneitter was called as a witness on behalf
725 of the plaintiffs, in rebuttal, and being first duly sworn, testified as follows:

Direct Examination

I live in New York City, and am a Diesel engineer, a branch of mechanical engineering. I was graduated from the University of Missouri with the degree of Mechanical Engineering, in 1920. I have practiced mechanical engineering since that time, all of that time on Diesel engines. After leaving the University I was employed for six months at St. Louis, Missouri, with the DeBusse Diesel Engine Company; from 1920 to 1923 by the Texas Power & Light Company as operator of Diesel plants and maintenance engineer; then in Cuba as supervising engineer in charge of about 25 Diesel plants of the Cuban Electric Company;

in 1925 by the Electric Bond & Share Company, in New York, as Diesel engineer, supervising operation and maintenance of Diesel plants both in the domestic and foreign fields, in Cuba, Mexico, Argentina, Brazil, Ecuador and Colombia. At present I am consulting engineer for a large service company in New York City having clients with Diesel plants totaling about 120,000 horse power. I have had charge of the installation of Diesel plants in Texas, and am familiar with the operation of Diesel plants there. I am familiar with the Diesel engines proposed to be installed in Plainview, Texas, and with the expected life and the expected kilowatt hours generated by them. Useful or economic life means the period through which the engine will give active service and during which period we should charge off the cost of the equipment. A conservative or prudent period for a municipal plant would be a ten or twelve-year period, not exceeding at the maximum a 15-
year period. In an industrial plant the life would be
726 —the economic or useful life would be much less,
probably about five or six years. The factors which limit the useful life of a Diesel engine at the present time would be the cost of fuel; inadequacy; obsolescence; and the lower price of Diesels, improvements that are made from time to time, as those are factors which might in time cause an existing engine to become uneconomic. By cost of fuel, I mean the rising cost of fuel. By inadequacy I mean inability to generate the necessary kilowatt hours. In estimating the costs of maintenance on a plant that is not yet in operation, I have a number of records of plants that have operated for ten years or more; but the maintenance which I refer to now is running maintenance. It does not include any depreciation charges and would be figured on the material and labor required to keep all of the equipment in good running condition. For a plant of the size and with the load conditions as set down for the Plainview municipal plant, I estimate that the labor for maintenance will average 2,500 to 3,500 man-hours per year. Taking that at a cost of about 80 cents per man-hour we have a cost of $2,400 a year average for labor maintenance. Materials for the engines referred to will cost from $2,000 to $5,000 a year. Of course their maintenance is not a fixed amount in any one year. It varies. There will be periods

of years of high maintenance and others of mean or average maintenance. The materials I estimate at an average cost of $3,500 a year, making a total for materials and labor of $5,900. Maintenance is dependent on geographic location of an engine. It is different in one part of the country from what it is in another. The figures which I have estimated are based on conditions in Texas. The outstanding conditions in Texas which differ from other sections are high temperature conditions and sand storms.

Cross Examination

In answer to a question on direct examination about the useful life of a Diesel engine, I stated that a con-
727 servative estimate would be ten or twelve years in a municipal plant. By "municipal plant" I mean a plant either privately or publicly owned which is supplying electricity to a municipality. After the period of useful life I have referred to, the plant can still be used, but it cannot be used to as high a degree of efficiency as during its period of useful life. I do not mean to say that the plant just falls apart at the end of ten or twelve years. A progressive company would discard the old one and put in a new one. It is true that a great many privately-owned utility companies do operate Diesel engines for longer periods than 15 years. I know of very few that are operated as long as 20 or 21 years. They are not the principal operating units in the station. When they get to the age of 15 years, then they are relegated to stand-by service, and they get very little operation. They are really discarded, but probably maintained and kept for stand-by purposes. There are engines running that are 15 years of age; but there are few that are older than 15 years, that I know of. There may be special conditions where an engine might be continued in service after a 15-year period, but for safety and prudence one would charge off an engine that is 10 or 12 or 15 years old—not over a 15-years period at the maximum if you are a prudent operator. The life of the plants will vary from 8 years to 15 years, something like that. I stated that among the factors that go to end the useful life of a plant were fuel, inadequacy, obsolescence. By "obsolescence" I mean that there are new types of engines developed that should be used. And by "Inadequacy" I mean

that more current is being sold than can be supplied by the plant that is in use. If there were no improvement in the art during the next 15 years and if the proposed municipal plant in Plainview were adequate to supply the needs of the community at the end of that period, there might not
728 be any need then for a new Diesel plant; but I don't think we can assume that there is going to be no improvement in the art, because if we look back over the last ten years we will see a big improvement in Diesel engines. There will be improvements in the next ten years. I know engines being sold at the present time with a fuel consumption of about .4 of a pound per brake horsepower hour. There are developments going on in Europe and reports that the fuel consumption is as low as .33 of a pound of oil per brake horse-power hour. So there is research; there is more research going on in the Diesel field at the present time than there is in any other industry. In my estimate of expected life, I consider the wear on the engine as well as those factors I mentioned, and good engineering practice. If you follow a prudent course of writing off the plant equipment, a 15-year life would be a maximum period to assume.

N. T. Veach, Jr., a witness previously called and
729 sworn, was recalled in rebuttal and testified as follows:

Direct Examination

The first item on Plaintiffs' Exhibit 63 in which there was a difference between Mr. Harley's estimate and mine was the item of clerical help in the office. I have figured $2,400, and Mr. Harley's estimate was $1,600. It is customary in the smaller cities owning municipal utilities to have the city clerk's office handle the office end of the utility operation. In my estimate I assumed that the City of Plainview would follow the same practice, and that the only additional labor or help would be that of clerks, bookkeepers, storekeepers, and so forth. I figured that there would be at least three additional people needed, and that probably a budget of $2,400 would be sufficient to employ that help.

The next item in which there was a difference was for a solicitor of new business. It was my intention that this item might or might not be taken as representing the salary of any one person, but rather as the cost of soliciting new

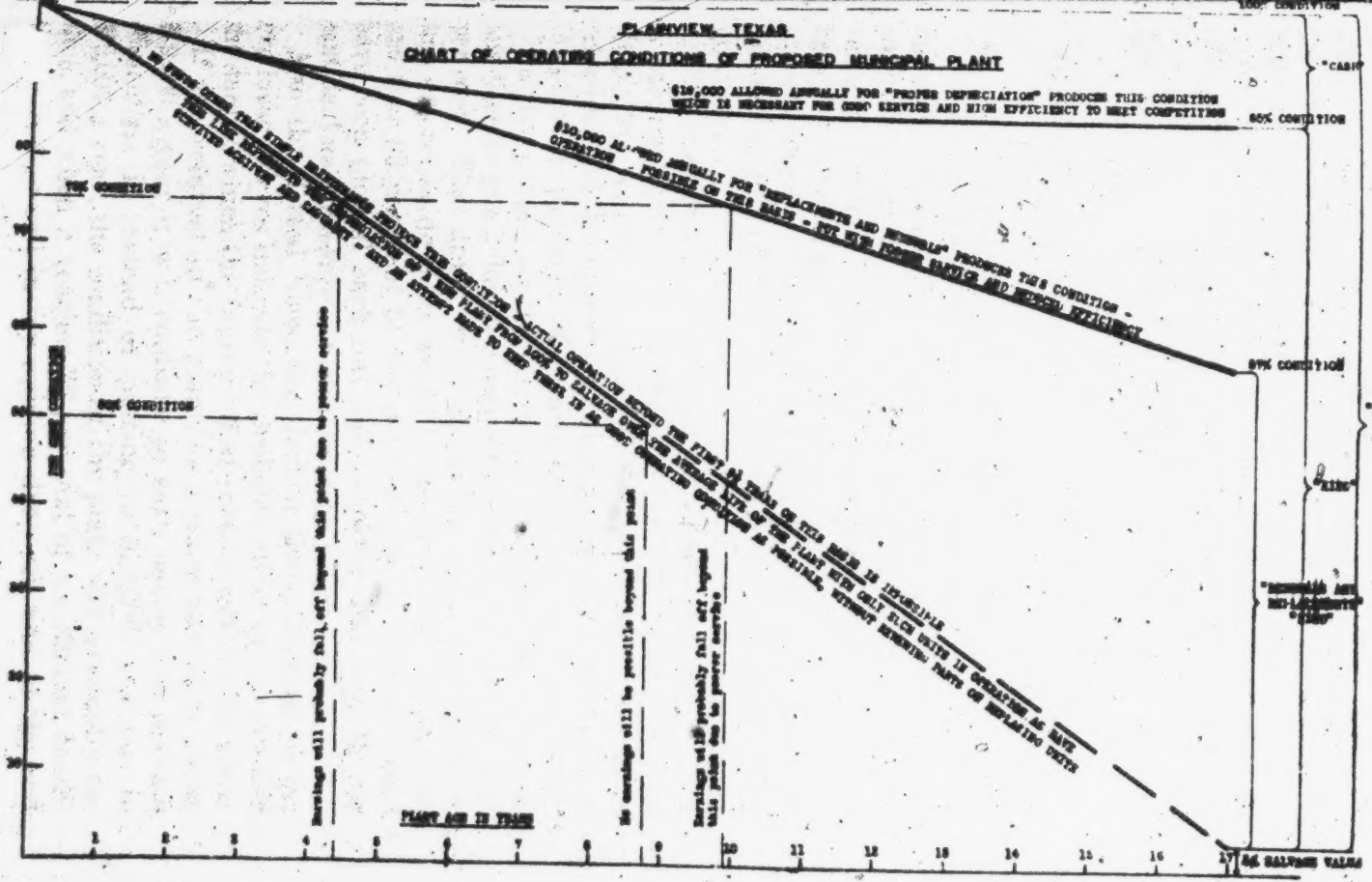
business. It seemed inconceivable to me that a plant competing with an active company giving good service could expect to get its share of the business without active solicitation. Therefore the estimate of $1,200.

The next difference is on line assistants. Mr. Harley said he had one lineman and one ground man. My estimate is based on two linemen at the salary paid linemen in that vicinity. It is my opinion that both of the men making up the crew should be capable of doing line duty. The amount was $2400, a hundred dollars a month apiece for each lineman. My estimate was based on going wages in Plainview.

On the plant maintenance item I have $5,100. Mr. Harley's estimate was $3,500. Mine was made up of
730 $2,400 for labor and $2,700 for material. On the basis of the probable output of the proposed plant at Plainview this represents a cost of 2.38 mills per kilowatt hour. This is checked by actual operating data taken from the company's plant at Plainview, which is a 1,600 kilowatt capacity plant as compared with 1,500 capacity as proposed by the city, and the records cover a seven year period. The per kilowatt hour costs of maintenance in this plant vary over that period from 3.83 mills per kilowatt hour, when the output was a little over two million kilowatt hours per year, to 1.04 mills when the out put had increased to about 8,000,000 kilowatt hours.

A study of these data indicates that a reasonable cost for the plant at Plainview as proposed by the city would be three and a half mills. That compares with the figure estimated by me which amounts to 2.38 mills per kilowatt hour. It is believed that my figure is conservative, to say the least.

Mr. Harley eliminated $1,000 from commercial expense. My total amount for commercial expense of $2,550 is on the basis of the probable number of customers at Plainview, which I have taken as 1,200. The total operating cost shown by my estimate is 3.67 cents per kilowatt hour. I think it is a reasonable operating cost. I have a number of data from plants that have regular running records available. The total cost according to my estimate per customer per year is $32.40 based on 1200 customers, exclusive of debt retirements. In my experience that is normal, and is less than comparable costs in plants operating under simi-


PLAINVIEW, TEXAS
CHART OF OPERATING CONDITIONS OF PROPOSED MUNICIPAL PLANT
$10,000 ALLOWED ANNUALLY FOR "PROPER DEPRECIATION" PRODUCES THIS CONDITION WHICH IS NECESSARY FOR GOOD SERVICE AND HIGH EFFICIENCY TO MEET COMPETITION
$10,000 ALLOWED ANNUALLY FOR "REPLACEMENTS AND REMOVALS" PRODUCES THIS CONDITION - OPERATION - POSSIBLE ON THIS BASIS - BUT WITH POORER SERVICE AND REDUCED EFFICIENCY
100% CONDITION
"CASH"
65% CONDITION
87% CONDITION
"PROPER DEPRECIATION"
"RISK"
"REMOVALS AND REPLACEMENTS"
"SEED"
70% CONDITION
80% CONDITION
Earnings will probably fall off beyond this point due to poorer service
No earnings will be possible beyond this point
Earnings will probably fall off beyond this point due to poorer service
PLANT AGE IN YEARS
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
5% SALVAGE VALUE

lar conditions. I have prepared in graphic form an explanation of the effect upon the earnings of the plant of the various items of depreciation, renewals and repairs, and ordinary maintenance.

Whereupon a chart prepared by the witness showing the effect upon earnings of various items of depreciation, renewals, repairs and ordinary maintenance, was
731 marked "Plaintiffs' Exhibit No. 274" and received in evidence.

(Here follows photostat marked page 731.)

732 In the first place, the vertical scale shown on the left hand side with the sheet held flat, that is, with the long dimension horizontal, represents the percent condition ranging from zero to 100 per cent. The scale along the botom is the age of the plant in years. The three heavy lines ranging from the upper left hand corner to the three points on the right hand side represent at any time during the life of the plant the physical condition of the property.

With respect to the three plans shown graphically, one is running maintenance; the other a plan where a fund simply to take care of replacements and renewals would be set aside, and the upper one being the physical condition of the plant on the basis of setting aside proper depreciation.

To give proper service the plant should not be allowed at any time to get below a composite physical condition of 85 per cent. That upper curve shows that if proper depreciation was set aside there would be cash equal to 100 per cent and that 85 per cent of the depreciation accretions would have been plowed back into the property and only 15 per cent held as a reserve for emergencies.

Also the dotted lines, the dashed lines, leading to the two lower curves indicate the probable effect on service and the date at which the falling off of service would take place.

If you reinvest in the plant, as I claim should be done, $19,000 a year it will continue to earn money and operate efficiently. If instead of putting in $19,000, you put in $10,000 a year, the condition of the plant will gradually decline, and when it reaches 75 per cent of its efficient condition, earnings will in my opinion drop off, and at the end

of the period it will end up at 57 per cent efficiency. If you did not expend the $19,000 or the $10,000, but just had ordinary maintenance, the condition of the plant would be represented by the third black line, and at the end
733 of four and a half years it would reach 75 per cent of efficiency, and earnings would then begin to drop off. And in eight and three-quarter years it would reach 50 per cent efficiency, and it could no longer operate and give good service. As a matter of fact, such condition is impossible because there would be certain elements of the plant that would be wiped out. It is an impossible situation.

Cross Examination

There might be less clerical help needed for the electrical plant and the municipally-owned water system if they were operated together, from one office. I base my estimate on the knowledge that in city-owned plants the clerk's office would handle both the water and the light business. My estimate was based on combined operation.

Q. To bring about that increase of $800, you have an item of $1,800 for soliciting new business. Do you think it is good practice to spend $1,800 to bring about an increase business of $800? A. The soliciting of new business not only will work to get new business but to hold business. A solicitor is a business representative who tries to hold customers and add new customers and have those already on, use more electricity.

I can't speak as to the figures on Plaintiffs' Exhibit 72. I only know that in general in these competing situations it is dog eat dog, a continual fight to keep business on the side of either the private company or the municipal plant, and that either one of them without some money spent for holding the present business and adding new business would not do so well.

Plaintiffs' Exhibit 274 showed that at the end of the loan period, if you set aside $19,000 for depreciation each year the value of the property in cash and kind would be equal to the original cost. I testified that the original cost of plant was $400,000.00. This chart, Plaintiffs' Exhibit 274, applied entirely to the physical plant, and the situa-

734 tion shown there must exist regardless of what is done with bonds or deficits or anything else, if you are going to keep the plant operating properly.

Thereupon **Donald A. Henry** was called as a wit-
735 ness on behalf of the plaintiffs in rebuttal and, having been first duly sworn, was examined and testified as follows:

Direct Examination

In my opinion, the estimates of gross revenues as shown on Defendants' Exhibits 7 and 8 are incorrect for two reasons. In the first place, the starting point is not right, and in the second place the method of calculation was wrong.

Mr. Harley testified that he started with an average revenue in 1935 of, as nearly as I can make out, about somewhere between 4.4 cents a kilowatt-hour and 4.7 cents a kilowatt hour. As an actual fact the revenue collected by Texas Utilities Company, divided in the manner he testified it should be divided, would have produced an average revenue per kilowatt hour for the portion of the business going to the municipality, under his assumptions, of 3.92 cents at the first year, or 1935. In other words, on Mr. Harley's own premises his figures are wrong. The record also shows that his revenue at the fourteenth year is figured on a basis of 4 cents per kilowatt-hour, which is higher than Texas Utilities Company collected in 1935. Thus, it would indicate a higher rate in the year 1950 than we actually have in effect now.

Mr. Harley testified that he had reduced the rate from 4.4 cents in the fourth year, I believe, to 4 cents; whereas, as I say, it should have started at 3.92 cents, and if it were reduced at all, it should be below that at the end of the period.

I do not think it is reasonable to expect that a plant would operate static for 15 years with the same personnel or with the personnel performing equal tasks, during which time the load would increase by the amount shown by Mr. Harley, and not incur additional expenses for labor.

Mr. Harley criticized the item of insurance, which he said went up in my figures, although the value of property went down. The item of insurance included by me is

736 the total of insurance for public liability and property damage, workmen's compensation, and fire and tornado insurance.

It will be noted that on Exhibit 70 I have made certain increases in pay roll over the periods covered there. Workmen's compensation and public liability insurance is based on a rate per $100 of pay roll, so that it naturally increases when pay roll increases. As a matter of fact, in the fourteenth year, as shown on Plaintiffs' Exhibit 70, the total insurance is made up of fire and tornado, $966, as against $1,160 in the first base year.

The amount of money included there for workmen's compensation and public liability and property damage in the fourteenth year is $1,284, based on exactly the same rates per $100 of pay roll as the base year, which shows $920. The sum total of those two charges slightly increases over the period.

Mr. Harley also not only had the item for uncollectible accounts remaining constant for 15 years but reduced to about 40 per cent of the amount which I have shown. He stated that my figure was practically 7 per cent of the gross revenue. That is exactly what it was intended to be, and that is a figure which is shown from experience, where there are two competing plants. The uncollectible accounts under those conditions are tremendously higher than they are where you have one plant. There are very good reasons for that, which might take a while to go into, and I shall not do it unless you want me to. A customer stays as long as he can on one plant without paying the bill, and then he goes to the other.

Cross Examination

In computing my figure of gross revenues for the City plant for the first operating year, I did not include as revenue the cost of pumping water. If the City were to obtain the revenue from pumping, that would not increase my figures for gross revenue by an amount between $11,000
737 and $12,000 per year, because the present revenue which the Texas Utilities Company gets by reason of water pumping is not for the electric current with which that water is pumped, but it is a payment for the water plus the maintenance and depreciation on the equipment

and wells which the Texas Utilities Company owns, plus the cost of current, and the current is somewhere around 40 per cent of that total, I should say, just roughly. I am not testifying as to the terms of any contract, because I don't know what they are; but I do know what the Texas Utilities Company furnishes to the City of Plainview. They furnish them with water; they do not furnish electric current for pumping. I am sure of that. We have meters on them, and the water is measured.

In Defendants' Exhibit 5 which you show me I find what indicates that the company is selling water instead of charging for pumping. That is exactly what it says. It says: "5 cents per 1,000 gallons for the first 15 million gallons of water delivered to the City per month at the present pumping site."

I do not assume that the company would continue to get its revenue from pumping throughout the long period of gross revenue in your figures. I did not include any revenue from pumping for any year in the estimate of probable earnings of the city plant which I prepared, Plaintiffs' Exhibit 72. I did not assume that the Texas Utilities Company would continue to get the revenue from pumping even after the present contract expired. I assumed that the City would not get the revenue from pumping. If it were true that the City did get the revenue from pumping during this entire loan period, I would not have to increase your figures on gross revenues substantially. The cost of supplying that service would be, I think, slightly more than is now paid Texas Utilities, and there would not be a dollar left. In fact, there would be an additional deficit if the City took over that pumping. On my figures the Com-
738 pany is not now losing money. The company can furnish that service cheaper than the city ever can.

If the city plant were to procure 60 per cent of the domestic business instead of 50 per cent, as I testified on a previous occasion, that would increase the revenues by about $5,600. I do not know what the uncollectible accounts of Texas Utilities Company in Plainview are at the present time. I could have gotten those figures, but they would not have done me any good in this situation. I made no effort to get them; but I looked into the competing situation where we have competing plants. I couldn't tell you

how old the present plant in Plainview is. I don't know anything about the physical plant down there. I have never checked into that. I do know, in a general way, that the last engine was put in there in about 1929, I think; I am not certain.

The Diesel plant in Plainview at the present time is used for stand-by service only. The city of Plainview gets its electricity from a high line. I am not familiar with the division of business between the municipal and the privately-owned plants in the city of Seattle. I have known what that is, but I can't remember the figures now. I have not had occasion to refer to them. I have not examined the Seattle figures for some time. The privately-owned plant in Seattle is owned by the Engineers Public Service Company, which is entirely a separate concern, although a subsidiary of Stone & Webster, Incorporated, separate from the one in which I work. I think it is true that the City of Seattle is one of the two large cities in the country where privately-owned plants and municipally-owned plants operate side by side in competition. When I was preparing my figures as to the division of business between privately-owned plants and municipally-owned plants where they compete, I did not give any consideration to the division of business in the City of Seattle. I do not know
739 whether it is a fact that in Seattle the municipal plant gets 60 per cent of the total domestic business and the private plant 40 per cent. I know that it varies from time to time. There is no fixed point about any of that. When I testified to the division of business, the statement made was that averaged over a long period of years, with approximately equal rates, you would find equal division of revenues. Conditions differ in various parts of the country and they vary from year to year.

Thereupon **N. T. Veatch, Jr.** was recalled as a wit-
740 ness for and on behalf of the plaintiffs in rebuttal and, having been previously duly sworn, testified further as follows:

Direct Examination—resumed

I have prepared a schedule entitled "Cost of Construction and Operation of Water Supply to Replace that owned

by Texas Utilities Company". The first figure on this schedule, $14,760, was taken from Mr. McDonald's testimony. The second figure was taken from the application of the City of Plainview to PWA. The remaining figures are based on my own knowledge and experience and knowledge of the general site and location of supply. The figures are correct, to the best of my knowledge and experience.

Whereupon a table entitled "Plainview, Texas; Cost of Construction and Operation of Water Supply to Replace that owned by Texas Utilities Company" was marked "Plaintiffs' Exhibit 275" and was received in evidence.

Plaintiffs' Exhibit 275—In Evidence

Plainview, Texas

Cost of Construction and Operation of Water Supply to Replace That Owned by Texas Utilities Company

Cost of Construction

3 Wells @ $14,760	$44,280
Pipe lines to present distribution system	17,838
Collecting pipe lines	1,500
Electrical Substation	5,000
Electrical Transmission and Distribution lines	2,000
Total cost of construction	$70,618

Cost of Operation

Electric current from proposed municipal electric plant	$4,655
Maintenance	500
Depreciation @ 1½% per year	1,060
Amortization and debt service	5,195
Total cost of operation	$11,410

741 Cross Examination

On Exhibit 275 there is an item of Amortization and Debt Service, $5,195. That is on the total cost represented above, $70,618. The depreciation at 1½ per cent per year, $1,060, is on the total cost. In arriving at the item of $4,655 for electric current from proposed municipal electric plant,

I had the amount of current used by the company in pumping in the year 1935, and I used the cost of production according to my estimates of the proposed plant in Plainview. I assumed that the current would be sold by the electric department to the water department of Plainview at production cost. I did not get the figure of $11,410 based upon the present contract rate between the City and the Company. That is my estimate of what the cost to the City would be if they put in their own water supply.

Be it further remembered that the foregoing con-
742 tains the substance of all the evidence given at the hearing of the above-entitled causes, and in order that the same may be made of record this Statement of Evidence is duly stated, approved, signed and ordered to be made of record in the above-entitled causes and in each of them this 15th day of August, 1936.

By the Court.

ALFRED A. WHEAT,
Chief Justice.

743 In the District Court of the United States
For the District of Columbia.

Holding an Equity Court.

Filed Aug 14 1936 Charles E. Stewart, Clerk

Equity No. 58927

TEXAS UTILITIES COMPANY,

v.

HAROLD L. ICKES, ET AL.

Equity No. 59071

ALABAMA POWER COMPANY,

v.

HAROLD L. ICKES, ET AL.

Equity No. 59671

ALABAMA POWER COMPANY,

v.

HAROLD L. ICKES, ET AL.

Equity No. 60245

IOWA CITY LIGHT AND POWER COMPANY,

v.

HAROLD L. ICKES, ET AL.

Stipulation

It is hereby stipulated and agreed between the parties to the above entitled causes, by their respective counsel, that the foregoing statement of evidence is a true, full, correct, and complete statement of all the evidence taken and given on the trial of these cases.

August 14, 1936.

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Special Attorney.

Counsel for Defendants.

744 Endorsed on cover: District Court of the United States District of Columbia. No. 6579. Texas Utilities, a corporation organized and existing under the laws of the State of Texas, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. No. 6580. Alabama Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. No. 6583. Alabama Power Company, a corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. United States Court of Appeals for the District of Columbia. Filed Aug. 18, 1936. Moncure Burke, Clerk.

FILE COPY

FILED
MAY 26 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. ~~1024~~, ~~1026~~ 84-86 and ——

ALABAMA POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

ALABAMA POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

IOWA CITY LIGHT AND POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

	Page
PETITION FOR WRITS OF CERTIORARI.....	1
Opinions Below	2
Jurisdiction	2
Specification of Errors to be Urged and Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writs	11
APPENDIX	
I. Pertinent Sections of the National Industrial Recovery Act	24
II. Executive Order of the President, July 8, 1933..	29
III. Executive Order of the President, August 19, 1933	30
IV. Pertinent Sections of the Emergency Relief Appropriation Act of 1935	32
V. Executive Order of the President, June 7, 1935.	39
VI. Executive Order of the President, Sept. 21, 1935	41
CASES CITED	
Angle v. Chicago, St. Paul, M. & O. R. Co., 151 U. S. 1	14
Arkansas-Missouri Power Co. v. City of Kennett, 78 F. (2d) 911	15
Ashton v. Cameron County, 298 U. S. 513.....	6
Ashwander v. Tennessee Valley Authority, 297 U. S. 288	17
Benton v. Pratt, 2 Wend. 386	14
Cincinnati Soap Co. v. United States, U. S. Sup. Ct., May 3, 1937	20
Citizens Electric Illuminating Co. v. Lackawanna and Wyoming Valley Power Co., 255 Pa. 145.....	15
City of Campbell v. Arkansas-Missouri Power Co., 55 F. (2d) 560	15

Page

City of Denton v. Denton Home Ice Co., 27 S. W. 2nd 119 (Tex.) 21
Cole v. La Grange, 113 U. S. 1..... 23
Colorado Central Power Co. v. Municipal Power Development Co., 1 F. Supp. 961 15
Deon v. Kirby Lumber Co., 162 La. 671 14
Dodge v. Mission Tp., 107 Fed. 827..... 23
Duke Power Co. v. Greenwood County, 298 U. S. 651, 299 U. S. 259 .....11, 20
Frothingham v. Mellon, 262 U. S. 447 .....12, 13
Gallardo v. Porto Rico Ry. L. & P. Co., 18 F. (2d) 918 15
Gibson v. Fidelity & Casualty Co., 232 Ill. 49..... 14
Green v. Frazier, 253 U. S. 233..... 21
Greenwood County v. Duke Power Co., [redacted] F. (2d) 986 .....13, 14
Helvering v. Davis, U. S. Sup. Ct. May 24, 1937.... 22
Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229 13
Ho Ah Kow v. Nunan, 12 Fed. Cas. No. 6546..... 16
Iowa Southern Utilities Co. v. Cassill, 69 F. (2d) 703 15
Jones v. Portland, 245 U. S. 217..... 21
Kansas G. & E. Co. v. City of Independence, 79 F. (2d) 32 15
Loan Association v. Topeka, 20 Wall. 655 23
Lowell v. Boston, 111 Mass. 454 23
Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239 23
Miles Planting Co. v. Carlisle, 5 App. D. C. 138..... 23
Mississippi Power Co. v. City of Starkville, 4 F. Supp. 833 15
Oklahoma Utilities Co. v. City of Hominy, 2 F. Supp. 849 15
Panama Refining Co. v. Ryan, 293 U. S. 388.....18, 19
Parkersburg v. Brown, 106 U. S. 487..... 23
Railroad Co. v. Ellerman, 105 U. S. 166..... 16
Rice v. Manley, 66 N. Y. 82 14
Schechter Poultry Corp. v. United States, 295 U. S. 495 .....18, 19
South Carolina v. United States, 199 U. S. 437.... 21
Standard Oil Co. v. City of Lincoln, 275 U. S. 504.. 21

Page

Steward Machine Co. v. Davis, U. S. Sup. Ct., May 24, 1937 22
Tasker v. Stanley, 153 Mass. 148 14
Township of Franklin v. Tugwell, 85 F. (2d) 208.... 20
Tuttle v. Buck, 107 Minn. 145 15
United States v. Butler, 297 U. S. 1..... 20
United States v. California, 297 U. S. 175..... 21
United States v. Certain Lands in Louisville, 78 F. (2d) 684, 296 U. S. 567, and 297 U. S. 726..... 20
United States v. Dern, 63 App. D. C. 28, 68 F. (2d) 773 16
U. S. Fidelity & G. Co. v. Millonas, 206 Ala. 147.... 14

STATUTES CITED

Title II National Industrial Recovery Act, 3, 11, 18, 19, 20, 22
Emergency Relief Appropriation Act of 1935, 3, 5, 7, 17, 19, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. ——, —— and ——

ALABAMA POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

ALABAMA POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

IOWA CITY LIGHT AND POWER COMPANY, *Petitioner,*

vs.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents,*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Alabama Power Company and Iowa City Light and Power Company, pray that writs of certiorari issue to review the judgment of the United States Court of

Appeals for the District of Columbia in the two cases of *Alabama Power Company* v. *Ickes, et al.*, (Docket Nos. 6580 and 6583), and the case of *Iowa City Light and Power Co.* v. *Ickes, et al.*, (Docket No. 6865), entered on May 10, 1937, affirming the judgment of the District Court of the United States for the District of Columbia.

OPINIONS BELOW.

Neither the opinion of the District Court (R. Vol. I, 437) nor that of the Court of Appeals (R. Vol. II, 1279) has yet been reported.

JURISDICTION.

The judgments of the Court of Appeals were entered May 10, 1937 (R. Vol. II, 1286-7). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

SPECIFICATION OF ERRORS TO BE URGED AND QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in holding that a public utility cannot question the legality of the action of federal officials who are about to destroy its business by promoting and financing, as Federal Public Works Projects, municipal plants which are intended to and which will duplicate and supplant its facilities and business.

2. Whether the Court of Appeals erred in failing to hold that the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), and Title II of the National Industrial Recovery Act (48 Stat. 200) do not authorize gifts and loans of federal moneys to municipalities for the construction of local electric distribution systems as Federal Public Works Projects, in the circumstances disclosed in this record.

3. Whether the Court of Appeals erred in failing to hold that the Emergency Relief Appropriation Act of 1935 (49

Stat. 115), and Title II of the National Industrial Recovery Act (48 Stat. 200), if construed to authorize gifts and loans of federal moneys to municipalities for the construction of local electric distribution systems as Federal Public Works Projects, in the circumstances disclosed in this record, are unconstitutional, because:

(a) They delegate legislative power to the executive.

(b) The gifts and loans are not authorized by the General Welfare clause of the Constitution or by any other clause thereof.

(c) The gifts and loans will have the necessary effect of extending federal control over and regulating matters reserved to the States or the People by the Tenth Amendment.

(d) The gifts and loans will have the direct and necessary effect of destroying the balance established by the Constitution between the Federal Government and the States.

STATUTES INVOLVED.

The statutes involved are Title II of the National Industrial Recovery Act, printed *infra*, p. 24 and the Emergency Relief Appropriation Act of 1935, printed *infra* p. 32.

STATEMENT.[1]

Petitioner, Alabama Power Company, generates and distributes electricity, wholly within the State of Alabama. (R. Vol. II, 24, 25.) It operates distribution systems in six

[1]The following statement of facts is in accord with the great weight of the evidence. No effort has been made to indicate wherein it is in accord with and wherein it goes beyond the findings of fact of the trial court, for the reason that the Court of Appeals, in reaching its decision, accepted the petitioners' version of the facts, (R. Vol. II, 1279, 1280-1281), without inquiry as to what facts the trial court had or had not found or as to whether its findings or failures to find—as to which error was assigned—were warranted by the record.

towns in northwestern Alabama. In four of these towns petitioner has non-exclusive unexpired franchises. (R. Vol. II, 16-20.) In the other two its franchises expired in 1932, but it still operates there with the towns' consent. (R. Vol. II, 15, 16.) Petitioner is the only agency distributing or presently equipped to distribute electricity in these six towns. (R. Vol. I, 448, R. Vol. II, 20.) Petitioner's properties in the towns have a value of slightly less than $1,000,000. (R. Vol. II, 90.) Its rates are regulated by the Alabama Public Service Commission. (R. Vol. II, 20.)

Petitioner, Iowa City Light and Power Company, generates and distributes electricity wholly within Johnson County, Iowa, serving Iowa City and adjacent territory. (R. Vol. II, 299, 300.) Petitioner's franchise in Iowa City expired in 1934, but petitioner has continued, with the consent of the City government, to supply electricity to the municipality and to private users. (R. Vol. II, 295, 301.) Petitioner's electric plant and distribution system serving Iowa City has a value of about $1,375,000. (R. Vol. II, 301) Its rates are regulated by the City Council. (R. Vol. II, 297.)

The respondent officials of the Federal Emergency Administration of Public Works (PWA) have entered into a contract with each of the six Alabama towns, providing for the construction in it, as a "Federal Public Works Project", of a municipal electric distribution system. These towns will obtain their electricity from the Tennessee Valley Authority. The systems are to be built entirely with federal funds, of which part is to be an outright gift, the remainder being repayable only out of the earnings of the system. (R. Vol. I, 259-278, 297-333, 378-436.) The amounts of the loans and grants to the Alabama towns and the authority under which the Administrator purports to act are given below:

City	*Loan*	*Grant*	*Statute*
Decatur	$250,000	$100,000	Title II, N. I. R. A.
Sheffield	178,000	52,000	" " "
Tuscumbia	100,000	30,000	" " "
Hartselle	33,000	27,000	Emergency Relief Appropriation Act, 1935
Guntersville	48,000	39,272	Emergency Relief Appropriation Act, 1935
Russellville	69,000	56,454	Emergency Relief Appropriation Act, 1935

The contract between the respondents and Iowa City is for a grant only, of $413,000 (45 per cent of the estimated cost of construction) and a power plant is to be built as well as a distribution system. (R., Iowa City, 114-131.) This project is said to derive its authorization from the Emergency Relief Appropriation Act of 1935.

The contracts between PWA and the cities not only provide that the projects shall be known as Federal Public Works Project but cover every detail of the construction work, just as though the work were being done for the United States Government. The plans and specifications must be approved by the Administrator. The method of letting the construction contracts is prescribed; performance bonds and liability insurance are required; the construction contracts must provide for a 30-hour week, minimum wages, employment preferences, collective bargaining, use of human labor in lieu of machinery when possible; the provisions of the "Kick-back" Statute must be incorporated; reports must be made to numerous government bureaus, etc., etc. (R. Vol. I, 262, 264, 266-278.)

If the contemplated projects are carried out, the business of the petitioners in the seven towns will be wholly destroyed. The elimination of the petitioners is essential to the financing of the projects. Sheffield and Tuscumbia will remove the petitioner's distribution systems from the streets as a nuisance as soon as the municipal system is completed, and so represented to the Administrator. (R.

Vol. II, 122, 123.) Iowa City will adopt the same course. (R. Vol. II, 302.) The other towns, in their applications to PWA, said: "The distribution system is intended to practically duplicate and supplant a public utility distribution system . . . The project will not be competitive since practically all of the consumers are signed up for a ten year period." (R. Vol. II, 109, 110, 111, 126-127.) PWA reached the same conclusion, and, in computing the financial soundness of the projects, assumed that the petitioner would be immediately eliminated. (R. Vol. II, 347, 349.)

Construction of the distribution systems will be directly caused by the Administrator. The stated purpose of the Public Works program was to cause construction which would not otherwise take place. PWA officially declared that "the public grants are given to induce public bodies to undertake construction of useful works . . ." (R. Vol. II, 401.) To this end the offer of grants and revenue loans was given wide publicity. (R. Vol. II, 420, 535-6.) And the financial condition of the towns was such that they could not have undertaken these projects save with federal funds. (R. Vol. II, 34, 47, 70, 78.) This situation was general. See *Ashton* v. *Cameron County*, 298 U. S. 513, 533.

Legal Authority of the Administrator. The authority of the Administrator must be found, if at all, in the statutes, printed in the Appendix, *infra*, p. 24, and discussed *infra*, pp. 18 to 22, and in the administrative procedure had thereunder.

The action taken by the President with regard to these projects is contained in documents described on pages 338-361 of Volume II of the Record. It may be summarized as follows: Lists, called "books", of "Non-Federal Projects Which Are Deemed Desirable," were presented by the Administrator to the President. These contained an index giving the location, type of project, and amount of loan and grant of each project. These amounts were totaled at the end of the index. Following the index was a brief description of the construction proposed in each project. At the

end of the index appeared in pencil the letters, "O. K. F. D. R."

Attached to the list including the Iowa City project was a letter from the President to the Secretary of the Treasury (R. Vol. II, 345), and to the list including the projects in Hartselle, Guntersville and Russellville, a letter to the Secretary of the Interior (id. 355) which contained the following (substantially similar in both letters):

> "Pursuant to the Emergency Relief Appropriation Act of 1935, I hereby:
>
> "I. Approve the projects included in the program of public works set forth in the annexed 'Schedule A', as to each of which I find and determine that not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular project."

It is agreed on the Record (R. Vol. II, 338-9) that the documents mentioned above represent all the orders and findings of the President, Administrator or any officials having authority to make ultimate determinations in regard to these projects.

The applications of the towns were made to field officers of PWA. They were forwarded with reports to Washington where they were further examined by an Engineering Division, a Finance Division, a Legal Division, and, for a time, by an Electric Power Board of Review, later by a Power Division. From time to time a list was made of those projects which were approved by the divisions mentioned. This list was then submitted to the Administrator and for a time to an advisory body known as the Special Board for Public Works. The list was then presented to the President for his approval as stated above. (R. Vol. II, 314, 315.)

The Petitioners subpoenaed the reports or recommendations of the Examining Divisions in order to establish that criteria for approval of projects not authorized by the stat-

utes were employed, but, with the exception of one report voluntarily produced (R. Vol. II, 346), the trial judge ruled that they were immaterial and need not be produced. (R. Vol. II, 350-1.)

However, the evidence in the record establishes that the standard or criterion applied in approving these projects was not the relief of unemployment—in fact, there is no evidence that there was any contemporaneous investigation or finding as to any effect of these projects upon unemployment—but was, in the Alabama cases, the furnishing of a market for T. V. A. power, and, in all cases, the establishment of yardsticks to measure and reduce rates for electric energy produced and sold wholly within a state.

The list submitted by the Administrator to and approved by the President containing the Decatur project, the largest of the six, recited that the project was recommended "for the reason, among others, that the Tennessee Valley Authority has acquired the necessary transmission lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its electrical energy." (R. Vol. II, 343-4.) The original contracts between the Administrator and the towns (since cancelled) conditioned the loans and grants upon the towns making contracts with T. V. A. to take its power and to charge rates prescribed by it. (R. Vol. II, 20-21.) Although all the applications were made between August 30, 1933 (R. Vol. II, 120), and December 20, 1933 (Vol. I, 454-457; R. Vol. II, 115, 120, 156), and the first approvals by the President were in November, 1933 (id. 339), no contracts with the towns were made until December 6, 1934, and no steps to advance funds were taken until just prior to the institution of these suits in July, 1935. This delay was occasioned, and it was so stated by the Administrator, by negotiations undertaken by T. V. A. to acquire the Company's distribution systems in the towns. (R. Vol. II, 136-139, 142-3, 476.)

The Electric Power Board of Review (a division in the Public Works Administration) which reviewed and approved these projects considered principally "social desirability", in accordance with rules prescribed by the President. (R. Vol. II, 373.) Its members "did not place a great deal of importance on employment as bearing on social desirability. Primarily, the employment was more or less limited on municipal (electric) projects as compared with a great many of the others, and the class of employment was too technical to become selected from the local unemployment situation. The people who had to be employed on a municipal electric project were such skilled labor that they could not be found in most communities. The number of people employed on those projects as a type was considerably less than on other projects. The board found the principal element of social desirability in municipal electric projects in the difference in the cost of service to the consumers. If the cost of service to the consumers was lower from the project than they were obtaining under the existing conditions, it was considered very desirable from a social standpoint. That means, if the rates suggested in the application were lower than the existing rates." (R. Vol. II, 252.)

In his testimony in this case the Administrator said much the same thing. (R. Vol. II, 516.)

> "Dealing specifically with an application for a duplicating and competing municipal power project, there might be several elements of social desirability which governed the action and decision of PWA. You might put the municipality in the position of being able to supply current to its citizens at a lower rate. It certainly gave employment in constructing and in operating the plant, and it might have the effect of removing from the municipality the heavy, and in some cases the corrupting, hand of a public utility. All those were criteria which were proper to be considered by PWA in determining the social desirability of an application for a loan and grant for competing municipal

projects. I think, in a general way, they were considered."

Proceedings below. Petitioners filed these bills in the United States District Court for the District of Columbia to enjoin the respondents from making the allotments under the contracts between PWA and the seven towns, or from paying to these towns any funds whatsoever for the construction of electric systems. These causes were selected by counsel from more than forty similar cases for trial upon the facts. After such trial the trial judge dismissed each of the bills upon the merits, holding that the petitioners had a standing to present and have adjudicated the question of the legal authority for the threatened acts of the respondents but that their acts were authorized by statute and that the statutes so construed were constitutional. (R. Vol. I 472.) The Court of Appeals affirmed, without inquiring into the legal authority for the threatened acts, on the ground that the petitioners had no standing to question their validity.

The majority of the Court of Appeals held that the petitioners were without standing to question the legal authority for the Administrator's acts, because, they said, the thing which will affect the petitioners is the competition of the municipal plants and that is lawful. As is pointed out below, it is not competition which affects the petitioners but their elimination and the supplanting of their facilities—in three of the towns by order to remove their facilities, and in the others by the action of the towns in securing all their customers for ten years by contract in order to assure the Administrator that the revenue loans will be repaid. But, however that may be, the opinion of the Court is apparently based upon the legal proposition that no one, no matter how seriously injured, can question the legal authority of a public official whose acts cause the injury, provided its impact upon the plaintiff comes from the intervening legal act of a third party. Such damage,

the Court says, is *damnum absque injuria*, not merely as against the person acting lawfully, but also as against the official acting, according to the plaintiff, unlawfully. Therefore, the legality of the official's conduct cannot be examined.

REASONS FOR GRANTING THE WRITS.

In *Duke Power Company* v. *Greenwood County*, 298 U. S. 651, this Court granted certiorari to review the decision of the Fourth Circuit Court of Appeals in a suit brought by a public utility company to enjoin a similar loan and grant by the Administrator, allegedly under Title II of the National Industrial Recovery Act. The Circuit Court of Appeals had held there, as here, that the petitioner had no standing to question the legality of the Administrator's acts, but went on, nevertheless to consider that question and to decide, as did the trial court in these cases, in favor of the legality of the action threatened. In fact, the *Duke Power Company* case was the principal authority relied upon by both courts in these cases, the trial court, however, rejecting its conclusion as to the petitioners' standing to raise the constitutional and statutory questions. The *Duke* case, if it had been decided on the merits, by this Court, would have disposed of these cases, but it was sent back, *per curiam*, for a new trial because of irregularities in practice appearing on the record, 299 U. S. 259. The questions which it presented still remain undecided by this Court.

In the petition for certiorari in the *Duke Power Company* case, filed April 17, 1936, this Court was told that there were pending in the lower federal courts approximately thirty other suits involving federal loans and grants for power projects. Petition, p. 23. On February 27, 1937, the Assistant Administrator of PWA reported to the Senate that there were at that time 53 such suits pending against the Administrator. (75th Congress, 1st Session, Senate Document No. 27.) Approximately the same number of suits are pending at the present time. These suits

effect public utilities all over the United States, and it is of the greatest importance to these utilities and their stockholders that the questions presented in these cases be authoritatively and finally determined by this Court.

While the propriety of granting certiorari to determine these questions is thus clear, the following statement of reasons is made for the convenience of this Court:

1. The Court of Appeals in holding that petitioners have no cause of action against the Administrator for injunctive relief, even though the statute under which he purports to act be unconstitutional or his acts unauthorized by law and even though the destruction of their businesses will necessarily result from and is contemplated by the projects which he has authorized and which he will finance, has decided a question which is both one of general importance and one relating to the application of the Constitution and laws of the United States which has not been but should be decided by this Court.

In *Frothingham* v. *Mellon*, 262 U. S. 447, 488, this Court said that the legality of expenditures of federal funds might be questioned by a party

> "able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

In the present case the Administrator has authorized, for purposes which he claims are authorized by law, the construction, as Federal Public Works Projects, with funds which he will advance and in a manner which he prescribes, of facilities which are intended to supplant the petitioners', and which must do so if the loans contemplated are to be repaid. It is this action of his, in causing the construction for alleged federal purposes and with federal funds, which threatens the petitioners' business with destruction. Every citizen has a right to be free from unlawful and unauthor-

ized action of public officials which contemplates and must result in the destruction of his particular property. Every official owes a duty to refrain from such illegal and injurious actions. If he fails to observe that duty the courts are open to the citizen to prevent the wrong. The dissenting Circuit Judge in the *Duke Power Company* case stated the proper application of the *Frothingham* case in this way:

> "The power company has such an interest in the business as to justify its suit. The practical effect upon its valuable property interests is manifest. It has an interest far more weighty than that of a federal taxpayer, which in *Frothingham* v. *Mellon*, 262 U. S. 447, was held to be too remote, uncertain, and insignificant to entitle him to injunctive relief against an invalid federal appropriation. The plaintiffs here conform to the rule laid down in that case since they show not only that the act of the administrator was invalid, but that they are in danger of sustaining a direct and substantial injury therefrom." *Greenwood County* v. *Duke Power Company*, 81 F. (2d) 986, 1001, 1002.

The fact that the impact of the injury upon the petitioners will be produced by the action of the towns—in three cases by ordering the removal of petitioners' facilities, and in the other three by causing such removal because all of its customers have been bound by contract to the proposed plants for ten years—does not render the Administrator immune from petitioners' suit. The fact remains that he is the proximate and moving cause of the injury which they will suffer solely because of his unlawful acts in authorizing and financing with gifts and revenue loans, the repayment of which contemplates and requires the total elimination of petitioner from the towns, these particular Federal Public Works projects. It is well settled that where one without warrant or justification in law, induces and enables another to inflict injury on a third party, the wrongdoer is liable even though the intervening party may act within his legal rights. *Hitchman Coal & Coke Company* v. *Mitchell*,

245 U. S. 229, 251-252; *Tasker* v. *Stanley*, 153 Mass. 148; *Deon* v. *Kirby Lumber Co.*, 162 La. 671; *U. S. Fidelity & G. Co.* v. *Millonas*, 206 Ala. 147; *Gibson* v. *Fidelity and Casualty Co.*, 232 Ill. 49; *Rice* v. *Manley*, 66 N. Y. 82; *Benton* v. *Pratt*, 2 Wend. 386; compare *Angle* v. *Chicago, St. Paul M. & O. R. Co.*, 151 U. S. 1, 12-13, 22, 23.

The Administrator argued in the Court of Appeals and also in the *Duke Power Company* case—and the Court of Appeals seems to adopt the argument—that what the petitioners really complain of is future competition which will result from the operation of the Federal Public Works projects authorized and financed by the Administrator; that the operation of these plants by the towns will be lawful; and that, therefore, the petitioners cannot complain that the operation was brought about by acts of the Administrator, a public official, even though these acts are without authority or justification in law. It is said that the public official owes no duty to the petitioners not to cause this injury to them. This argument is unsound both in its premise and its conclusion. It involves a most fundamental question of law, vital to the protection of the constitutional rights of citizens which this Court should decide.

In the first place, the short answer to the argument has already been given. It is not competition by the towns which threatens petitioners' businesses. It is total elimination. Three of the towns will upon the completion of the projects order the removal of petitioner's facilities from their limits. The other three have already secured all petitioners' costomers by ten-year contracts. There will be no competition in the six towns. The Federal Public Works projects will be there alone.

Moreover, it is not the law that even if petitioners were permitted to remain to secure some crumbs of business they could not challenge the legality of the Administrator's acts in authorizing and financing the construction of plants in such a way as to insure and require irreparable injury to them. The Administrator's argument rests upon the

assertion that because the petitioners cannot complain of competing operation by the towns, no one including the Administrator owes them any duty to refrain from unlawful conduct which directly causes such operation. This is not the law.

Even though operation by the towns were lawful, both the towns and persons contracting with them could still be enjoined by the petitioners from violating any law in the construction or the financing of the plants. *City of Campbell* v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560; *Oklahoma Utilities Co.* v. *City of Hominy*, 2 F. Supp. 849; *Iowa Southern Utilities Co.* v. *Cassill*, 69 F. (2d) 703; *Gallardo* v. *Porto Rico Ry. L. & P Co.*, 18 F. (2d) 918; *Colorado Central Power Co.* v. *Municipal Power Development Co.*, 1 F. Supp. 961; *Mississippi Power Co.* v. *City of Starkville*, 4 F. Supp. 833; *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F. (2d) 911; *Kansas G. & E. Co.* v. *City of Independence*, 79 F. (2d) 32. Thus the argument that the petitioners have no standing to complain if the operation of the plants by towns is lawful falls to the ground. The petitioners can complain, regardless of the lawfulness of the operation, if the acts which cause it are in violation of law. The Administrator owes the petitioners a duty not to cause petitioners injury by acts done beyond and without authority in law. If he breaches that duty, it avails him nothing that the impact of the injury comes from operation of the plants by third parties which may be lawful. It is the unlawfulness of his acts and not of the towns' acts of which petitioners complain. This doctrine has long been applied in such cases as have arisen—and they are necessarily few—where a defendant unlawfully injures a plaintiff through the competition of a third person. *Citizens Electric Illuminating Co.* v. *Lackawanna Etc. Co.*, 225 Pa. 145; *Tuttle* v. *Buck*, 107 Minn. 145. This is not a suit to enjoin competition by the towns. They will be as free after as before any decree entered herein to engage in it. This is

a suit to enjoin the unlawful acts of the Administrator which cause the injury to petitioners and which breach the duty which he owes them.

Railroad Co. v. *Ellerman,* 105 U. S. 166, cited by the Court of Appeals, has no bearing upon this question. That was a suit by Ellerman, the operator of a wharf to enjoin the lessee of the Railroad Company from operating a wharf in competition with him. The Railroad was a corporation, the powers of which included that of acquiring and using wharves for *railroad purposes.* Ellerman's claim, this Court said, came down to the contention that the defendant's operation of the wharf infringed Ellerman's rights because the lease was beyond the corporate powers of the Railroad Company. But, this Court answered, only a stockholder or the State could raise the question of *ultra vires* under these circumstances; Ellerman had no interest in it. The corporation owed him no duty which it had not performed. The case is only one of many which hold that only the State, stockholders and, in some instances, creditors may question the violation of powers contained in a corporate charter. It has no applicability here. The petitioners here have a right—and the respondent owes a corresponding duty—that their businesses shall not be destroyed by unlawful acts of the respondent in authorizing and financing Public Works projects intended to eliminate and supersede their facilities.

It is obviously beside the point to discuss cases like *United States* v. *Dern,* 63 App. D. C. 28, 68 F. (2d) 773, where the consequences to the plaintiff of the conduct complained of were indirect and remote. To argue that the petitioners' injury comes from the action of the towns and is the consequential and indirect result only of the Administrator's acts, is to ask this Court to forget Justice Field's admonition in *Ho Ah Kow* v. *Nunan,* 12 Fed. Cas. No. 6,546, at 255:

> ". . . we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness,

and forbidden to know as judges what we see as men . . ."

It is the subsidized construction of these plants as Federal Public Works projects which destroys the petitioners' property. Without this unwarranted and unlawful interference, they would never be threatened with the necessity of removing and scrapping their facilities because of the wasteful and subsidized duplication of the systems. The apparent result of the Court of Appeals decision is that although the petitioners might challenge the legal authority of the Administrator if he should attempt to construct these Federal Public Works projects directly (compare, *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288), they may not challenge it if he authorizes the towns to construct them for the same purposes, with the same funds, and with the same injury to the petitioners. Such a result, we submit, is hardly consistent with the orderly administration of government or the adequate protection of constitutional or legal rights. The result is to create an area in which a government official can destroy the property of other persons with impunity, regardless of the legality or constitutionality of his act. This startling situation arises because the injured parties are denied a right to come into court to test the substantive question. A constitutional right without a remedy to enforce it is nugatory. The Administrator, by acting through the municipalities, will have placed himself beyond the reach of the law and above the Constitution. Clearly at a time when federal funds are used increasingly throug' local governments, government owned corporations, and other agencies to finance projects which directly impinge upon the businesses of citizens, this Court should determine whether or not a citizen specially injured by such a threatened expenditure can question the authority of the federal official authorizing and directing it.

2. These cases present the important question, not hitherto decided by this Court, whether the Emergency Re-

lief Appropriation Act of 1935, in its application as disclosed in this record, and Title II of the National Industrial Recovery Act, to the extent, if any, that it is made applicable to the facts here disclosed by Section 12 of the former Act, constitute an unconstitutional delegation of legislative power from the Congress to the President, within the principles enunciated by this Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495.

The relief appropriation of 1935 provides that "in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated . . . to be used in the discretion and under the direction of the President" four billion, eight hundred and eighty million dollars. It is further provided that, except as the President may use any or all of this amount for direct relief (p. 33, *infra*) or for financing the purchase of farm lands by farmer, tenants or laborers (p. 35, *infra*) or for the administration of the Agricultural Adjustment Act, (p. 35, *infra*), the appropriation shall be available for a list of classes of projects in amounts not exceeding specified sums. One such item is:

> "(g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000."

Under authority sought to be given him in the act, the President increased the amount named from $900,000,000 to $1,700,000,000, p. 41, *infra.*

The President's power to make loans and grants under Title II of NIRA was limited by section 201 (d) to June 16, 1935. Any further authority under that Act must come

from Section 12 of the 1935 Act. That section is obscure but its proper interpretation seems to be that the power of the *President* to make grants under the earlier Act was not extended and that his power to make loans was limited to the proceeds of the revolving fund created by the sale of obligations of borrowers. The proposed loans to Sheffield and Tuscumbia are not from this fund but from earmarked allotments of the original appropriation.

However this may be, Title II appropriated three billion dollars. The Administrator was directed to "prepare a comprehensive program of public works, which shall include among other things," "(c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public." "With a view to increasing employment quickly" the President was authorized to construct or finance any Public Works project included in the comprehensive program and to make a gift to any State or public body not exceeding 30% of the cost of labor and materials.

No comprehensive program was ever prepared. The only program of any sort was the several lists presented to the President, *supra* p. 6, authorizing projects. R. Vol. II, 514-15.

It is plain that under these two acts the President was given a total of just under eight billion dollars, with no guide whatever as to what he should do with it except to spend it. The words in NIRA, "with a view to increasing employment quickly", are a mere repetition of the expression, "to reduce and relieve unemployment", contained in Declaration of Policy, which this Court described in the *Schechter* case, *supra* (p. 537) as "such a preface of generalities as to permissible aims as we find in section 1 of Title I."

It is at once apparent that if the principles announced by this Court in the *Panama* and *Schechter* cases, which declared unconstitutional Title I of NIRA, are applied to Title II of the same act and to the Emergency Relief Ap-

propriation Act of 1935, these acts also are invalid. The Court of Appeals for the District of Columbia in *Township of Franklin* v. *Tugwell*, 85 F. (2nd) 208, held that these principles were applicable and that the provisions of Section 1 of the Act of 1935 there involved were unconstitutional. The Circuit Court of Appeals for the Sixth Circuit indicated, without deciding, that it held the same view of Title II of NIRA, in *United States* v. *Certain Lands in Louisville*, 78 F. (2nd) 684, 685. Certiorari was granted to review the decision in this case (296 U. S. 567), but dismissed upon motion of the petitioner, the Government (297 U. S. 726).

In other recent cases the question of the extent to which Congress may delegate its power to determine how, when, for what purposes and upon what objects funds of the Government shall be spent has been brought before this Court. The question was briefed and argued in the *Duke Power Company case, supra,* and in *United States* v. *Butler*, 297 U. S. 1. But in neither case did this Court find it necessary to decide the question.

This question was touched upon but not decided by this Court in *Cincinnati Soap Company* v. *United States*, U. S. Sup. Ct., May 3, 1937. That case involved a payment of Federal funds to the Philippine Islands. There was no attempt to indicate how the government of the Islands was to use the funds, but this Court upheld the payment in view of the Islands' semi-independent status. It can hardly be doubted that if the President or the Administrator had stood in the place of the Philippine Islands the act would have been unconstitutional. It is unnecessary to argue the transcendent importance of the question of delegation of power to determine the use of federal funds, or the propriety of its review by this Court.

The question is squarely presented by the record in these cases. These statutes, in both the size of the sums appropriated and their astounding vagueness as to where, when, how, and for what the moneys are to be used are utterly un-

like anything heretofore known. Eight billion dollars was to be spent on any conceivable project which the President and his advisors might choose, except the construction of naval vessels in excess of the London Naval Treaty of 1930. Nor did the term "projects of States" and municipalities provide any guide as to what should be done through these agencies. Such projects may include everything from trimming shrubbery, tick eradication and indexing books (See Monthly Report of Federal Emergency Relief Administration, December 31, 1933, reporting on Expenditures of PWA funds, page 18) to the whole gamut of business and industry. For instance, States and their political subdivisions have owned and operated gasoline filling stations, *Standard Oil Company* v. *City of Lincoln*, 275 U. S. 504; ice plants, *City of Denton* v. *Denton Home Ice Co.*, 27 S. W. (2d) 119 (Tex.); railroads, *United States* v. *California*, 297 U. S. 175; liquor stores, *South Carolina* v. *United States*, 199 U. S. 437; warehouses, grain elevators, flour mills, real estate developments, and banks, *Green* v. *Frazier*, 253 U. S. 233; coal, wood and fuel yards, *Jones* v. *Portland*, 245 U. S. 217. The situation is summed up in a report sent by the President to Congress with his message of February 3, 1937:

> "The definition of public works has been expanded. Public work now includes the collection of basic data, mapping and preparation of plans. The term also covers a variety of services such as forestry, pest control, soil conservation, housing and rural electrification.
> "The list has been further expanded in the efforts of the Works Progress Administration to provide useful work for persons on relief *in accordance with principles established by the President.*" (Italics ours.)

There could be no plainer statement that the President was free to spend these vast sums as he, in his discretion, thought best and that any guiding principles which were

given his agents were evolved by him and not by the Congress.

Furthermore, even if it be argued that the words "with a view to increasing employment quickly" furnished some guide to the Executive, the record here discloses that there was no administrative procedure, by way of findings or otherwise, to show that the so-called standard or guide was followed in these cases, that these projects had any bearing upon the relief of unemployment, or even that any unemployment existed in the areas here involved, or in the industries which would furnish the materials for the projects. It does not even appear that any investigation was ever made on this subject. Clearly neither the Congress, nor the Comptroller General, nor the people of the United States can ever tell whether or not the money has been spent as provided by law. For the so-called law lays down no guide, and the President has made no record of the considerations which moved him to make the expenditure.

3. These cases present the important question, not hitherto decided by this Court, whether the General Welfare clause of the Constitution, in view of the limitation upon the federal spending power contained in the Tenth Amendment and in the dual sovereignty of the States and the Federal Government authorizes the Federal Government to give and lend its funds to municipalities for the construction of local electric distribution systems which are to be destructive of existing privately owned systems.

While this Court has held that expenditures to relieve unemployment are for the general welfare, *Steward Machine Co.* v. *Davis,* U. S. Sup. Ct., May 24, 1937, it has also stated that "the line must still be drawn between one welfare and another, between particular and general," *Helvering* v. *Davis,* U. S. Sup. Ct., May 24, 1937. The present cases present the question, not whether the expenditures fall within "a penumbra where discretion is at large," but whether an expenditure for an object admittedly local and particular can become general or national because of pos-

sible remote or collateral results not supported by administrative findings of fact. It is well settled that the collateral or consequential results of expenditures will not save their legality if the immediate object is unauthorized. Compare *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 251-252; *Dodge* v. *Mission* Tp., 107 Fed. 827, 830; *Lowell* v. *Boston*, 111 Mass. 454, 461; *Miles Planting Co.* v. *Carlisle*, 5 App. D. C. 138, 158. All the more is this true here where the immediate object of the expenditure is not merely unauthorized, but is the performance of a state function, the creation of local publicly operated utilities as yardsticks for the regulation of local electricity rates.

In its memorandum replying to the petition for certiorari in the Duke case the Government agreed that the question of validity of the loan and grant, if properly presented, was of public importance meriting review by this Court.

For these reasons, it is respectfully submitted that the petitions for certiorari should be granted.

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APPENDIX.

I.

NATIONAL INDUSTRIAL RECOVERY ACT:

[PUBLIC—No. 67—73d CONGRESS]

AN ACT

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INDUSTRIAL RECOVERY

DECLARATION OF POLICY

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

* * * * *

TITLE II—PUBLIC WORKS AND CONSTRUCTION PROJECTS

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

SECTION 201. (a) To effectuate the purposes of this title, the President is hereby authorized to create a Federal

Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the "Administrator"), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint.

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

(d) After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended, the President shall not make any further loans or grants or enter upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate: *Provided,* That he may issue funds to a borrower under this title prior to January 23, 1939, under the terms of any agreement, or any commitment to bid upon or purchase bonds, entered into with such borrower prior to the date of termination, under this section, of the power of the President to make loans.

SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings; and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed; *Provided,* That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and/or the limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft and technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or motorization of such Army

tactical units as he may designate: *Provided, however,* That in the event of an international agreement for the further limitation of armament to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part, any such naval or military construction or mechanization and motorization of Army units; *Provided further,* That this title shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such architect is the contracting and/or executive officer.

SEC. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grant to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase; *Provided,* That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; (4) to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; and (5) to advance, upon request of the Commission having jurisdiction of the project, the unappropriated balance of the sum authorized for carrying out the provisions of the Act entitled "An Act to provide for the construction and equipment of an annex to the Library of Congress", approved June 13, 1930 (46 Stat. 583); such advance to be expended under the direction of such Commission and in accordance with such Act; *Provided,* That in

deciding to extend any aid or grant hereunder to any State, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several States, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

* * * *

(d) The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

* * * *

SEC. 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed; *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be

used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

* * * *

ISSUE OF SECURITIES AND SINKING FUND

SEC. 210. (a) The Secretary of the Treasury is authorized to borrow, from time to time, under the Second Liberty Bond Act, as amended, such amounts as may be necessary to meet the expenditures authorized by this Act, or to refund any obligations previously issued under this section, and to issue therefor bonds, notes, certificates of indebtedness, or Treasury bills of the United States.

* * * *

APPROPRIATION

SEC. 220. For the purposes of this Act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000.

II.

EXECUTIVE ORDER OF THE PRESIDENT, JULY 8, 1933

ADMINISTRATION OF PUBLIC WORKS

Pursuant to the authority of "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

FRANKLIN D. ROOSEVELT.

The White House
July 8, 1933.

III.

EXECUTIVE ORDER OF THE PRESIDENT, AUG. 19, 1933

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

A. DELEGATION OF FUNCTIONS AND POWERS.

Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities, and tenure.

2. Under the conditions prescribed in section 203 of said Act, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act; upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

3. In deciding to extend any aid or grant to any State, county, or municipality, to consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof.

4. In his discretion, and under such terms as he may prescribe, to extend any of the benefits of Title II of said Act to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

B. REGULATIONS.

Pursuant to the authority vested in me by section 209 of the National Industrial Recovery Act I hereby prescribe the following rules and regulations as necessary to carry out the purposes of Title II of said Act:

1. No convict labor shall be employed on any project constructed in whole or in part under the provisions of Title II of said Act. No materials manufactured or produced by convict labor shall be used on any such project.

2. No contractor or sub-contractor on any such project who is subject to a code adopted pursuant to Title I of said Act shall permit any employee to work in excess of the hours of labor prescribed in said code. No other contractor or sub-contractor shall permit any employee to work more than 30 hours in any one week, except by authority of the Administrator; *provided* that working time lost in any week because of inclement weather or unavoidable delay may be worked within the succeeding 20 days; *provided further,* that in localities where a sufficient amount of labor is unavailable in the immediate vicinity of the project a maximum of 130 hours of labor in any calendar month may be authorized by the Administrator; *provided further,* that in localities so remote and inaccessible that employees must be housed in camps the Administrator may authorize labor not to exceed 8 hours in any one day and 40 hours in any one week.

3. No employee on any such project shall be paid less than a just and reasonable wage which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. All such wages shall be paid in lawful money of the United States, in the full amount earned by each individual at the time of payment, not less often than once each week, and without deduction on account of goods purchased, rent, or other obligations which obligations shall be subject to collection only by legal process.

4. Each contractor or sub-contractor on any such project shall post in a prominent and easily accessible place at the site of the work a legible statement of all wage rates paid.

5. Should it appear that any individual employed on any such project has been or is being paid less than hereinbefore prescribed, the Administrator shall notify the employer of such individual to pay him all wages due accord-

ing to the prescribed rate. Upon 10 days default on the part of such employer he shall be liable to the penalties provided in said Act for violation of these regulations.

6. Any violation of these rules and regulations may be notified by the Administrator to the District Attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for such violation.

FRANKLIN D. ROOSEVELT.

The White House,
August 19, 1933.

IV.

EMERGENCY RELIEF APPROPRIATION ACT OF 1935.

[PUBLIC RESOLUTION—No. 11—74TH CONGRESS]

[H. J. Res. 117]

JOINT RESOLUTION

Making appropriations for relief purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be used in the discretion and under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of $4,000,000,000, together with the separate funds established for particular areas by proclamation of the President pursuant to section 15 (f) of the Agricultural Adjustment Act (but any amounts thereof shall be available for use only for the area for which the fund was established); not exceeding $500,000,000 in the aggregate of any savings or unexpended balances in funds of the Reconstruction Finance Corporation; and not exceeding a total of $380,000,000 of such unexpended balances as the President may determine are not required for the purposes for which authorized, of the following appropriation, namely: The appropriation of $3,300,000,000 for national industrial recovery contained in the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (48 Stat. 974); the appropriation of $950,000,000

for emergency relief and civil works contained in the Act approved February 15, 1934 (48 Stat. 351); the appropriation of $899,675,000 for emergency relief and public works, and the appropriation of $525,000,000 to meet the emergency and necessity for relief in stricken agricultural areas, contained in the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (48 Stat. 1055); and any remainder of the unobligated moneys referred to in section 4 of the Act approved March 31, 1933 (48 Stat. 22); *Provided*, That except as to such part of the appropriation made herein as the President may deem necessary for continuing relief as authorized under the Federal Emergency Relief Act of 1933, as amended, or for restoring to the Federal Emergency Administration of Public Works any sums which after December 28, 1934, were, by order of the President impounded or transferred to the Federal Emergency Relief Administration from appropriations heretofore made available to such Federal Emergency Administration of Public Works (which restoration is hereby authorized), this appropriation shall be available for the following classes of projects, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: (a) Highways, roads, streets, and grade-crossing elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation, $500,000,000; (c) rural electrification, $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000; *Provided further*, That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or more of the foregoing limitations if he

finds it necessary to do so in order to effectuate the purpose of this joint resolution; *Provided, further,* That no part of the appropriation made by this joint resolution shall be expended for munitions, warships, or military or naval material; but this proviso shall not be construed to prevent the use of such appropriation for new buildings, reconstruction of buildings and other improvements in military or naval reservations, posts, forts, camps, cemeteries, or fortified areas, or for projects for nonmilitary or nonnaval purposes in such places.

Except as hereinafter provided, all sums allocated from the appropriation made herein for the construction of public highways and other related projects (except within or adjacent to national forests, national parks, national parkways, or other Federal reservations) shall be apportioned by the Secretary of Agriculture in the manner provided by section 204 (b) of the National Industrial Recovery Act for expenditure by the State highway departments under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of the Act of June 18, 1934 (48 Stat. 993); *Provided,* That any amounts allocated from the apppropriation made herein for the elimination of existing hazards to life at railroad grade crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing stuctures, and the relocation of highways to eliminate grade crossings, shall be apportioned by the Secretary of Agriculture to the several States (including the Territory of Hawaii and the District of Columbia), one-half on population as shown by the latest decennial census, one-fourth on the mileage of the Federal-aid highway system as determined by the Secretary of Agriculture, and one-fourth on the railroad mileage as determined by the Interstate Commerce Commission, to be expended by the State highway department under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of such Act of June 18, 1934 (48 Stat. 993); but no part of the funds apportioned to any State or Territory under this joint resolution for public highways and grade crossings need be matched by the State or Territory; *And provided further,* That the President may also allot funds made available by

this joint resolution for the construction, repair, and improvement of public highways in Alaska, Puerto Rico, and the Virgin Islands, and money allocated under this joint resolution to relief agencies may be expended by such agencies for the construction and improvement of roads and streets; *Provided, however,* That the expenditure of funds from the appropriation made herein for the construction of public highways and other related projects shall be subject to such rules and regulations as the President may prescribe for carrying out this paragraph and preference in the employment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief, where they are qualified, and the President is hereby authorized to predetermine for each State the hours of work and the rates of wages to be paid to skilled, intermediate, and unskilled labor engaged in such construction therein: *Provided further,* That rivers and harbors projects, reclamation projects (except the drilling of wells, development of springs and subsurface waters), and public buildings projects undertaken pursuant to the provisions of this joint resolution shall be carried out under the direction of the respective permanent Government departments or agencies now having jurisdiction of similar projects.

Funds made available by this joint resolution may be used, in the discretion of the President, for the purpose of making loans to finance, in whole or in part, the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers. Such loans shall be made on such terms as the President shall prescribe and shall be repaid in equal annual installments, or in such other manner as the President may determine.

Funds made available by this joint resolution may be used, in the discretion of the President for the administration of the Agricultural Adjustment Act, as amended, during the period of twelve months after the effective date of this joint resolution.

SEC. 2. The appropriation made herein shall be available for use only in the United States and its Territories and possessions. The provisions of the Act of February 15, 1934 (48 Stat. 351), relating to disability or death compensation and benefits shall apply to those persons receiving from the appropriation made herein, for services rendered

as employees of the United States, security payments in accordance with schedules established by the President; *Provided*, That so much of the sum herein appropriated as the United States Employes' Compensation Commission, with the approval of the President, estimates and certifies to the Secretary of the Treasury will be necessary for the payment of such compensation and administrative expenses shall be set aside in a special fund to be administered by the Commission for such purposes; and after June 30, 1936, such special fund shall be available for these purposes annually in such amounts as may be specified therefor in the annual appropriation Acts. The provisions of section 3709 of the Revised Statutes (U. S. C., title 41, sec. 5) shall not apply to any purchase made or service procured in carrying out the provisions of this joint resolution when the aggregate amount involved is less than $300.

SEC. 3. In carrying out the provisions of this joint resolution the President may (a) authorize expenditures for contract stenographic reporting services; supplies and equipment; purchase and exchange of law books, books of reference, directories, periodicals, newspaper and press clippings; travel expenses, including the expense of attendance at meetings when specifically authorized; rental at the seat of government and elsewhere; purchase, operation, and maintenance of motor-propelled passenger-carrying vehicles; printing and binding; and such other expenses as he may determine necessary to the accomplishment of the objectives of this joint resolution; and (b) accept and utilize such voluntary and uncompensated services, appoint, without regard to the provisions of the civil-service laws, such officers and employees, and utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as may be necessary, prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, fix the compensation of any officers and employees so appointed.

Any administrator or other officer, or the members of any central board, or other agency, named to have general supervision at the seat of Government over the program and work contemplated under the appropriation made in section 1 of this joint resolution and receiving a salary of $5,000 or more per annum from such appropriation, and

any State or regional administrator receiving a salary of $5,000 or more per annum from such appropriations (except persons now serving as such under other law), shall be appointed by the President, by and with the advice and consent of the Senate; *Provided,* That the provisions of section 1761 of the Revised Statutes shall not apply to any such appointee and the salary of any person so appointed shall not be increased for a period of six months after confirmation.

SEC. 4. In carrying out the provisions of this joint resolution the President is authorized to establish and prescribe the duties and functions of necessary agencies within the Government.

SEC. 5. In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

SEC. 6. The President is authorized to prescribe such rules and regulations as may be necessary to carry out this joint resolution, and any willful violation of any such rule or regulation shall be punishable by fine of not to exceed $1,000.

SEC. 7. The President shall require to be paid such rates of pay for all persons engaged upon any project financed in whole or in part, through loans or otherwise, by funds appropriated by this joint resolution, as will in the discretion of the President accomplish the purposes of this joint resolution, and not affect adversely or otherwise tend to decrease the going rates of wages paid for work of a similar nature.

The President may fix different rates of wages for various types of work on any project which rates need not be uniform throughout the United States; *Provided, however,* That whenever permanent buildings for the use of any department of the Government of the United States, or the District of Columbia, are to be constructed by funds appropriated by this joint resolution the provisions of the Act of March 3, 1931 (U. S. C., Supp. VII, Title 40, sec. 276a), shall apply but the rates of wages shall be determined in advance of any bidding thereon.

SEC. 8. Wherever practicable in the carrying out of the provisions of this joint resolution, full advantage shall be taken of the facilities of private enterprise.

SEC. 9. Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

SEC. 10. Until June 30, 1936, or such earlier date as the President by proclamation may fix, the Federal Emergency Relief Act of 1933, as amended, is continued in full force and effect.

SEC. 11. No part of the funds herein appropriated shall be expended for the administrative expenses of any department, bureau, board, commission, or independent agency of the Government if such administrative expenses are ordinarily financed from annual appropriations, unless additional work is imposed thereupon by reason of this joint resolution.

SEC. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purposes of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution, for the making of further loans under said Act or under this joint resolution.

SEC. 13. (a) The acquisition of articles, materials, and supplies for the public use, with funds appropriated by this joint resolution, shall be subject to the provisions of section 2 of title III of the Treasury and Post Office Appropriation Act, fiscal year 1934; and all contracts let pursuant to the provisions of this joint resolution shall be subject to the provisions of section 3 of title III of such Act.

(b) Any allocation, grant, or other distribution of funds for any project, Federal or non-Federal, from the appropriation made by this joint resolution, shall contain stipulations which will provide for the application of title III of such Act to the acquisition of articles, materials and supplies for use in carrying out such project.

SEC. 14. The authority of the President under the provisions of the Act entitled "An Act for the relief of unemployment through the performance of useful public work, and for other purposes", approved March 31, 1933, as amended, is hereby continued to and including March 31, 1937.

SEC. 15. A report of the operations under this joint resolution shall be submitted to Congress before the 10th day of January in each of the next three regular sessions of Congress, which report shall include a statement of the expenditures made and obligations incurred, by classes and amounts.

SEC. 16. This joint resolution may be cited as the "Emergency Relief Appropriation Act of 1935."

Approved, April 8, 1935, 4 p. m.

V.

EXECUTIVE ORDER OF THE PRESIDENT, JUNE 7, 1935

AUTHORIZING THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO CONTINUE TO PERFORM FUNCTIONS UNDER TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND TO PERFORM FUNCTIONS UNDER THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935.

Pursuant to the authority vested in me by the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (Public Resolution No. 11, 74th Congress), I hereby authorize the Federal Emergency Administration

of Public Works, under the Federal Emergency Administrator of Public Works;

(a) to continue after June 16, 1935, to perform all of the functions which it was authorized to perform prior to June 16, 1935, under Title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200);

(b) subject to the rules and regulations heretofore and hereafter prescribed by the President to carry out the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, to perform the following functions under said Act:

(1) make loans or grants, or both, for projects of states, territories, possessions, including subdivisions and agencies thereof, municipalities and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project;

(2) carry out projects for slum-clearance or low-cost housing, or both;

(c) to sell any securities acquired under Title II of the National Industrial Recovery Act, approved June 16, 1933, or under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and all moneys realized from such sales shall be available for the making of further loans under the said Title II of the National Industrial Recovery Act or the said Emergency Relief Appropriation Act of 1935, in the performance of the functions herein authorized.

To the extent necessary to carry out the provisions of this Executive Order, the Administrator is authorized to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

* * * *

The unobligated balances on June 30, 1935, of allotments of funds made pursuant to Title II of the National Indus-

trial Recovery Act, approved June 16, 1933, to departments and agencies of the Government which continue to exist after June 16, 1935, for the performance of functions of the Federal Emergency Administration of Public Works, are hereby reallocated for use by said departments and agencies, respectively, after June 30, 1935, for the purposes for which originally allocated thereto: Provided That upon completion of the project or work any unexpended balances of the aforesaid reallocations shall be reported by the departments or agencies concerned to the Secretary of the Treasury who will cause such balances to be placed to the credit of the appropriations from which said allotments were made.

FRANKLIN D. ROOSEVELT.

The White House
June 7, 1935

VI.

EXECUTIVE ORDER OF THE PRESIDENT, SEPT. 21, 1935

INCREASING THE LIMITATION CONTAINED IN CLAUSE (G) OF SECTION 1 OF THE EMERGENCY RELIEF APPROPRIATION ACT of 1935.

WHEREAS I find it necessary, in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 7th Congress), to increase by $800,000,000 the limitation of $900,000,000, contained in clause (g) of section 1 of the said Act, on the amount which may be expended under the Act for loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia and self-liquidating projects of public bodies thereof:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me under the said Emergency Relief Appropriation Act of 1935, it is ordered that the said limitation be, and it is hereby, increased from $900,000,000 to $1,700,000,000.

FRANKLIN D. ROOSEVELT

The White House,
September 21, 1935.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

NOS. 84 AND 85.

ALABAMA POWER COMPANY, *Petitioner*,

v.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents*,

ALABAMA POWER COMPANY, *Petitioner*,

v.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents*,

---

BRIEF FOR PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Specification of Errors	14
Summary of Argument	15
Argument	18
I. The Petitioner Has Shown Facts Which Entitle It to Question the Legality of the Respondents' Acts	18
II. Title II of the National Industrial Recovery Act, and the Emergency Relief Appropriation Act of 1935 are Unconstitutional Delegations of Legislative Power	34
1. Petitioner's Position Stated	34
2. The Power Attempted to be Delegated	35
(a) History Shows that the Term, "Public Works Project", Did Not Furnish an Objective or a Path by Which to Attain One	38
(b) Subsequent Experience Under the Acts Here Involved Shows that the Term, "Public Works Project", Failed to Furnish Either Guide or Standard	42
3. Congress Cannot Delegate Its Power to Spend for the General Welfare	47
4. Congress Has Not Ratified the Acts of the Administrator Here Challenged	54
III. The Loans and Grants are Unauthorized Because the Administrator in Approving Them Has Applied a Standard or Criterion Which Congress Has Not and Could Not Validly Provide	56

Page

IV. If the Statutes be Construed to Authorize What Has Been Done Here, They are Unauthorized by any Power Delegated to the Federal Government and Violate the Tenth Amendment 66

Conclusion 70

CITATIONS

CASES:

Alabama Power Co. v. Ickes, et al., LXIV Wash. L. Rep. 563, 91 F. (2d) 303 1
Angle v. Chicago, St. Paul, M. & O. Ry. Co., 151 U. S. 1 24
Arkansas Railroad Commission v. Chicago, Rock Island & Pacific R. R. Co., 274 U. S. 597 67
Ashton v. Cameron County, 298 U. S. 513 5
Benton v. Pratt, 2 Wend. 386 24
Campbell v. Arkansas-Missouri Power Co., 55 F. (2d) 560 28
Chicago Junction Case, 264 U. S. 258 31
Cincinnati Soap Co. v. United States, 301 U. S. 308 ... 53
Citizens Electric Illuminating Co. v. Lackawanna & Wyoming Valley Power Co., 255 Pa. 145 28
Clayton v. Berry, 27 Ark. 129 50
Collins v. New Hampshire, 171 U. S. 30 67
Colorado Central Power Co. v. Municipal Power Development Co., 1 F. Supp. 961 27
Commissioner of Patents v. Whitely, 4 Wall. 522 66
Denton v. Denton Home Ice Co., 119 Tex. 193 46
Deon v. Kirby Lumber Co., 162 La. 671 24
Edward Hines Trustees v. United States, 263 U. S. 143 29
Ex Parte Young, 209 U. S. 123 20
Florida v. United States, 282 U. S. 194 ..... 66, 67
Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 .. 67
Franklin Township v. Tugwell, 85 F. (2d) 208 69
Frost v. Corporation Commission of Okla., 278 U. S. 515 27

Page

Frothingham v. Mellon, 262 U. S. 447 23
Gallardo v. Porto Rico Ry., L. & P. Co., 18 F. (2d) 918 28
Gibson v. Fidelity & Casualty Co., 232 Ill. 49 24
Green v. Frazier, 253 U. S. 233 46
Greenwood County v. Duke Power Co., 81 F. (2d) 986 25
Hammer v. Dagenhart, 247 U. S. 251 ..... 22, 67
Henderson v. Mayor of New York, 92 U. S. 259 67
Herkness v. Irion, 278 U. S. 92 65
Herring v. Houston National Exchange Bank, 113 Tex. 264 56
Hett v. Portsmouth, 73 N. H. 334 50
Hill v. Wallace, 259 U. S. 44 ..... 67, 68
Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 24
Ho Ah Kow v. Nunan, 12 Fed. Cas. No. 6546 25
Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 493 67
In re Ayres, 123 U. S. 443 21
Interstate Commerce Commission v. United States ex rel. Humboldt Steamship Co., 224 U. S. 474 65
Iowa Southern Utilities Co. v. Cassill, 69 F. (2d) 703 .. 28
Isbrandtsen-Moller Co. v. United States, 300 U. S. 139 55
Jackson v. Gallet, 39 Idaho 382 50
Jones v. Portland, 245 U. S. 217 46
Kansas v. Colorado, 206 U. S. 46 70
Linder v. United States, 268 U. S. 5 68
Ludwig v. Western Union Telegraph Co., 216 U. S. 146 22
McCulloch v. Maryland, 4 Wheat. 316 70
Minnesota v. Barber, 136 U. S. 313 67
Mugler v. Kansas, 123 U. S. 623 67
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 69
New York v. United States, 257 U. S. 591 67
Ohio v. Helvering, 292 U. S. 360 46
Oklahoma Utilities Co. v. Hominy, 2 F. Supp. 849 28
Panama Refining Co. v. Ryan, 293 U. S. 388 51

Page

People v. Compagnie Generale Transatlantique, 107 U. S. 59 67
Philadelphia Co. v. Stimson, 223 U. S. 605 22
Pierce v. Society of Sisters, 268 U. S. 510 22
Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563 67
Railroad Co. v. Ellerman, 105 U. S. 166 29
Rice v. Manley, 66 N. Y. 82 24
Ristine v. State ex rel. Board of Commissioners of the Sinking Fund, 20 Ind. 328 50
St. Louis & O'Fallon Ry. Co. v. United States, 279 U. S. 461 65
Santa Fe Pacific R. R. Co. v. Lane, 244 U. S. 492 22
Schechter Poultry Corp. v. United States, 295 U. S. 495 ..... 16, 34, 51, 67
Smithberger v. Banning, 129 Neb. 651 50
South Carolina v. United States, 199 U. S. 437 46
Sprunt & Son v. United States, 281 U. S. 249 ..... 29, 30
Standard Oil Co. v. Lincoln, 275 U. S. 504 46
State ex rel. Norfolk Beet Sugar Co. v. Moore, 50 Neb. 88 50
State ex rel. Pine v. LaGrave, 23 Nev. 25 50
Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297 .. 55
Terrace v. Thompson, 263 U. S. 197 22
Thacker Coal Co. v. Burke, 59 W. Va. 253 24
Truax v. Raich, 239 U. S. 33 22
United States v. Arizona, 295 U. S. 174 55
United States v. Butler, 297 U. S. 1 ..... 67, 68, 70
United States v. California, 297 U. S. 175 46
United States ex rel. Chicago, Great Western R. R. Co. v. Interstate Commerce Commission, 294 U. S. 50 66
United States ex rel. Dunlap v. Black, 128 U. S. 40 66
United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638 65
United States ex rel. New York Warehouse, W. & T. Assn. v. Dern, 68 F. (2d) 773 33

Page

U. S. Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147 24
Walker v. Cronin, 107 Mass. 555 24
Walla Walla City v. Walla Walla Water Co., 172 U. S. 1 27
Wilbur v. United States ex rel. Kadrie, 281 U. S. 206 66
Wisconsin v. Duluth, 96 U. S. 379 55
Work v. Louisiana, 269 U. S. 250 65

CONSTITUTION OF THE UNITED STATES:

Article I, Sec. 8, Clause 1 ..... 14, 34, 47, 54, 66
Tenth Amendment 14, 17, 54, 66

STATUTES:

Act of Aug. 24, 1935, c. 641, Sec. 21 (b) (49 Stat. 750, 771) 18, 55
Act of June 17, 1902, c. 1093 (32 Stat. 388) 53
Emergency Relief Appropriation Act of 1935 (49 Stat. 115) 1, 3, 6, 14, 16, 34, 36, 45, 50, 53
Emergency Relief Appropriation Act of 1936 (49 Stat. 1608) 18, 54, 69
Federal Employment Stabilization Act of 1931 (46 Stat. 1084) 41
Gold Reserve Act of 1934, Sec. 13 (48 Stat. 337, 343) .. 18, 55
Judicial Code, Sec. 240 (a) 1
National Industrial Recovery Act of 1933 (48 Stat. 195)
Title I 16, 34
Title II (48 Stat. 200) 1, 3, 14, 16, 34, 41, 42, 44, 45
Sec. 202 ..... 35, 36, 38
Sec. 203 ..... 35, 44

MISCELLANEOUS: Page

Annual Report of the Tennessee Valley Authority for the Fiscal Year Ended June 30, 1936.....3, 59
Brief for Respondent in Opposition to Certiorari.... 54
Clark, Economics of Planning Public Works..... 39
Congressional Record, Vol. 80, Part 9..... 56
Creasy, The Rise and Progress of the English Constitution 48
Executive Order of November 9, 1933..... 43
Executive Order of September 21, 1935..... 52
Government Competition with Private Enterprise, Report of Investigating Committee, Pursuant to House Resolution 235, House Report No. 1985, 72nd Congress, 2nd Session 46
Hearings Before the Committee on Commerce, United States Senate, 74th Congress, 1st Session, on S. 2825, June 13, 1935 37
Holmes, Collected Legal Papers 26
Ickes, Back to Work 37, 38
Monthly Report of the Federal Emergency Relief Administration, Dec. 1 to Dec. 31, 1933..... 44
National Planning Board of Federal Emergency Administration of Public Works, Final Report, 1933-1934 41
National Resources Board Report, Dec. 1934..... 41
National Resources Committee Report, Dec. 1936... 47
Senate Document 167, 73rd Congress, 2nd Session.... 42
Senate Document 184, 74th Congress, 2nd Session.... 54
Senate Resolution 235, 74th Congress, 2nd Session.. 54
Story, The Constitution (3rd Ed., Sec. 416)..... 70

APPENDIX

	Page
I. Pertinent Sections of the National Industrial Recovery Act	71
II. Executive Order of the President, July 8, 1933	76
III. Executive Order of the President, August 19, 1933	77
IV. The Emergency Relief Appropriation Act of 1935	79
V. Executive Order of the President, June 7, 1935	86
VI. Emergency Relief Appropriation Act of 1936	88
VII. Sections 10, 11 and 12 of the Tennessee Valley Authority Act, as amended	89

IN THE

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OCTOBER TERM, 1937.

NOS. 84 AND 85.

ALABAMA POWER COMPANY, *Petitioner*,

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. Vol. I, 437) has been reported in Vol. LXIV, WASH. L. REP. 563. That of the Court of Appeals (*Id.* 509) has been reported in 91 F. (2d) 303.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. The decrees of the Court of Appeals were entered May 10, 1937. (R. Vol. I, 516-517.) Writs of certiorari were granted June 1, 1937. (*Id.* 522.)

STATUTES INVOLVED.

The statutes involved are Title II of the National Industrial Recovery Act, (48 STAT. 200) printed *infra*, p. 71, and the Emergency Relief Appropriation Act of 1935 (49 STAT. 115), printed *infra*, p. 79.

STATEMENT OF THE CASE.

As originally brought, these were five suits in the United States District Court for the District of Columbia seeking to enjoin the making of loans and grants by the respondents to ten municipalities for the construction of electric-power distribution systems as federal public works projects. The plaintiffs were the Texas Utilities Company, the Alabama Power Company (in two cases), the Oklahoma Utilities Company, and the Iowa City Light and Power Company. The defendants were the Federal Emergency Administrator of Public Works and certain of his subordinates, together with the Secretary of the Treasury, the Treasurer of the United States, and the Chief Disbursing Officer of the United States. (Fdgs. 1-12, R. Vol. I, 447-450). These cases were chosen for trial by agreement of counsel as representative of fifty-seven similar cases pending in the United States District Court for the District of Columbia.

Several of the cases have become moot by virtue of withdrawal by some of the cities of their applications for loans and grants. This is true of the suits by the Texas Utilities Company, the Oklahoma Utilities Company, the Iowa City Light & Power Company, and of the suit of the Alabama Power Company (No. 84) insofar as it related to the proposed loans and grants to the cities of Florence and Tuscumbia, Alabama. Likewise the suit of the Alabama Power Company (No. 84) insofar as it related to the proposed loan and grant to Sheffield has become moot, since the town has recently completed an electric distribution system, is furnishing the inhabitants with electricity, and the petitioner has been required to remove and has removed its facilities from the town.

Petitioner, Alabama Power Company, generates and distributes electricity wholly within the State of Alabama. (R. Vol. II, 23-25.) It operates distribution systems throughout the State and, of particular concern here, in four towns in northwestern Alabama—Decatur, Hartselle, Guntersville, and Russellville. The petitioner has non-ex-

clusive unexpired franchises (R. Vol. II, 16-20), and is the only agency distributing or presently equipped to distribute electricity in these towns. (R. Vol. I, 448, R. Vol. II, 20.) Petitioner's properties in the towns have a value of approximately $570,000. (R. Vol. II, 90.) Its rates are regulated by the Alabama Public Service Commission. (R. Vol. II, 20.)

The respondent officials of the Federal Emergency Administration of Public Works (PWA) have entered into a contract with each of the Alabama towns, providing for the construction in it, as a "Federal Public Works Project", of a municipal electric distribution system. These towns will obtain their electricity from the Tennessee Valley Authority. The terms and conditions under which they will obtain it are disclosed by the contract already entered into between Sheffield and the Tennessee Valley Authority. ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1936, p. 223, (Government Printing Office); see *infra*, p. 56. The systems are to be built entirely with federal funds, of which part is to be an outright gift or grant, the remainder being repayable only out of the earnings of the system. (R. Vol. I, 259-278, 378-436.) The amounts of the loans and grants and the authority under which the Administrator purports to act are given below:

Town	Loan	Grant	Statute
Decatur	$250,000	$100,000	Title II, N. I. R. A.
Hartselle	33,000	27,000	Emergency Relief Appropriation Act, 1935
Guntersville[1]	48,000	39,272	Emergency Relief Appropriation Act, 1935
Russellville	69,000	56,454	Emergency Relief Appropriation Act, 1935

[1]Under the loan and grant agreements between PWA and the towns, the latter may if they choose raise the money to be borrowed by selling their obligations to parties other than PWA and PWA agrees to take up any unsold balance within the limits

The contracts between PWA and the towns not only provide that the projects shall be known as federal public works projects but cover every detail of the construction work, just as though the work were being done for the United States Government. The plans and specifications must be approved by the Administrator. The method of letting the construction contracts is prescribed; performance bonds and liability insurance are required; the construction contracts must provide for a 30-hour week, minimum wages, employment preferences, collective bargaining, use of human labor in lieu of machinery when possible; the provisions of the "Kick-back" Statute must be incorporated; reports must be made to numerous government bureaus, etc., etc. (See, e. g. R. Vol. I, 259-278.)

If the contemplated projects are carried out, the business of the petitioner in the four towns will be wholly destroyed. The elimination of the petitioner is essential to the financing of the projects. The towns, in their applications to PWA, said:

> "The distribution system is intended to practically duplicate and supplant a public utility distribution system.
>
> • • • • • • • • • •

---

and under the conditions specified in the agreement, and to make the grant. The grant may be used to pay for construction or to pay bond interest and maturities. Guntersville, since the decision of the Court of Appeals, has entered into an arrangement with an electrical construction firm, whereby in substance the firm will take bonds in payment for constructing the system. This arrangement is involved in litigation in the state courts and may never be carried out. The Town is still asking for the loan and grant from PWA. The Mayor stated in an affidavit, sworn to September 1, 1937, and filed in the state court: "We had at all times kept our application with the PWA for both the Loan and Grant and it is still pending . . ." In the ordinance of July 1, 1937, which authorized the bonds under the new contract, the purpose of the issue is stated to be, "to defray the cost of the above-described improvement, exclusive of that part of the cost thereof which may be met by any grant or grants of money by the United States of America . . ."

> "The project will not be competitive since practically all of the consumers are signed up for a ten (10) year period." (See, e. g. R. Vol. II, 109, 111, 126-127.)

PWA reached the same conclusion and, in computing the financial soundness of the projects, assumed that the petitioner would be immediately eliminated. (See, e. g. R. Vol. II, 347-349.)

Construction of the distribution systems will be directly caused by the Administrator. The stated purpose of the Public Works program was to cause construction which would not otherwise take place. PWA officially declared that "the public grants are given to induce public bodies to undertake construction of useful works . . ." (R. Vol. II, 401.) To this end the offer of grants and revenue loans was given wide publicity. (R. Vol. II, 420, 535-6.) And the financial condition of the towns was such that they could not have undertaken to duplicate the petitioner's facilities by new construction unless the Administrator had offered to give them free and clear, in one case, 30 per cent of the cost and, in the other three cases, 45 per centum. Officials of the towns freely stated either that their obligations were in default or that they could not sell municipal obligations to provide funds for new construction or purchase of the petitioner's systems. (R. Vol. II, 70, 78, 98, 108, 123, 129, 159, compare *Ashton* v. *Cameron County*, 298 U. S. 513, 533.) The applications of the towns to PWA point out that the requests for the projects were predicated upon the free grant of from 30 per cent to 40 per cent of the cost, and that the earnings were expected to repay the loan of the remaining amount. (R. Vol. II, 96-97, 101, 114.) Two of the towns, no longer involved, set such store by the proffered gifts that, in negotiating to purchase petitioner's systems within their limits, they insisted that the purchase price be reduced by the amount of the gift obtainable if a new system were built. (R. Vol. II, 45, 50, 56, 57.)

Legal Authority of the Administrator. The authority of the Administrator must be found, if at all, in the statutes printed in the Appendix, *infra*, p. 71, and discussed *infra*, pp. 34 to 47, and in the administrative procedure had thereunder.

The action taken by the President with regard to these projects is contained in documents described on pages 338-361 of Volume II of the Record. It may be summarized as follows:

Lists, called "books", of "Non-Federal Projects Which Are Deemed Desirable", were presented by the Administrator to the President. These contained an index giving the location, type of project, and amount of loan and grant of each project. These amounts were totaled at the end of the index. Following the index was a brief description of the construction proposed in each project. At the end of the index appeared in pencil the letters, "O. K. F.D.R."

Attached to the list including the Hartselle, Guntersville, and Russellville projects was a letter from the President to the Secretary of the Interior (R. Vol. II, 355), which contained the following:

> "Pursuant to the Emergency Relief Appropriation Act of 1935, I hereby:
>
> . . . . . .
>
> "III. Approve the projects included in the program of public works set forth in the annexed 'Schedule B', as to each of which I find and determine that not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular project."

It is agreed on the Record (R. Vol. II, 338-339) that the documents mentioned above represent all the orders and findings of the President, Administrator, or any officials having authority to make ultimate determinations in regard to these projects.

The applications of the towns were made to field officers of PWA. They were forwarded with reports to Washington where they were further examined by an Engineering Division, a Finance Division, a Legal Division, and, for a time, by an Electric Power Board of Review, later by a Projects Division. From time to time a list was made of those projects which were approved by the Divisions mentioned. This list was then submitted to the Administrator and for a time to an advisory body known as the Special Board for Public Works. The list was then presented to the President for his approval as stated above. (R. Vol. II, 314-316.)

The petitioner subpoenaed the reports or recommendations of the examining divisions in order to establish that criteria for approval of projects not authorized by the statutes were employed, but, with the exception of one report voluntarily produced (R. Vol. II, 346), the trial judge ruled that they were immaterial and need not be produced. (R. Vol. II, 350-351.)

However, the evidence in the record establishes that the standard or criterion applied in approving these projects was not the relief of unemployment—in fact, there is no evidence that there was any contemporaneous investigation or finding as to any effect of these projects upon unemployment—but was the furnishing of a market for TVA power and the establishment of yardsticks to measure and reduce rates for electric energy produced and sold wholly within a state, as set forth below.

The list submitted by the Administrator to and approved by the President containing the Decatur project, the largest of the four, recited that the project was recommended "for the reason, among others, that the Tennessee Valley Authority has acquired the necessary transmission lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its

electrical energy . . .'' (R. Vol. II, 343-4.) The original contracts between the Administrator and the towns (since cancelled) conditioned the loans and grants upon the towns' making contracts with TVA to take its power and to charge rates prescribed by it. (See *infra*, p. 58, footnote; R. Vol. I, 126.) The contracts between municipalities and TVA, *infra*, p. 59, prescribe the resale rates to be charged and provide that they may be changed only with the consent of TVA. Although all the applications for loans and grants were made by the towns between August 30, 1933 and December 20, 1933 (Vol. I, 455-457, R. Vol. II, 156), no contracts with the towns were made by PWA until December 6, 1934, and no steps to advance funds were taken until just prior to the institution of these suits in July, 1935. This delay was occasioned, and it was so stated by the Administrator, by negotiations undertaken by TVA to acquire the Company's distribution systems in the towns. (R. Vol. II, 136-139, 142-146, 476.)

The Electric Power Board of Review (a division in the Public Works Administration) which reviewed and approved these projects considered principally "social desirability", in accordance with rules prescribed by the President. (R. Vol. II, 373.) Its members—

> "did not place a great deal of importance on employment as bearing on social desirability. Primarily, the employment was more or less limited on municipal (electric) projects as compared with a great many of the others, and the class of employment was too technical to become selected from the local unemployment situation. The people who had to be employed on a municipal electric project were such skilled labor that they could not be found in most communities. The number of people employed on those projects as a type was considerably less than on other projects. The board found the principal element of social desirability in municipal electric projects in the difference in the cost of service to the consumers. If the cost of service to the consumers was lower from the project than they were obtaining

under the existing conditions, it was considered very desirable from a social standpoint. That means, if the rates suggested in the application were lower than the existing rates." (R. Vol. II, 252.)

In his testimony in this case the Administrator said much the same thing: (R. Vol. II, 516)

"Dealing specifically with an application for a duplicating and competing municipal power project, there might be several elements of social desirability which governed the action and decision of PWA. You might put the municipality in the position of being able to supply current to its citizens at a lower rate. It certainly gave employment in constructing and in operating the plant, and it might have the effect of removing from the municipality the heavy, and in some cases the corrupting, hand of a public utility. All those were criteria which were proper to be considered by PWA in determining the social desirability of an application for a loan and grant for competing municipal projects. I think, in a general way, they were considered."

On September 27, 1934, PWA made an announcement to the press as follows: (R. Vol. II, 253-5)

"Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

"Municipal or local publicly owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

"The statement of Administrator Ickes followed action by some privately owned utilities, which, on reexamination of their condition, found it possible to reduce rates to a point below those proposed by municipal project plants.

"In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

"In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

"Since the Public Works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cogniznant of the greater use of power resulting from lower rates.

"Administrator Ickes said:

"'PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"'However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate

facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

" 'Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

" 'PWA will co-operate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

" 'State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect.' "

The Administrator repeatedly announced the same criterion for granting or refusing applications for municipal electric systems at his press conferences. In the words of the United Press correspondent,

"He said that the reasonableness of private utility rates would be one of the determining factors in consideration of loan and grant applications. By that, I mean the reasonableness of the private utility rate in the town which applied for the loan and grant. Mr. Ickes made this statement more than once. I could not estimate how many times, although it has run re-

peatedly through his discussion of municipal power plants, and his program." (R. Vol. II, 362.)[1]

[1]Similar statements were made in documents offered in evidence by the plaintiffs and excluded as irrelevant by the trial judge, the exclusion being assigned as error. In an article in *Today*, of November 17, 1934, Mr. Ickes said: (R. Vol. II, 395) "This is not the place for a detailed discussion of the power policy of Public Works. But that policy also conforms to the general purpose to strengthen private enterprise . . . Loans for municipal power plants have been granted only upon application of the municipality concerned and upon a clear showing that the existing rates can be substantially reduced after adequate provision for interest and amortization. Private (power) companies furnishing adequate service at reasonable rates have nothing to fear from the power policy of PWA."

On November 8, 1933, the Deputy Administrator of PWA, H. M. Waite, sent circular instructions to PWA State Engineers containing the following: (R. Vol. II, 393) "A number of inquiries have come into me regarding our attitude and procedure in regard to applications for loans for municipal light plants. . . We are most anxious to set up around the country sound publicly owned utilities as yard-sticks to determine the principle of whether or not communities can satisfy themselves and give lowered rates for electricity."

In the same month TVA, which is seeking an outlet for its power in the Alabama towns, through its Director and General Counsel, David E. Lilienthal, stated its purpose thus: (R. Vol. II, 417)

> "Now that is what had been going on throughout the United States. Regulation by commissions had in many states proved ineffectual. In some states it was perfectly obvious that the regulators were not regulating the utilities, but in effect, the utilities were regulating the regulators. In other states, the regulatory commissions were doing an honest and sincere job, but were hampered by the interminable procedure of regulation, with rate cases sometimes dragging through a decade. And so, to supplement regulation by commissions, Congress passed the Tennessee Valley Authorities Act. This Act is not an assault upon private ownership and management of public utilities. But it is a determined attack on private mis-management of the public business of power at the expense of the people back home—consumers and investors alike. • • •
>
> "It was with such a background that Congress passed the Tennessee Valley Authority Act, and set up a measure of public operation of the power business. This public opera-

Proceedings below. Petitioner filed these bills in the United States District Court for the District of Columbia to enjoin the respondents from making the allotments under the contracts between PWA and the towns, or from paying to these towns any funds whatsoever for the construction of electric systems. After trial the trial judge dismissed each of the bills upon the merits, holding that the petitioner had a standing to present and have adjudicated the question of the legal authority for the threatened acts of the respondents, but that their acts were authorized by the statutes and that the statutes so construed were constitutional. (R. Vol. I, 472.) The Court of Appeals affirmed the decree of the trial court, without inquiring into the legal authority for the threatened acts, on the ground that the petitioner had no standing to question their validity.

The Court of Appeals held that the petitioner was without standing to question the legal authority for the Administrator's acts, because, it said, the thing which will affect the petitioner is the competition of the municipal plants and that is lawful. The opinion of the Court is apparently based upon the legal proposition that no one, no matter how seriously injured, can question the legal authority of a public official whose acts cause the injury, provided its impact upon the plaintiff comes from the intervening legal act of a third party. Such damage, the Court says, is *damnum absque injuria*, not merely as against the person acting lawfully, but also as against the official acting, according to the plaintiff, unlawfully. Therefore, the legality of the official's conduct cannot be examined.

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tion is to serve as a yardstick by which to measure the fairness of electric rates. It has an additional function. It is a reminder that electricity performs a public service. It is a reminder that unless that business is conducted by private corporation with fairness, without financial jugglery and with a due sense of responsibility to the paramount public interest, that the public at any time may itself assume the function of providing itself with this necessity of community life."

SPECIFICATION OF ERRORS.

1. Whether the Court of Appeals erred in holding that a public utility cannot question the legality of the action of federal officials who are about to inflict irreparable injury upon its business, by promoting and financing, as federal public works projects, municipal plants which are intended to and which will duplicate and supplant its facilities and business.

2. Whether the Court of Appeals erred in failing to hold that the Emergency Relief Appropriation Act of 1935 (49 STAT. 115), and Title II of the National Industrial Recovery Act (48 STAT. 200) do not authorize gifts and loans of federal moneys to municipalities for the construction of local electric distribution systems as federal public works projects, in the circumstances disclosed in this record.

3. Whether the Court of Appeals erred in failing to hold that the Emergency Relief Appropriation Act of 1935 (49 STAT. 115), and Title II of the National Industrial Recovery Act (48 STAT. 200), if construed to authorize gifts and loans of federal moneys to municipalities for the construction of local electric distribution systems as federal public works projects, in the circumstances disclosed in this record, are unconstitutional, because:

(a) They delegate legislative power to the executive.

(b) The gifts and loans are not authorized by the General Welfare Clause of the Constitution or by any other clause thereof.

(c) The gifts and loans will have the necessary effect of extending federal control over and regulating matters reserved to the states or the people by the Tenth Amendment.

(d) The gifts and loans will have the direct and necessary effect of destroying the balance established by the Constitution between the Federal Government and the states.

SUMMARY OF ARGUMENT.

I.

The petitioner has a standing to question the legality of the respondents' acts. Petitioner, will sustain a direct and special injury caused by these acts, and will not suffer in an indefinite way in common with people generally. Its interest, in fact, is vital, since its business in the four towns will be destroyed, and its property there rendered worthless. Petitioner's right is to conduct its business free from interference and injury from public officials acting without authority in law. Respondents' duty is to refrain from injurious acts unless authorized by law. Respondents' acts are the proximate cause of petitioner's injury. They propose to authorize and finance, as federal public works projects, electric distribution systems which are designed and intended to and will supplant petitioner's facilities and take all of petitioner's customers in the four towns. Respondents are to be repaid—and can only be repaid—from the business which is now petitioner's. Petitioner's irreparable injury is contemplated, caused, and required by respondents' acts.

It is immaterial whether private persons would incur liability by doing the acts threatened by respondents. The basis of suit against these public officers is the absence of lawful power and the abuse of authority in doing the acts which cause irreparable loss to the petitioner in violation of its right to enjoy its property and conduct its business subject only to such interference from public officials as the law warrants.

It is immaterial also that the impact of the injury upon petitioner will be produced by the operation of the plants by the towns. This operation is contemplated and required by the respondents' acts, which remain the proximate cause of the injury. Injury resulting from the competition of a third person is legal injury, giving the petitioner one of the required foundations to judicial determination of its

claim that the acts causing the legal injury constitute legal wrong.

II.

Title II of the National Industrial Recovery Act, *infra* p. 71, and the Emergency Relief Appropriation Act of 1935, *infra* p. 79, are unconstitutional delegations of legislative power. Title I of the NIRA was declared unconstitutional on this ground in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. Title II and the Act of 1935 are even more sweeping in the power conferred. The President is given discretionary power to spend billions of dollars with no more definite guide to the end sought or the means to attain it than that he should engage in or finance "public works projects". The Administrator has stated freely the total absence of anything which could be used as a guide for PWA. History shows that the term "public works project" did not furnish an objective or a path by which to attain one. Experience under the statutes shows that the term failed to furnish either guide or standard. The term "public works project" acquired a meaning as broad as the word "anything". Whatever principles or standards were established were provided not by the Congress but by the President.

The Constitution confers the power to spend for the general welfare upon the Congress, not upon the Executive. It was not by chance that this was done. The framers were placing the seal of culmination on the centuries-old struggle of English-speaking people for the power of the people through their legislature to specify the objects of expenditure. Courts of the states have been fully aware of this struggle and have held that the legislative branch cannot delegate this power to the executive. No such plenitude of power as these statutes attempt to give to the President over the expenditure of eight billion dollars is susceptible of transfer from Congress to the Executive.

Congress has not ratified the acts of the Administrator here challenged. Since Congress had no power to authorize the acts of the Administrator, it is obvious it could have no power to ratify them. Respondents contend that the Emergency Relief Appropriation Act of 1936 (49 STAT. 1608) may be construed as a ratification of these projects. The Act admittedly contains no express ratification of previous administrative acts, as did the Gold Reserve Act of 1934, Sec. 13 (48 STAT. 337, 343); and the Act of August 24, 1935, c. 641, Sec. 21(b) (49 STAT. 750, 771). Nor is there in its language any approval or ratification within principles hitherto enunciated by this Court. Nor did the Committee which reported the act, as shown by the Chairman's statement intend to do more than to permit grants or gifts to be made from the PWA revolving fund, which had previously been available only for loans, the gifts to be made for the same types of projects for which the loans had been made. No attempted ratification of any prior acts can be tortured from this statute.

III.

The loans and grants are unauthorized because the Administrator in approving them has applied a standard or criterion which Congress has not and could not validly provide. Respondents attempt to find a standard in the purpose stated in the statutes to provide employment. But they at once destroy the so-called standard as a guide to administration by insisting, as the facts require them to, that any project meets the standard because any project involves some labor. On the other hand, the record leaves no doubt that the Administrator in determining whether or not to make these loans and grants applied the sole test of whether doing so was or was not necessary to provide retail outlets for power generated by the Tennessee Valley Authority which would be distributed under the rate control of that Authority. In other words, the criterion was whether or not the construction of these projects would provide a

means for lowering intrastate electric rates in Northern Alabama by TVA competition. Although courts will not review the discretion of an administrative official exercised within its legal scope, they will grant relief if he applies rules or principles which are not authorized by law. The Administrator has done so in this case.

IV.

If the statutes be construed to authorize what has been done here, they are unauthorized by any power delegated to the Federal Government and violate the Tenth Amendment. The control of intrastate electric rates, either directly through regulation or indirectly through competition, is a state function. Whenever federal power is exerted within what would otherwise be the domain of state power, its justification must clearly appear. The modicum of employment which might be created by these projects is a remote, speculative, and collateral consequence of them and is not the clear justification of the exercise of the federal power which alone will sustain it. It would be plain, if Congress expressly authorized the criteria and standards applied here by the Administrator, that they were not reasonably and naturally adapted to the effective exercise of the general welfare power. This power must be exercised for a national and not a local purpose and cannot lawfully be made the means of controlling matters of local concern.

ARGUMENT.

I.

THE PETITIONER HAS SHOWN FACTS WHICH ENTITLE IT TO QUESTION THE LEGALITY OF THE RESPONDENTS' ACTS.

The petitioner has a standing to question the legality of the respondents' acts if the facts established by the record entitle it to equitable relief on the assumption that the

respondents are without legal authority to do the threatened acts, either because they are beyond the authority conferred by the statute or because the statute, if construed to authorize them, is beyond the power of Congress. The petitioner is entitled to such relief if the respondents owe a duty to the petitioner to refrain from the unauthorized acts, if the commission of them will be the proximate cause of irreparable loss and damage to the petitioner, and if these consequences to the petitioner are of the kind recognized as legal injury.

The respondents have argued in the lower courts that the test of whether they owe a duty to the petitioner to refrain from the acts threatened—admitting for the purpose of this argument that they are unauthorized—is whether private individuals would incur liability from committing them. They argue that the respondents stripped of legal authority are merely private individuals and that the rights and duties of the parties must be determined by principles applicable in suits between one private individual and another.

The argument is as unsound in principle as it is opposed to authority. In many cases the act of the officer, if unauthorized, would fit into such common forms of action as trespass, but in a great and growing field of activity an officer acting under color of authority is not acting as a private person, the consequences of his acts are not the same as those of a private person, and no private person could conceivably propose to act in the same way. In short, the argument is wholly verbal and unrealistic. But the error in principle goes deeper.

The argument assumes that the legal principles determinative of the standing of the plaintiff to question the legality of acts of a public officer should be those which have been evolved to determine rights to *recover* against a *private* person. Nothing could be more fallacious. The principles determining the right to recover against private persons are the result of long and careful evaluation of the conflicting interests of private persons. A rule of law which makes

the difference between victory for the plaintiff and victory for the defendant represents the accumulated wisdom of courts and legislatures as to how private persons should live together and how loss, as between them, should be borne. These issues involve basic considerations of policy, but to make that same policy determinative of the right to question the statutory authority of a public officer disregards vital differences.

The considerations which should be, and have been, determinative with courts in formulating the principles affecting the right of private persons to question the authority of public officers are the necessity of affording protection against injury resulting from abuse of authority, while avoiding officious and burdensome litigation, and the assertion of fanciful wrongs and insubstantial injuries. Recognizing, as they should and must, this vital difference in the function and purpose of the rules involved in determining when a plaintiff may question the authority of a public officer and when he may recover from another private individual, courts have not, as respondents argue, blindly confused the two; but in determining the former have referred to the latter merely as a guide, by analogy, to types of injuries to plaintiffs of which the law will take note. A reference to the authorities will avoid further abstract discussion.

Ex parte Young, 209 U. S. 123, turned upon the validity of an injunction obtained by stockholders of a railroad in a federal court forbidding the Attorney General of Minnesota from bringing suit to enforce the provisions of a state law claimed to be unconstitutional. Among the questions decided by this Court were the two: whether the commencement of a suit to enforce an unconstitutional statute was an actionable injury; and what rights or duties formed the basis of the suit. On the first of these questions this Court held that the injury to the plaintiff from the bringing of the unauthorized suit was comparable to injuries which the law redressed, and that such injuries were not confined to those

produced by the more familiar wrongs. Referring to *In re Ayres*, 123 U. S. 443, the Court said:

> "It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property." (p. 153)

Turning to the effect of the threatened action upon the plaintiff the Court continued:

> "Whether the commencement of a suit could ever be regarded as an actionable injury to another, *equivalent* in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. (p. 153)
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> * * * * * * * * *
>
> "In those cases the only wrong or injury or trespass involved *was the threatened commencement of suits* to enforce the statute as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circumstances was therefore necessarily held to be *equivalent to any other threatened wrong or injury* to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer." (p. 158) (Italics supplied.)

Thus the point is driven home that it is the substantial nature of the consequences to the plaintiff with which the Court is concerned. If these are equivalent to injuries which courts are accustomed to recognize and redress, they constitute legal injury in the suit against the officer.

But it was pointed out by Mr. Justice Harlan in his dissenting opinion, as is urged by respondents here, that, viewed simply as a private person, the Attorney General had violated no duty owed to or right of the plaintiffs. "He could not become personally liable to the railway company *simply because of his bringing the mandamus suit.* . . . The mere bringing of such a suit could not be alleged

against him as an individual in violation of any legal right of the railway company or its shareholders. . . ." (p. 197)

This argument—as stated above, unrealistic in fact and unsound in principle—this Court rejected. The principle it adopted has been stated by the present Chief Justice with incomparable terseness:

> "Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte Young*, 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property." (*Philadelphia Co. v. Stimson*, 223 U. S. 605, 621.)

In the *Stimson* case, *supra*, the Secretary of War, if he had been a private citizen would have incurred no liability by threatening suits to enforce a harbor line which he had drawn. Similarly private persons would have owed no duty to the plaintiff which would have been violated by the acts threatened by the public officers in *Pierce* v. *Society of Sisters*, 268 U. S. 510 or *Terrace* v. *Thompson*, 263 U. S. 197, or *Hammer* v. *Dagenhart*, 247 U. S. 251, or *Truax* v. *Raich*, 239 U. S. 33. In *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492, if the Secretary of the Interior had been a private individual, and asserted a claim unauthorized in amount for surveying public land before issuing a patent—if the situation can be imagined—no legal duty to plaintiff would have been violated. Similarly in *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, the plaintiff sued to enjoin a state official from declaring that it was without authority to do business in the state—an act which

no private individual could perform, and which if threatened would not involve liability.

In all these cases the principle entitling the plaintiffs to question the officials' authority is the same—the plaintiffs had a right to hold their property or conduct their business free from injury by public officials from acts done without lawful power and in abuse of authority. Public officials owe a duty to refrain from interfering with the property or business of the plaintiffs and from injuring them therein without authority or in abuse of it. When an act, in violation of this duty, will be the proximate cause of consequences to the plaintiff so substantial and onerous as to be comparable to injuries which the law is accustomed to note as legal damage, a cause of action is asserted and the right to an injunction established.

The rule is no different when the injury flows from an unauthorized use of the spending power. There the plaintiff also establishes his right to question the authority of the officer if he is—

> "able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (*Frothingham* v. *Mellon*, 262 U. S. 447, 488.)

This petitioner has shown just such immediate threat of direct and special injury. In the present cases the Administrator has authorized for purposes which he claims are authorized by law, the construction, as federal public works projects, under his supervision and with funds provided by him, of facilities which are intended to supplant the petitioner's, and which must do so if the loans contemplated are to be repaid. It is this action of his, in causing the construction for alleged federal purposes and with federal funds, which threatens the petitioner's business with destruction. The elimination of the petitioner from the towns

is essential to the financing of the projects. (R. Vol. II, 122.) The towns have already provided for this elimination. In the words of their own officials, they intend to supplant the petitioner's distribution systems.

> "The project will not be competitive since practically all of the consumers are signed up for a ten year period." (*Supra* p. 5.)

It is equally plain that construction of each supplanting system is to be undertaken as a federal public works project, subsidized by the Administrator. We have already pointed out that the purpose of the public works program was to cause construction which would not otherwise take place, and referred to the official declaration of PWA that the public grants "are given to induce public bodies to undertake construction of useful works". (*Supra* p. 5.)

The fact that the impact of the injury upon the petitioner will be produced by action of the towns does not render the Administrator immune from petitioner's suit. The fact remains that he is the proximate and moving cause of the injury which it will suffer solely because of his unlawful acts in authorizing and financing these particular federal public works projects with gifts and revenue loans, the repayment of which contemplates and requires the destruction of petitioner's business in the towns. It is well settled that where one without warrant or justification in law, induces and enables another to inflict injury on a third party, the wrongdoer is liable even though the intervening party may act within his legal rights. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 251-252; *Walker* v. *Cronin,* 107 Mass. 555; *Thacker Coal Co.* v. *Burke,* 59 W. Va. 253; *Deon* v. *Kirby Lumber Co.,* 162 La. 671; *U. S. Fidelity & Guaranty Co.* v. *Millonas,* 206 Ala. 147; *Gibson* v. *Fidelity and Casualty Co.,* 232 Ill. 49; *Rice* v. *Manley,* 66 N. Y. 82; *Benton* v. *Pratt,* 2 Wend. 386; compare *Angle* v. *Chicago, St. Paul, M. & O., Ry. Co.,* 151 U. S. 1, 12-13, 22, 23. As the trial court concluded, ". . . the furnishing of the

funds by the Government and the resulting competition are so closely connected that, if the statute under which the funds are supplied is unconstitutional, or if the officer furnishing the funds is not authorized to do so, then the plaintiffs may test those questions on the merits." (R. Vol. I, p. 439.) And Judge Soper said in his dissenting opinion in *Greenwood County* v. *Duke Power Co.*, 81 F. (2d) 986, 1001, 1002:

> "The power company has such an interest in the business as to justify its suit. The practical effect upon its valuable property interests is manifest. It has an interest far more weighty than that of a federal taxpayer, which in *Frothingham* v. *Mellon*, 262, U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078, was held to be too remote, uncertain, and insignificant to entitle him to injunctive relief against an invalid federal appropriation. The plaintiffs here conform to the rule laid down in that case since they show not only that the act of the administrator was invalid, but that they are in danger of sustaining a direct and substantial injury therefrom."

To argue that the petitioner's injury comes from the action of the towns and is the consequential and indirect result only of the Administrator's acts, is to ask this Court to forget Justice Field's admonition in *Ho Ah Kow* v. *Nunan*, 12 Fed. Cas. No. 6,546, at 255:

> " . . . we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men. . ."

The Administrator argued in the Court of Appeals—and the Court of Appeals seems to have adopted the argument—that what the petitioner really complains of is future competition which will result from the operation of the federal public works projects authorized and financed by the Administrator; that the operation of these plants by the towns will be lawful; and that, therefore, the petitioner cannot complain that the operation was brought about by acts of

the Administrator, a public official, even though these acts are without authority or justification in law. It is said that the public official owes no duty to the petitioner not to cause this injury to it.

This argument is in reality a confusion of three arguments: (a) that the respondents owe no duty to the petitioner; (b) that the injury complained of is not the proximate result of the respondents' acts; and (c) that the consequences to the petitioner, since they reach the petitioner through the medium of legal competition, are not legal injury. The first two arguments have already been answered. The respondents do owe petitioner a duty, recognized by this Court, not to act in the absence of lawful power or in abuse of authority to its irreparable loss. The respondents' acts are the proximate cause of the petitioner's injury since that injury is the inevitable and contemplated result of the authorization of the projects; indeed, is essential to their accomplishment as planned. The petitioner's business must be taken from it in order to repay the administrator. We turn then to the final argument—that because the injury comes through the operation of the plants, in which the towns may lawfully engage, the consequences to the petitioner are not legal injury.

The respondents do not and cannot argue that because the intervening acts of third persons are lawful, resulting consequences to a plaintiff cannot be legal injury. The cases cited *supra*, p. 24, negative any such argument. As Mr. Justice Holmes has said:

> "To sum the matter up in a rule, where it is sought to make a man answerable for damage, and the act of a third person is nearer in time than the defendant's to the harm, if the third person's act was lawful, it stands like the workings of nature, and the question is whether it reasonably was to be anticipated or looked out for; . . ." *Collected Legal Papers*, p. 134.

Nor can they argue that the consequences to the petitioner do not constitute legal injury because they reach the peti-

tioner through the competition of a rival. That the injury from competition is injury recognized by the law was expressly held by this Court in *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1, 11. Similarly in *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515, a plaintiff was held entitled to question the authority of public officers to issue a license to a third person to enable it to compete with plaintiff. Here, as in the present case, the injury came through the act of the third person and consisted in the consequences of direct competition with plaintiff. This Court found no difficulty in determining that the consequences were legally injurious and that they were proximately caused by the acts of the public officers. It accordingly proceeded to decide the remaining question of the authority of the officers.

The respondents' argument is not, therefore, that either the legality of the intervening acts or the fact that they consist of competition renders the petitioner unable to question the legality of the respondents' act. Rather, it seems to be that nothing added to nothing makes something—that because the intervening act, which finally produces the injury, is legal competition, the consequences are not legal injury. Here, again, as might be expected, both authority and reason are against such an argument.

In the cases cited below the plaintiffs were electric utility companies; the injury of which they complained would reach them through the competition of proposed municipal plants; in all the cases *the operation* of the plants was within the legal powers of the cities; yet in all cases the plaintiffs were held entitled to question the legality of acts of third persons which would cause the competition and resulting injury to the plaintiffs. Thus in *Colorado Central Power Co.* v. *Municipal Power Development Co.*, 1 F. Supp. 961, the plaintiff was held entitled to question the legality of a contract between a construction company and a city for the construction of a municipal light plant, which was to compete with plaintiff's plant, on the ground that it vio-

lated statutes requiring that such construction contracts be let to the lowest bidder. So, too, whether municipal debt limits are being exceeded by a city in incurring indebtedness to build a competing plant, *Campbell* v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560; cf. *Oklahoma Utilities Co.* v. *Hominy*, 2 F. Supp. 849; whether prospective revenues from the municipal competitor are to be pledged in excess of the amount permitted by law, *Iowa Southern Utilities Co.* v. *Cassill*, 69 F. (2d) 703, whether the state competitor proposes to proceed pursuant to an unconstitutional statute, *Gallardo* v. *Porto Rico Ry. L. & P. Co.*, 18 F. (2d) 918, all are questions which have been held properly raised in a suit by one threatened with injury from the competition of the proposed plant, even though the municipality had unquestioned legal rights to operate a competing plant.

This principle is even more clearly shown by *Citizens Electric Illuminating Co.* v. *Lackawanna & Wyoming Valley Power Co.*, 255 Pa. 145. There a utility company was permitted to enjoin the defendant from selling electricity to another utility which was lawfully competing with plaintiff. The sale violated law, but there would be no injury except for the lawful competition. That the plaintiff had no right against the lawful competition was held to be beside the point. The issue was, rather, whether the defendant in furnishing electricity to the competing plant was violating law. And since it was, the court held that an injunction would issue.

Thus the argument that the petitioner has no standing to complain if subsequent operation of the plants by the towns is lawful falls to the ground. The petitioner can complain, regardless of the lawfulness of the operation, if the acts which cause it are in voilation of law. The Administrator owes the petitioner a duty not to cause petitioner injury by acts done beyond and without authority in law. If he breaches that duty, it avails him nothing that the impact of the injury comes from operation of the plants by third parties which may be lawful. It is the unlawfulness of his

acts and not of the towns' acts of which petitioner complains. This is not a suit to enjoin competition by the towns. They will be as free after as before any decree entered herein to engage in it. This is a suit to enjoin the unlawful acts of the Administrator which cause the injury to petitioner and which breach the duty which he owes them.

The cases cited by the respondents below in no way sustain their assertion that when injury is caused by competition which is in itself lawful, a plaintiff has no standing to attack the legality of acts of third parties which cause the competition. In all of these cited cases, although the plaintiff complained of injury from competition the infirmity in his case lay elsewhere and arose from well recognized principles of law. *Railroad Co.* v. *Ellerman,* 105 U. S. 166, on which chief reliance was placed below, was a suit by Ellerman, the operator of a wharf to enjoin the lessee of a railroad company from operating a wharf in competition with him. The railroad was a corporation, the powers of which included that of acquiring and using wharves for *railroad purposes.* Ellerman's claim, this Court said, came down to the contention that defendant's operation of the wharf infringed Ellerman's rights because the lease was beyond the corporate powers of the Railroad Company. But, this Court answered, only a stockholder or the state could raise the question of *ultra vires* under these circumstances; Ellerman had no interest in it. The corporation owed him no duty which it had not performed. The case is only one of many which hold that only the state, stockholders and, in some instances, creditors may question the violation of powers contained in a corporate charter. It has no applicability here.

In *Edward Hines Trustees* v. *United States,* 263 U. S. 143, and *Sprunt & Sons* v. *United States,* 281 U. S. 249, the plaintiffs' infirmity was twofold—it was not shown that the defendants' acts were the proximate cause of the injury complained of, and the plaintiffs were complaining, not that any rate charged to them was unlawful or that any competi-

tor was receiving preferential rates, but that a discrimination formerly applied against competitors was removed. In both cases carriers following proceedings before and orders by the Interstate Commerce Commission withdrew rates which had been disadvantageous to competitors of the plaintiffs. The plaintiffs, shippers who under the old rates had an advantage over competitors, brought suit to set aside the orders. But the Court pointed out that a judgment for the shippers would not restore the advantage previously enjoyed, because the order was no longer the cause of their trouble. The carriers had acquiesced in the order and put into effect new rates, the propriety of which the shippers did not and could not attack in the proceedings before the Court. In the *Hines* case, in which certain penalty charges which bore heavily on competitors of the plaintiff had been removed, this Court said;

> "It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered." (p. 148)

In the *Sprunt* case this Court similarly said:

> "The carriers who were respondents before the Commission filed the new rates, presumably because they now desire them. Nothing to the contrary is shown. So far as the carriers are concerned, it is as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission." (p. 256)

Driving the point home, this Court said further:

> "A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so." (p. 258)

Thus it became unimportant whether or not the Commission's order had been the original cause of the withdrawal of the old rates. They had been withdrawn and, when these suits were filed, the carriers had put into effect new rates, which the plaintiffs did not and could not attack as unreasonable or prejudicial to them in these suits, and which it was not shown that the carriers were willing to change. These new rates, as this Court pointed out, did not subject the plaintiffs to any legal wrong merely because they did not continue the plaintiffs in a preferred position. That position was a mere incident of the rates which had been withdrawn and which for aught that appeared in the record would not be reinstated whatever judgment were rendered regarding the validity of the Commission's original order. Under such circumstances the plaintiffs were plainly without standing to question the legality of the order—a question which had become entirely academic.

In the present case no such situation exists. Here, the acts of the respondents in authorizing and financing the public works projects are the cause of the injury threatened to petitioner. These projects are designed and intended to supplant petitioner's facilities and to take over its business in the towns. It is only by doing so that the respondents will be repaid for their loan, and the gifts are to induce the construction. The injury will not occur if the loans and gifts are not made. Furthermore, petitioner is not complaining of a penalty or discrimination removed from another, but of a legal wrong done to it,—the invasion of its legal right to conduct its business free from interference or injury by respondents done without lawful authority.

In the *Chicago Junction Case*, 264 U. S. 258, this Court held the plaintiffs entitled to question the legality of an order of the Commission under circumstances not different in principle from those existing here. The Commission had issued an order authorizing the New York Central to acquire the Chicago terminal railroads. The New York Central could not do so under the law without this authority,

which if valid established public interest in the acquisition. The plaintiffs were competing railroads entering Chicago who contended that the order was void because there was no evidence to support the finding of public interest. The defendants—the Commission, the New York Central and the terminal railroads—contended that the plaintiffs had not the legal interest necessary to entitle them to challenge the order.

This Court said:

> "That they have in fact a vital interest is admitted . . . . The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds $10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount. If, as suggested in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here." (p. 266)

This Court then pointed out that prior to the order of the Commission the plaintiffs had a right—qualified it was true—to compete on equal terms with the New York Central for traffic originating on the terminal railroads. The fact that the right to this opportunity might be ended, without redress, by purchase of the terminal railroads by the New York Central under permission of the Commission, did not render plaintiffs without legal interest to question the validity of the Commission's act in granting the permission. If the order was without authority in law their qualified right to compete on equal terms had been impaired and irreparable injury done to their revenues.

The same is true here. Here, too, it is admitted that the petitioner has a vital interest in fact. The consequences to it, if the projects go through, are equally plain and disastrous. Here, too, its right to continue its business in the towns is qualified by the possibility that other facilities, lawfully constructed and operated, may take its business

away. But this does not affect its right to continue its business free from interference by the public officer without authority in law. He, no more than the Commission, can authorize projects designed to destroy its business, without authority in law,—much less can he induce and aid them by unauthorized loans and gifts of federal funds. This petitioner, like the plaintiff in the *Chicago Junction Case, supra,* has a special interest in the proposal and a clear standing to question the legal authority upon which it is sought to be justified.

Also in *United States ex rel. New York Warehouse, W. & T. Ass'n.* v. *Dern,* 68 F. (2d) 773, 774, the defect in the plaintiffs' suit was, as the Court of Appeals for the District of Columbia said, that "Their interest is not personal and direct, but indirect and remote". That was a mandamus proceeding brought by warehousemen in New York to cancel a lease of a government warehouse in that city made by the Secretary of War in alleged violation of procedure established by statute. The plaintiffs did not contend that they were entitled to the use of the property, or that the lease contemplated or required any interference with their business. Their only interest was that the lessee might procure business which otherwise might go to them, although it might also go to others. There were many persons engaged in the same business in the port of New York dealing with customers from all over the world. The interest of these plaintiffs in the lease of one potential competitor was negligible, remote and indirect. The principle involved is clearly inapplicable to the present case.

The principles involved here are simple and fundamental. Petitioner's business in the towns is to be wholly destroyed by systems authorized and financed by respondents, without authority in law, which are designed to and will supplant and eliminate petitioner. It is basic to the projects that the income which they now receive shall go to repay these respondents. Here there is no lack of direct causation; no absence of legal right in petitioner to be free from

respondents' unauthorized interference; no indirect or remote interest at stake. Their suit is to stay the shaft drawn by respondents and aimed at the jugular.

II.

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT, AND THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935 ARE UNCONSTITUTIONAL DELEGATIONS OF LEGISLATIVE POWER.

1. Petitioner's Position Stated.

The respondents claim authority for one of the loans and grants from Title II of the National Industrial Recovery Act and for three of them from the Emergency Relief Appropriation Act of 1935. The former act is divided into two parts. Title I sought to delegate power of Congress derived from the Commerce Clause to the President. Title II seeks to delegate the power to promote the general welfare through the expenditure of federal funds. Title I was declared unconstitutional by this Court because, as the concurring Justice put it, the authority "in effect is a roving commission to inquire into evils and upon discovery correct them". And again, "If that conception shall prevail, anything the Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer." *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 551, 553.

Title II, especially as modified by the Act of 1935, is even more sweeping in the power conferred. To the extent of three billion dollars—with another five billion added by the later Act—anything which the Congress may do within the General Welfare Clause for the betterment of business, and even beyond that, may be done by the President or his deputy. Here again "no such plenitude of power is susceptible of transfer".

2. The Power Attempted to be Delegated.

The authorizing words in Title II of NIRA are found in Section 203 (a):

> "With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; . . ."

Section 202 reads:

> "The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include *among other things* the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control . . . (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation, or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended . . ." (Italics supplied.)

In fact, as the Administrator testified, no program was first prepared from which projects were taken, but the accumulation of approved projects constituted what he called the program. He said:

> "The program from time to time was made of such projects as had been approved from time to time. The comprehensive program fluctuated from day to day, according as we approved or did not approve further projects. That was the only comprehensive program that we had. We offer now a comprehensive program of public works. It had been developed. It is there." (R. Vol. II, 515.)

Since, therefore, Section 202 was merely suggestive, since the types of projects there mentioned might be undertaken "among other things," the statute contains no more definite guide to what should be done than the term "public works project".

The term in the 1935 Act is equally general. That act refers to "projects of States, Territories, Possessions, . . . municipalities". It is true that there is an apparent limitation to the extent that it must be a project where in the determination of the President not less than 25 per cent of the loan and grant is to be expended for "work". But respondents argue, and the Trial Court held, that "work" means labor either at the site or in the manufacture or transportation of materials used. Upon such interpretation the limitation disappears. Upon any other, the present projects are unauthorized, since the respondents themselves proved, and the Court found (R. Vol. I, 467), that only half the specified percentage would go for direct labor.

So the question is whether an authorization to the President to spend billions upon "projects" or "public works projects" furnished any guide or standard, in the light of history or recent experience, as to what to do.

It is well at once to notice that Administrator Ickes himself has been careful to point out that there was no plan

or guide, and his word on the subject should be most convincing.

On June 13, 1935, Mr. Ickes testified before the Senate Committee on Commerce on the question of the feasibility of establishing a national planning board. See HEARINGS BEFORE THE COMMITTEE ON COMMERCE ON S. 2825, UNITED STATES SENATE, 74th CONGRESS, 1st SESSION, June 13, 1935. He opened his remarks with this statement:

> "When I was entrusted with the administration of Public Works there was no plan on which we could proceed. We had to start from 'scratch'." (p. 4)

And he closed his remarks with this statement:

> "Such a plan (i. e. long-range planning) would have been of great help to us when we came to a consideration of our Public Works program, for *there was nothing at all to be used as a guide and we had to start out cold.*" (p. 6) (Italics supplied.)

Three days later, on June 16, 1935, the Administrator issued through the press section of PWA an article surveying his two years' experience. As summarized in the record he stated:

> "PWA had to chart its own course, set its own precedents, pioneer its entire program.". (R. Vol. II, p. 428.)

In the same year Mr. Ickes published his book entitled *Back to Work*, which is of special significance because it is one of the few documents available in this country or elsewhere which records the actual story of a large scale govern. ent spending campaign. In the first chapter he records the formation of PWA, and, in telling of the preliminary organization thrown together as the NIRA sped through its legislative course, he says:

> "This group faced a tremendous job. Never before in any country had an organization similar to theirs been formed. *They had nothing to go upon; no prec-*

> *edent, no set of rules upon which to model their plans.*" (Italics supplied.) (*Back to Work*, p. 18, this book appears as Defendants' Ex. 12 attached to the Record.)

In the second chapter, after recounting the meetings of the Special Board for Public Works to formulate the policies PWA was to pursue under the Act, he adds:

> ". . . we were in virgin territory, faced with the necessity of blazing our own trails through the mountains and the valleys of policy, of cutting through the legal underbrush to our goal." (*Back to Work*, p. 47.)

And in the third chapter, dealing with the efforts to organize PWA, he recurs to the theme:

> "To undertake this gigantic task we had no machinery at hand and no precedent to guide us. The seas were uncharted. If there was any works plan in existence anywhere, we were not informed of it." (*Back to Work*, p. 51.)

(a). ***History Shows that the Term, "Public Works Project", Did Not Furnish an Objective or a Path by Which to Attain One.***

It was not by chance or oversight that the Administrator found no well-beaten path. The fact is that there had, indeed, never been anything like Title II of the NIRA in any country. "Public works" had been an occasionally used term of many meanings. There had been no experience with, and no appreciable thought about a program which would embrace almost every conceivable undertaking that any public or semi-public body wished to engage in, such as the NIRA allowed. Still less had there been experience or thought which made the word "projects" suggestive of any type or character of undertaking. The word "projects" might as well have been the word "things". Indeed in Sec. 202 of the NIRA it was stated that the permissible classes should be "among other things".

The National Planning Board of PWA secured the services of John Maurice Clark, one of our most eminent economists, to study the planning of public works. In 1935 his study was published by the Government Printing Office, under the title *Economics of Planning Public Works*. It contains one of the few available surveys of the history of government spending to provide work.

Professor Clark points out that in Elizabethan England there was a fairly liberal poor law whereby the various parishes kept materials on which the poor could be set to work. (p. 3) This was succeeded by a strict period down to the Napoleonic Wars when again a more liberal policy prevailed consisting of outdoor relief in cash and a certain amount of subsidized private employment. It was a time of "indiscriminate liberality", stimulated by the fear of revolution. (p. 4) With 1834 a reaction occurred, and the work house, a semi-penal institution, was adopted, where the poor were set to work breaking stone. Outdoor relief was virtually prohibited, and sporadic outside relief works were almost as bad as the work house. (p. 4) These few outside works consisted of regular city work, and there was some road and sewer construction; but the bulk of it was a sort suggestive of made-work—grooming of parks, etc. (pp. 4-5) There was no basic change in the official theory, founded on the work house, all during the nineteenth century. There was only spasmodic resort to relief works. (p. 5) The lone example of an experiment that rose materially above the level of the work house was carried out in Lancashire during our Civil War, marked by a sewage and paving enterprise using some 8,000 men; but this experiment was not carried forward and relief work during the next depression "rejected the only points worth having in the Lancashire scheme". (p. 6)

In the meantime France, following the Revolution of 1848, had made a spectacular but abortive effort to give

employment, which probably reached only 6,000 men and ended in riot and bloodshed. (p. 5)

It will be noted that this entire experience had to do only with the problem of providing a pittance to men out of work, and the English were almost exclusively preoccupied with the question of making idleness as unattractive as possible. Professor Clark concludes, "At present the English are inclined to rely on the system of unemployment benefits, rather than on public works in any form, for the relief of unemployment." (p. 7)

With the beginning of the twentieth century, some thought was devoted to a different question, and between 1905 and the depression in England of 1920 various proposals were advanced, both in England and France, suggesting the "reserving" of ordinary governmental expenditures and ordinary governmental works in such a way that what would normally be done in good times would be postponed until dull times, when it would be done, not as poor relief, but under ordinary employment conditions. (pp. 9-10) The proposal presupposed only mild cyclical fluctuations which would be smoothed out to some extent by reserving the regular government expenditures until the dip of the curve. Such expenditures might be for anything from government printing to post offices. (p. 10) The Webbs in England had worked out the theory on paper. Certain attempts have been made in France to carry out this type of policy but results are as yet doubtful. (p. 9) In England during the 1920 depression $125,000,000 were granted for public works, but chronic depression since has not allowed the theory to be tested. England is now engaged in a large housing program, "but no general drive for expanded public works similar to that in the United States has been made". (p. 9)

In Germany after a wild, hit or miss period of local projects financed largely by American loans, there was a time of retrenchment from 1930 to 1932; then the Brüning government resorted to inflation to start a planned pro-

gram though it was not much greater in actual amount than in 1930. (pp. 10-11)

And in Italy in recent times there has been an effort, undertaken without much reference to costs or without weighing results, and geared to some extent to the prevention of actual disorder, whereby road and reclamation developments have been carried out, together with excavation of Roman remains. (p. 7)

This is the sum of Professor Clark's findings for the period of four hundred years. Out of all that time there emerges only one theory of public works, aside from the work house theory, *and that was a theory never consistently put into practice*—the theory entertained by the Webbs and a few others that the deferring of normal expenditures until dull times might tend to smooth the curve of milder depressions. In the United States the President's Conference on Unemployment in 1921 gave general endorsement to such an idea; some of the States had adopted plans for "scheduling" public works with few tangible results; and under the Federal Employment Stabilization Act of 1931 (46 STAT. 1084) a six year "schedule" of federal works was drawn up that was mildly consistent with the Webbs' theory. (p. 11) But it is safe to say that up to 1933 no man, living or dead, had seriously contemplated anything like the measure embodied in Title II of the NIRA. History affords no well-beaten path.

Aside from the conglomerate applications for RFC loans, the *only thing* that PWA was able to look to was the six-year "schedule" under the Act of 1931, and *this was of temporary assistance only with respect to conventional projects of the Federal Government.* The vast area beyond was uncharted. (*Id.*, p. 11; see also NATIONAL PLANNING BOARD OF FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, FINAL REPORT, 1933-1934, p. 20; (Government Printing Office.) And even within its domain the six-year schedule was "very limited in scope". NATIONAL RE-

SOURCES BOARD, REPORT, Dec. 1934, p. 55, (Government Printing Office).

(b). *Subsequent Experience Under the Acts Here Involved Shows That the Term, "Public Works Project", Failed to Furnish Either Guide or Standard.*

In Professor Clark's study, *supra,* he suggests that customarily public works are regarded as durable goods, primarily fixed structures. But he points out that there is a strong compulsion to extend the conception as far as possible into the field of intangible service. (*Op. cit.* p. 2.) And, it may be asked, why not, when a statute authorizes "projects of municipalities"?

In March, 1934, the Administrator submitted to the Senate a list of federal and non-federal projects approved under the NIRA as of January, 1934. SENATE DOCUMENT No. 167, 73rd CONGRESS, 2nd SESSION, Defendants' Ex. 10, attached to the Record. Upon thumbing through the pages, one finds that the following are a few of the "public works" authorized by NIRA.

Tools, materials, salaries and traveling expenses for technical direction of community sanitation programs in twenty-one states. (p. 22) Draining malaria swamps in Puerto Rico. (p. 28) Bathouses and latrines at Fort McClellan in Alabama. (p. 33) Reconditioning and preservation of ammunition in sixteen states and territories. (p. 38) Drinking fountains in Arlington Cemetery. (p. 39) Night lighting at Maxwell Field in Alabama. (p. 45) A sprinkler system at March Field in California. (p. 49) Clearing yard of debris at Norfolk Navy Yard. (p. 58) One hundred cedar posts for the Geological Survey. (p. 65) A plank walk at Kotlik, Alaska. (p. 73) Expenses for field investigations to determine customary wage rates by the Bureau of Labor Statistics. (p. 121) A silo at Annadale, N. J. (p. 125) An ice-plant at Beaver, Nebraska. (p. 125) A fence at Burlington, Vt. (p. 127) A fire alarm at Charlotte, N. C. (p. 127) "Miscellaneous"

at Cleveland, Ohio. (p. 128) A culvert at Des Moines, Iowa. (p. 129) A warehouse at Fort Pierce, Fla. (p. 131) A shed in Harris County, Tex. (p. 133) A dry dock in Tampa, Fla. (p. 144) A golf course in Waterbury, Conn. (p. 146)

Aside from these are allotments to railroads for equipment and repairs (p. 147) and to limited dividend corporations for housing. (p. 147) Again there are allotments to the Federal Power Commission for a study of electricity distribution costs (R. Vol. II, 385) to the Coast Guard for repairing storm damage "without awaiting the convening of Congress" (R. Vol. II, 388), to the National Planning Board for the stimulation of local planning. (R. Vol. II, 426) Then there are allotments for soil-erosion control and recreation facilities. (R. Vol. II, 448) And $400,000,000 are allotted to the Civil Works Administration. (*Id.*)

The allotment to the Civil Works Administration so reveals the extraordinary delegation in the NIRA that it bears special notice.

On November 9, 1933, the President promulgated an Executive Order as follows:

> "By virtue of the authority vested in me under title II of the National Industrial Recovery Act of June 16, 1933 (Public No. 67, 73rd Cong.), and for the purpose of increasing employment quickly.
>
> "(1) I hereby establish a Federal Civil Works Administration, and appoint as Administrator thereof the Federal Emergency Relief Administrator, *as an agency to administer a program of public works as a part of, and to be included in, the comprehensive program* under preparation by the Federal Emergency Administration of Public Works, which program shall be approved by the Federal Emergency Administrator of Public Works and shall be known as the 'civil works program.'
>
> "(2) The Federal Emergency Relief Administrator, as head of the Federal Civil Works Administration, is

authorized to *construct, finance, or aid in the construction or financing of any public works project included in the civil works program* and to acquire by purchase any real or personal property in connection with the accomplishment of any such project and to lease any such property with or without the privilege of purchase.

* * * * * * * * *

"(4) For the purposes of this order, there is hereby allocated to the Federal Civil Works Administration the sum of $400,000,000 out of the appropriation of $3,300,000,000 authorized by section 220 of the National Industrial Recovery Act and made by the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (Public No. 77, 73rd Cong.). (Italics supplied.)

FRANKLIN D. ROOSEVELT.

"The White House
November 9, 1933."

Thus the words of the NIRA are repeated and an entirely new "program" is launched within the PWA program. The Court will recall the effort during the winter of 1933-34, when men were put to work upon literally *every conceivable kind* of project, and by far the greater portion of these were "projects of municipalities" and local subdivisions. MONTHLY REPORT OF THE FEDERAL EMERGENCY RELIEF ADMINISTRATION, DEC. 1 TO DEC. 31, 1933, p. 18, (Government Printing Office). These projects included such things as painting guard rails and fences, trimming shrubbery and painting street signs (*Id.* p. 19), brush removal and bridle paths and wading pools (*Id.* p. 20), demolition of old buildings (*Id.* p. 20), tick eradication and moth control (*Id.* p. 21), artists' projects, drafting maps, revising town ordinances, copying old records, and indexing books. (*Id.* p. 23)

Since all this was done under precisely the same statutory authority that is now in question—the "public works project" provision of Sec. 203 (a) of the NIRA—it is apparent that that term did, indeed, acquire a meaning as

broad as the word "anything". Thus insofar as the statute is concerned the central words become absolutely indefinite, *and the language of the Act of 1935 is not restrictive but even broader.* In sum, the legislation says bluntly that whenever a public body wants to do a "thing" the President in his discretion may finance that "thing".

These examples of the kinds of projects which were included under NIRA gives an indication of the lengths to which one is inevitably driven in defining the word "public works project", or in ascertaining what a public works program can amount to when it is the sort authorized by the NIRA. The point made by Profesor Clark, *supra*, is a very real one. From the multifarious types of large, fixed structures, such as post offices or city halls, one is immediately taken into the ramifications of structures and services, leading inexorably to the conclusion that as a matter of cold fact the word "public works" in the NIRA and, much more so, the word "project" in the Act of 1935 was limited only by the interaction between all the wants of public bodies (and even some private bodies) and the integrity and wisdom of the Administrator. Nothing had ever happened prior to June, 1933, that was comparable to this in scope and variety.

It is not only that the term "public works" or "project" is an indefinite term. Quite aside from that there was no experience with a program of this multitudinous character. It is no doubt true that a city here or there had at some time built a silo, and that another city had at some time built a plank walk. But there had never been an effort to carry out a program that ran virtually the entire gamut of things that municipalities or states or other public bodies might want to undertake. No well-beaten path of experience gave meaning or limitation to the scope of the program or the character of its items.

Counsel for respondents in oral argument in the Court below attempted to find some limitation upon the appar-

ently infinite discretion which this Act permits to the Administrator. Counsel was unable to state what the limitation was but merely that in his opinion there was one. He said:

> "Section 202 of title II (NIRA) continues and shows that Congress clearly intended that a broad and comprehensive program should be initiated and undertaken. They used the language:
>
> " 'and any publicly owned instrumentalities and facilities,'
>
> "That is limited. It does not mean a grocery store. It does not mean a filling station. It does not mean a lot of things. It means just what it says,
>
> " 'publicly owned instrumentalities and facilities.' "

Counsel did not inform us why the words quoted did "not mean a filling station". It could not have been because filling stations are never publicly owned or never constitute a project of a state or municipality. The recent case of *Standard Oil Co.* v. *Lincoln*, 275 U. S. 504, involved the very operation by a municipality of filling stations so casually referred to by counsel. Furthermore, in view of what states and their political subdivisions have undertaken to do, we do not wonder that counsel for the respondents has not the temerity to suggest what are the things which the statute would not permit. For instance, states and their political subdivisions have owned and operated ice plants, *Denton* v. *Denton Home Ice Co.*, 119 Tex. 193; railroads, *United States* v. *California*, 297 U. S. 176; liquor stores, *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; warehouses, grain elevators, flour mills, real estate developments, and banks, *Green* v. *Frazier*, 253 U. S. 233; coal, wood and fuel yards, *Jones* v. *Portland*, 245 U. S. 217. See also, GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE, REPORT OF INVESTIGATING COMMITTEE, PURSUANT TO HOUSE RESOLUTON 235, HOUSE REPORT No. 1985, 72nd CONGRESS 2nd SESSION.

The fact of the matter is that there is no limitation contained in or deducible from the words of the statutes. This is clearly brought out in the report of the National Resources Committee for December, 1936, which the President sent to Congress with his message of February 3, 1937. In that Report the Committee said:

> "The definition of public works has been expanded. Public work now includes the collection of basic data, mapping and preparation of plans. The term also covers a variety of services such as forestry, pest control, soil conservation, housing and rural electrification. The list has been still further expanded in the efforts of the Works Progress Administration to provide useful work for persons on relief in accordance with the principles established by the President."

The Court will note in this quotation that the principles referred to have been established not by the Congress, but by the President.

3. Congress Cannot Delegate Its Power to Spend for the General Welfare.

The government has made some contention heretofore that there can be no unlawful delegation of legislative power here because the question is one of the objects for which money shall be expended, that Congress exhausts its functions when it authorizes the President to expend up to a certain sum of money, that the amount of actual expenditure within those limits and the use to which the money shall be put are functions of the Executive. The argument reduces itself to this: that the Congress has exhausted its function when it says "up to $5,000,000,000.00 for the President, if he wants it, to do with it what he will".

There seems no support whatever for the government's theory. Admittedly the power to do what is being done here is based upon Clause 1 of Section 8 of Article I of the Constitution. The power given by that clause, whatever it

is, is a power given to Congress, not the President. The determination of what is for the general welfare, and how the general welfare is to be subserved, is a legislative, Congressional function. So says Clause 1.

It was not by chance that the Constitution reposes in Congress plenary power over money raising and expenditure. On the contrary, the men of 1787 were placing the seal of culmination on the struggle of the people for complete power over the Executive which had begun centuries before and had been marked by steady gain.

The struggle raged over three issues: the power of the King to raise revenue at his will; the power of the King to dispense with sessions of Parliament for long periods of time instead of having to return to it regularly for revenue; the power of the King to spend money for whatever purposes he wished.

The Revolution of 1688 marked the final ascendancy of Parliament, for it appears that by that time it had been established that Parliament had the ultimate power over the levying of taxes and the designation of the objects of expenditures, with the right of periodic assembly.

Creasy in *The Rise and Progress of the English Constitution* says (pp. 293-4):

> "In addition to this important guarantee (the mutiny act), for the regular meeting of Parliament, a system of settling the royal revenue was established in *William's* reign, which necessitated the observance of the same constitutional principle. *The House of Commons then determined no longer to vote to the crown certain general large sums of revenues to be applied to particular purposes, according to the royal discretion; but they appropriated specific parts of the revenue to specific purposes of government.* This principle had been previously attempted, but it is only since 1688 that it has been strictly enforced." (Italics supplied.)

This victory of the people over the corruption and waste of an irresponsible sovereign was dearly bought and

jealously maintained, and the thought of political theorists in the period of our Revolution and the establishment of our Constitution was much occupied with this necessary check by the representatives of the people over the King. The writings of the Frenchman, De Lolme, in this field of English constitutional theory were familiar at the time of the Convention.[1]

When the Constitution was established there was no problem of people *versus* King, for the people had seized all the power. Hence the question was one of distributing the power between the various departments of the government, and of providing not merely that ultimate control should repose in one or the other branch but that each branch should have certain exclusive powers, with the correlative duty to discharge them and not to pass them to the other branches. Thus it came about that the ultimate powers of the Parliament to make laws, including legislation upon the spending of money as well as the raising of money, were not only made powers of Congress but, by our Constitutional theory, the powers of Congress exclusively.

Hence, as Parliament in 1688 asserted its right that the King could not take public funds and apply them to this

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[1]De Lolme, who wrote extensively on all phases of English political theory, sketches the outlines of the Parliamentary power in *The Constitution of England*, published in English first in 1771 and now available in the *Chandos Classics* (London and New York, 1873). See pp. 167-182, 237. He shows that the only ultimate check the Parliament had over the King was its power over the revenues, and that, first by attaching conditions and finally by detailing more specifically how the money was to be spent, the grants to the King took the conventional form of laws, pp. 173-174, with the Parliamentary will enforced by winning the power of impeaching the King's agents. See pp. 179-180.

In a footnote at p. 349 the author mentions that he discussed these Constitutional problems with Dr. Franklin some months before his return to America.

The questions of the relation of the King to the legislature with respect to the raising and spending of revenue were placed in the forefront by the Colonies' disputes with the mother country. See pp. 348-350.

or that purpose as he pleased but only as Parliament permitted, so our Constitution of 1789 requires that it is not only the right but the *duty* of the legislative branch to prescribe whether this or that purpose shall be subserved by expenditures of public funds. And when Congress says in the Act of 1935 that the President may, if he wants to, spend $600,000,000 for the CCC, or $100,000,000 for rural electrification or $900,000,000 for "projects" of "municipalities" or the entire $4,880,000,000 for aid to farmers or for the administration of the AAA, principles founded in a centuries-old struggle with the caprice and injustice of absolutism have been violated.

The courts of the states, in many instances dealing with a constitutional structure like that of 1789, have been fully aware of this struggle and have not been false to its plain dictates. As early as 1863 the Supreme Court of Indiana reviewed the Parliamentary history in a searching opinion and concluded that in that historic background the division of powers meant "the giving to the legislative power alone the right, and imposing upon it the duty, of designating, periodically, the particular demands against the state, or other objects, to which the moneys in the treasury shall be, from time to time, applied, and the amount to each. Opinions Att'y Gen. Vol. II, p. 670. And it is a great and important principle not to be lightly violated." *Ristine* v. *State ex rel. Board of Commissioners of the Sinking Fund,* 20 Ind. 328. See also *State ex rel. Norfolk Beet Sugar Co.* v. *Moore,* 50 Neb. 88; *Jackson* v. *Gallet,* 39 Idaho 382; *Clayton* v. *Berry,* 27 Ark. 129; *State ex rel. Pine* v. *La Grave,* 23 Nev. 25; *Hett* v. *Portsmouth,* 73 N. H. 334.

The most recent pronouncement was that of the Nebraska Supreme Court, on Sept. 20, 1935, in *Smithberger* v. *Banning,* 129 Neb. 651. State statutes had appropriated $4,000,000 to the state assistance committee. This committee was given the power to spend the funds for persons eligible, under federal legislation, "to work relief, direct relief, old age assistance, assistance to dependent mothers

and children, unemployment insurance, health of mothers and children, public health or related matters of security and welfare, and public works, especially roads, by the use of work relief". This was held an unconstitutional delegation of power to the state assistance committee. The Court said, at pp. 656 and 657:

> "There is no provision in any of the bills mentioned that fixes any standards for the guidance of the state assistance committee or the board of educational lands and funds. The committee and board above mentioned have an arbitrary and unrestricted discretion to allocate the $4,000,000 to any of the purposes set forth in the acts under consideration, with the single exception that old age pensions are to be given a preference. Under these acts, the board and committee have the power, if they see fit to do so, to allocate the whole fund to the payment of old age pensions and unemployment insurance without the requirement of the making of any findings of fact under standards and tests provided for in the act. Such provisions amount to a delegation of legislative power. Under section 1, art. 2, and section 1, art. 3, of the Nebraska Constitution, the legislative power of the state is vested in the legislature and cannot lawfully be delegated to any board or committee."

The court then analyzed at length the decisions of this Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 and *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, with this significant conclusion, at p. 660:

> "The above cases have particular application in principle to the case at bar. In the Nebraska acts, there are no limitations, standards, rules of guidance or criterion for the guidance of the state assistance committee and the board of educational lands and funds in allocating funds for old age assistance, unemployment relief, mothers' health, unemployment insurance, and other forms of relief therein enumerated. There is no requirement that the administrators of the acts find certain facts in determining for which of

> the various purposes allocations should be made and no basis for determining the amount to be allocated to each or any of the purposes therein set forth. This is all left to the discretion of the state assistance committee. Under the authorities hereinbefore cited, this constitutes a delegation of legislative functions to an administrative board."

The Court likewise held invalid on the same grounds the provision that the collection of certain taxes to raise the $4,000,000 might be terminated by the governor if Congressional social securirty legislation, not yet passed, required less than a $4,000,000 contribution from Nebraska. Thus to permit Congress, an agency other than the state legislature, "to determine the amount to be raised by the tax" is a delegation of legislative power. (p. 664)

In sum, the respondents must show that the authority delegated to them by Congress is an authority to execute a law providing for the general welfare, and not an authority themselves to legislate for the general welfare. One could desire no more eloquent testimony to the legislative character of the power delegated to the President than the President's executive order appropriating an additional $800,000,000 to these respondents, thus practically doubling the amount available to them:

> "EXECUTIVE ORDER
>
> "WHEREAS I find it necessary, in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 74th Congress), to increase by $800,000,000 the limitation of $900,000,000, contained in clause (g) of section 1 of the said Act, on the amount which may be expended under the Act for loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia and self-liquidating projects of public bodies thereof; NOW, THEREFORE, by virtue of and pursuant to the authority vested in me under the said Emergency Relief Appropriation Act of 1935, it is

ordered that the said limitation be, and it is hereby, increased from $900,000,000 to $1,700,000,000.

FRANKLIN D. ROOSEVELT.

"The White House
September 21, 1935"

Without findings, in a manner which may be perfectly arbitrary for all that appears in the order or in the Act of 1935, defying scrutiny by the Comptroller General, the courts, or the Congress itself, the President thus exercises powers that Parliament had won for itself nearly three centuries ago.

It is beside the point to cite, as respondents have done in earlier cases, instances where Congress has appropriated lump sums *for specific purposes* leaving the Executive discretion as to the time, place and manner of its disbursement. In all of such cases the object of the expenditure is clear and no question arises as to the delegation of a power conferred on Congress.

For instance, the Act of June 17, 1902, c. 1093, (32 STAT. 388), cited by this Court in *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 322, as an illustration of discretion properly conferred on the executive branch, set aside a special fund composed of moneys received from the sale of public lands in specified states to be used for the reclamation of arid lands in those states, the Secretary of the Interior to determine what projects were practicable and advisable. Here there was no vague direction to spend the money for the good of the country, but a precise specification of the object of expenditure, the area within which it was to be made, and a direction to the Secretary to determine the place and time of the projects on the basis of practicability. In the present instances the entire plenitude of the Congressional power to promote the general welfare with these vast sums is sought to be transferred to the President.

4. Congress Has Not Ratified the Acts of the Administrator Here Challenged.

In their brief in opposition to certiorari (pp. 23-24) respondents argued that a certain act of Congress amounted to an approval or ratification of the conduct of the Administrator in authorizing the loans and grants here involved.

We point out in Section IV, *infra*, p. 66, that Congress has no power under the General Welfare Clause to authorize the acts of the Administrator here in question, and that to do so would violate the limitation of the Tenth Amendment. That Congress has no power to ratify an act which it could not authorize in the first place is too obvious to need argument.

The facts from which this claim of ratification is sought to be spelled out are as follows:

In response to SENATE RESOLUTION No. 235, 74th CONGRESS, 2nd SESSION, the Administrator on March 6, 1936, furnished the Senate with SENATE DOCUMENT No. 184, 74th CONGRESS, 2nd SESSION, a list of approved projects involving the production or distribution of electric power or gas, among which were listed those here involved.

On June 22, 1936, the Emergency Relief Appropriation Act of 1936 (49 STAT. 1608), *infra*, p. 88, was enacted providing in part as follows:

> "In order to increase employment by providing for useful public works projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the President, use not to exceed $300,000,000 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects. . . ."

Respondents cannot, of course, argue that Congress expressly ratified any acts of the Administrator. Both the

73rd and the 74th Congress knew how to ratify acts of administrative officers when they wished to do so. In the Gold Reserve Act of 1934, Sec. 13, (48 STAT. 337, 343), the 73rd Congress provided:

> "All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed."

And in the Act of August 24, 1935, c. 641, sec. 21 (b) (49 STAT. 750, 771),—amending the Agricultural Adjustment Act—the 74th Congress enacted that processing taxes theretofore imposed by the President or by the Secretary of Agriculture—

> "are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress."

Respondents do not contend that Congress ratified the Administrator's acts by any such plain action as the above. Nor do they contend that the ratification was by specific appropriation to these specific projects as in *Wisconsin* v. *Duluth*, 96 U. S. 379, 386, and *United States* v. *Arizona*, 295 U. S. 174, 186. Nor do they argue that the specific administrative action here questioned was specifically mentioned in any act of Congress, and, in this way, approved as in *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, and *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297. The alleged ratification is unlike any heretofore acknowledged by this Court. It amounts merely to the appropriation of a sum for grants to future projects—not those here involved—which future projects were described in the most general terms as of the general type and kind as those theretofore undertaken. The statement of the chairman of the

House Committee on appropriations (CONG. REC., Vol. 80, Part 9, p. 9791) in reporting the Emergency Relief Appropriation Act of 1936 makes it plain that he had no intention of ratifying anything and intended merely to release funds in the revolving fund of PWA for the making of grants, which theretofore could be used for loans only. No sweeping ratification of innumerable acts can or should be implied from such restricted and general language. Compare, *Herring* v. *Houston National Exchange Bank*, 113 Tex. 264.

III.

THE LOANS AND GRANTS ARE UNAUTHORIZED BECAUSE THE ADMINISTRATOR IN APPROVING THEM HAS APPLIED A STANDARD OR CRITERION WHICH CONGRESS HAS NOT AND COULD NOT VALIDLY PROVIDE.

Even those who would argue that in the purpose, mentioned in the statutes, to provide employment there is enough guide or standard for the Administrator "to turn the color of legal litmus paper" in favor of the validity of the acts, must go further and concede that, unless the Administrator *bona fide* approves projects to this end, in accordance with their desirability in the light of the national reemployment program, the so-called standard entirely disappears. For it is obvious that some modicum of employment must result from any construction for any purpose. If that inescapable modicum is sufficient authorization for the project, then there is no standard and the Administrator, indeed, has a roving commission.

So the very position of the respondents in endeavoring to sustain the acts requires that the Administrator be able to show that the standards which he applied were those which alone could, according to his contention, extend the general authorization of the acts to the particular projects. If the proof is conclusive that he applied a standard or criterion which, even on his own argument, Congress has not provided, and which it could not provide, he cannot

save himself by the argument that, anyway, he could not fail to create some employment whatever he did. Such an argument destroys his essential premise that he has a chart to steer by.

The petitioner submits that the record leaves no reasonable doubt that the Administrator in determining whether or not to make these loans and grants applied the sole test of whether doing so was or was not necessary to provide retail outlets for TVA power under the rate control of TVA. Speaking more broadly the criterion was whether or not the construction of these projects would provide a means for lowering intrastate electric rates in Northern Alabama by TVA competition. We begin, as the record does, with the application of the towns.

(1) Each application recites that the town will use TVA power; that the use and sale of such power at low rates will reduce electric light and power rates in other communities; that the resale rates will be at schedules prescribed by TVA. (R. Vol. II, 92-95, 97, 99-100, 109-111, 126-127.)

(2) In the official document, approved by the President, authorizing the loan and grant to Decatur the only reason stated for the project is "that the Tennessee Valley Authority has acquired the necessary lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its electrical energy . . .". (R. Vol. II, 343-4.) In a similar document the Russellville project is described as "Construction of distribution system to distribute TVA energy". (R. Vol. II, 359.) The remaining approvals are silent as to reasons.

(3) The advancing of funds for these projects—"with a view to increasing employment quickly"—was delayed for a year and a half to enable TVA to purchase the petitioner's lines, in which case the projects would have been abandoned. (*Supra*, p. 8.) TVA's plan was to purchase and operate these distribution systems for a while, later selling them to the towns. (R. Vol. II, 142, 144.) But it

was essential that all the towns agree to its plan. One of them—Florence—rejected it. (R. Vol. II, 136-146.) PWA held these projects up while TVA conducted its negotiations. (*Ibid*) The Administrator wired the Mayor of Florence: "Lilienthal informs me all other communities in area affected have approved TVA plan that Florence alone is holding out. Policy Public Works is to support Tennessee Valley Authority . . . Administration will advance no funds to Florence for expenditures inconsistent TVA plan . . .". (R. Vol. II, 137.)

(4) When the first contracts were made between the Alabama towns and the Administrator (those with Sheffield and Decatur, now superseded) they contained provisions conditioning the loan and grant upon the towns making contracts with TVA to purchase its power and resell at rates prescribed by it.[1]

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[1]The provisions referred to are found in Vol. I of the Record at p. 83 (Sheffield) and at pp. 125-126 (Decatur), the latter being as follows:

> "13. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:
>
> . . . . . .
>
> "(f) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the Ordinance providing for the authorization, issuance, and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator;
>
> "(g) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of an interest upon the Bonds, and to provide a reserve for new construction and contingencies, and will specifically per-

(5) Although the foregoing requirement was eliminated from the later contracts between PWA and the towns, Sheffield, as of March 16, 1936, entered into a contract with TVA for electric power, containing this provision:

> "6. *Resale Rates.*—In order to facilitate the disposition of surplus power generated by Authority and not needed by it in its operations, and in order to carry out the intention of Congress to encourage the more abundant use of electricity throughout the area in which municipality operates, municipality agrees to charge consumers the rates set forth for the several classes thereof in schedules B-1 to B-5, inclusive, of the said schedule of rates and charges, and not to depart therefrom except by agreement of the parties. Additional resale schedules for special classes of consumers or special uses of electricity may be added from time to time by agreement of the parties. The term 'contractor' in said schedule shall be construed to mean municipality. If it should appear that the rates provided for in said resale schedules with the surcharge provided for therein do not produce reve-

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mit the Borrower to apply and keep in effect for the first year of operation of the Project, and longer if necessary for the foregoing purposes, a surcharge of 10% on the domestic, commercial, and industrial resale rate schedule of the Tennessee Valley Authority, and for at least the three succeeding years a surcharge of 10% on the commercial and industrial resale rate schedule of the Tennessee Valley Authority."

When the cases were in the Court of Appeals on the first appeal (from an order dismissing the bills of complaint) the respondents moved to remand to the lower court for amendment of the pleadings and trial upon the amended pleadings, the ground of the motion being that new contracts had been entered into between the respondents and the towns since the appeal had been taken. (R. Vol. I, 77, 193.) The motions were granted. (R. Vol. I, 195-198.) In his brief in support of the motion to remand the Administrator stated that the provisions regarding rates in the former contracts with municipalities were eliminated in the later ones because of the decision of the District Court (the first decision) in *Greenwood County* v. *Duke Power Company*, 12 F. Supp. 70. The Administrator, however, denied that the District Court had correctly interpreted those provisions of the contract. See also Mr. Ickes' testimony at R. Vol. II, 512.

> nues sufficient to operate and maintain municipality's electric system on a self-supporting and financially sound basis, then municipality shall, by agreement with Authority, prescribe and enforce such changes in rates as will provide for the increased revenues necessary to place the system upon such a self-supporting and financially sound basis." ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1936 (pp. 224-225).

The contract is the standard contract used in agreeing with municipalities and cooperative associations to supply power for resale. (*Id.*, Appendix A. For statutory authority for such provisions see pp. 89-90, *infra*.)

This, then, is the record. The projects were justified in the applications of the towns as outlets for TVA power and subject to its rate regulations; they were described, so far as they were described at all, in the document submitted to and approved by the President as outlets for TVA power; they were delayed for eighteen months while TVA explored an alternative which would have scrapped the projects; and when the projects were finally approved, the towns were first required by PWA, and when that was removed by TVA, to submit to TVA control of resale rates.

The mere statement of these facts leaves no other conclusion possible than that whether the work should go forward or stop depended solely on the criterion of consistency with the TVA plan. There is not even a reference in the telegram to the Mayor of Florence to providing employment or to any national reemployment plan of which these projects were a part. Florence is scolded for "holding out"—not for funds to provide employment—but for a plan inconsistent with that of TVA. It is made plain that the Administrator will provide no funds—to increase employment quickly or otherwise—inconsistent with the TVA plan, a plan which, at that time, would provide no construction, but which it was his policy to support.

That this policy was no isolated one, but was a part of the Administrator's announced standard for determining

whether or not to advance funds for local electric systems is shown by the facts already recited, *supra*, pp. 9-12, and which will not be repeated. It is sufficient to say that that standard was not concerned with employment but depended on whether the project would result in increased use of electricity at lower rates.

In the Courts below the respondents have attempted to make an oblique reply to this record by insisting that the Administrator did not choose the projects but merely approved or disapproved those chosen by the municipalities and submitted to him, and that therefore he could not have any such policy as the record shows. Of course, the argument is beside the point. The subject under investigation is the standard for approval or disapproval, for determining whether a particular project fell within the general terms of the statute. But in these cases even the irrelevant argument stated above is not open to the respondents. For the record shows that the towns here involved and the counties in which they were situated submitted other projects as well as those here concerned. The record shows also, by respondents' own witness that the direct labor involved in such projects as public building, water works and sewers, which were those not approved, was far greater than any involved in the electric systems. (R. Vol. II, 562-563.) The projects submitted were as follows:

Name of Town	Type of Project	Amount of Requested Loan	Amount of Requested Grant	Reference
Decatur (Morgan Co.)	County Jail	$112,000	30%	Def. Ex. 10, p. 148
	School	10,000	30%	Def. Ex. 10, p. 148
	School (Total cost $30,000)		$13,500	Plaintiff Ex. 262, p. 3
Hartselle (Morgan Co.)	Extension of Waterworks	38,550		Def. Ex. 10, p. 182
	Cemetery	3,345		Def. Ex. 10, p. 182
	Sewers	50,000		Def. Ex. 10, p. 182
	Sanitary Sewer	31,000	25,364	Plaintiff Ex. 262, p. 5
Morgan County	Refrigerating Plant	41,250	33,750	Plaintiff Ex. 262, p. 5
Russellville (Franklin Co.)	City Hall	35,298	30%	Def. Ex. 10, p. 182
Franklin County	Waterworks Sewer	36,869	33,908	Plaintiff Ex. 262, pp. 3, 4
Guntersville (Marshall Co.)				
Marshall County	Street improvements Schools Sewerage	183,737.40	89,244.60	Def. Ex. 10, p. 148, Plaintiff Ex. 262, p. 5

So the Administrator did have and did make a choice between various possible projects. His choice emphasizes again that the standard he applied in making it was not to provide employment quickly but to provide an agency, under federal control, for the reduction of electric rates in Northern Alabama.

At the trial the respondents undertook to prove that, irrespective of standards applied by the respondents in approving the projects, their construction and the manufacture of the materials used would create some employment. This proof, however, amounted only to the generality that any construction or purchase—except purchases of real estate—must create some employment.

The respondents' witness was an official of the Bureau of Labor Statistics. (R. Vol. II, 542, *et seq.*) He testified that the principal unemployment during the depression was in the durable goods industries. At the request of the respondents he prepared computations of the amount of direct and indirect man hours involved in the erection of and production of materials for six completed power systems financed by PWA. All of these projects included steam or deisel power plants. (Those here involved have no power plants). The direct labor could be computed from the reports of contractors. (*Id.* 560.) The indirect labor had to be estimated The direct labor, —i. e., at the site—represented about one-tenth of the expenditure (*Id.* 562) and about one-fifth of the total labor estimated. (*Id.* 553.) It was much less than the direct labor furnished by other types of projects, such as building, waterworks, sewers, dams and roads. (*Id.* 562-563.)

The estimate of indirect labor involved in the manufacture of materials used was based upon studies made by the witness in 1935 (before which there was no reliable information) as to the amount of labor involved per dollar of final cost in the production of steel and cement, and incomplete studies of some other industries supplying materials. (*Id.*, 563-564.) These studies showed considerable variation between various plants depending on location, process, and rate of operation. No attempt was made in the estimate to ascertain from what plants or areas the materials were purchased, and the actual labor involved might vary from the general figures used. The witness would not say that any unemployed were put to work. (*Id.*, 564.)

The sum total of all of this is that on projects, substantially dissimilar to these, calculations were made, after the event and after the present cases had gone to trial, which disclosed a small amount of employment furnished at the site and an estimate that in the manufacture of the materials used, whenever and wherever that took place, a highly speculative amount of labor was involved. But no one can

say whether that labor contributed to the relief of unemployment, or whether the materials were furnished out of accumulated stocks or manufactured in areas or plants where there was no unemployment problem. So far as the direct labor is concerned Mr. Rau of the PWA Electric Power Board of Review testified that the "class of employment was too technical to be selected from the local unemployment situation . . . they could not be found in most communities". (R. Vol. II, p. 252.) In short, we are back where we started and have only stated in pseudo-scientific ponderousness that some small amount of direct labor is necessary to erect the systems and that the manufacturing of the materials either has involved or will involve other labor. But the testimony proves conclusively that the reference in the statutes to providing employment, as understood by respondents, furnished no guide or standard, and that in any event respondent was not guided by employment making factors in selecting these projects for approval.

What is said above applies equally to the President's so-called finding, contained in a letter to the Secretary of the Interior accompanying his approval of a large number of projects including those in Russellville, Guntersville, and Hartselle, *supra*, p. 6, that "not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular project". The respondents insist that work referred to means work in the manufacturing of materials as well as on the job—since they, themselves, proved that only one-tenth will be spent for labor on the job. And they cannot claim that it means future labor, since the materials, or a large part may be already manufactured. Whatever may be said of this finding, as respondents insist that it must be interpreted, it is enough to observe that it could have been made of any conceivable project, and that it disposes finally of any contention that employment making potentialities of these projects were in any way the standard which led to their selection.

It is wholly beside the point to argue, as respondents do,

that the Administrator has a large field of discretion in the selection of projects and that a court will not substitute its judgment for his. It is true that he has a great field of discretion—so great, we argue, as to render the statutes void as delegations of legislative power. But, upon his own argument, he must exercise his judgment according to the guide or standard which he claims to find in the statutes—the making of employment. It is only when he acts *bona fide* within this field that he can claim that discretion has been legally exercised. When he boldly departs from this field, claiming that since he cannot fail to make some employment he need not think about it, and applies standards of efficacy in rate control, he is not doing what even he asserts that Congress told him to do.

It is a familiar principle that, although courts will not review the discretion of an administrative official exercised within its legal scope, they will grant relief if he applies rules or principles which are not authorized by law. In *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, the Interstate Commerce Commission applied principles of valuation not in accord with the statute. Although the Commission had vast discretion in the matter of valuation, it was held that its order must be set aside. In *Work* v. *Louisiana*, 269 U. S. 250, a statute authorized the Secretary of the Interior to transfer federal lands to states when certain conditions existed. When the Secretary added a condition not contained in the statute, he was enjoined. Similarly, in *Herkness* v. *Irion*, 278 U. S. 92, a Louisiana official was enjoined because he applied a non-statutory rule in refusing to issue the plaintiffs a license to manufacture carbon black. Closely related cases are *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.*, 224 U. S. 474; *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638. There through a misconstruction of the statute the Commission refused to take jurisdiction in a matter involving discretion. Mandamus was held to lie to compel

the Commission to take jurisdiction, although its discretion, lawfully exercised, could not be controlled. See *United States ex rel. Chicago, Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 61; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 218; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; and *Commissioner of Patents* v. *Whitely*, 4 Wall. 522, 534.

In the present case the Administrator has clearly put his actions beyond the protection of the statutes as he himself construes them.

IV.

IF THE STATUTES BE CONSTRUED TO AUTHORIZE WHAT HAS BEEN DONE HERE, THEY ARE UNAUTHORIZED BY ANY POWER DELEGATED TO THE FEDERAL GOVERNMENT AND VIOLATE THE TENTH AMENDMENT.

To authorize what has been done here, it must be contended that Congress under the General Welfare Clause may spend for the construction of local electric distributing systems to be used to retail power produced by a federal agency at rates prescribed by a federal agency for the announced purpose of lowering electric rates within a state, when it appears that the only claimed connection with the national welfare is the generalization that some employment must result from the erection of the system and the purchase of the materials. Such an argument runs counter to plain and fundamental pronouncements of this Court.

It is too plain for argument that the control of intrastate electric rates, either directly through regulation or indirectly through competition, is a state function. The first principle which governs the intrusion of the federal power into a field normally reserved to the states was announced by this Court in *Florida* v. *United States*, 282 U. S. 194, 211-212:

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and

with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

The only justification claimed here would have to be the remote, collateral and speculative one that in the construction of the system some modicum of employment would be created and that this employment *might* tend to contribute to the relief of a national unemployment problem. Such a remote and collateral connection is not the clear justification of the exercise of the federal power which alone will sustain it. *Florida* v. *United States, supra; Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *Arkansas R. R. Commission* v. *Chicago, Rock Island & Pacific R. R. Co.*, 274 U. S. 597; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 546-8; *United States* v. *Butler*, 297 U. S. 1.

Furthermore, it would be plain under accepted canons that the purpose of the statute supposed was not to promote the general welfare but to regulate intrastate commerce. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." *Collins* v. *New Hampshire*, 171 U. S. 30, 34; *Hammer* v. *Dagenhart*, 247 U. S. 251, 275; *Hill* v. *Wallace*, 259 U. S. 44, 66; see also *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10. And it is "established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid

and cannot be enforced", *Linder* v. *United States*, 268 U. S. 5, 17.

It would be plain, if Congress expressly authorized the criteria and standards applied here by the Administrator, that they were not reasonably and naturally adapted to the effective exercise of the general welfare power. In fact, it would be apparent that they had nothing whatever to do with it. This conclusion would be irresistible when it was further shown, as it is here, that the creation of employment to aid the unemployed is at most a highly speculative and collateral result of the type of project contemplated and that even this is hindered rather than aided by the application of the standards used. In such a case this Court must conclude that "it is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business" wholly within a state, by coercing the petitioner through competition or the threat of it to charge rates approved by a federal authority. See *Hill* v. *Wallace, supra*, 66.

In *United States* v. *Butler*, 297 U. S. 1, 66-68, 87 the Court while adopting Story's construction of the welfare clause in preference to Madison's more limited construction stressed the fact that "the adoption of the broader construction leaves the power to spend subject to limitations"; that it may only be exercised for a general not local, national not state, purpose. *And the Court expressly held that the federal spending power cannot lawfully be made the means of controlling matters of local concern, or of exercising powers reserved to the states.* The dissenting Justices did not differ on this point. Mr. Justice Stone in his dissenting opinion said:

> "The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. *Another is that it may not be used to coerce action left to state control.*" (Italics supplied.)

For the federal spending power to be used so as to invade the powers and perform the functions of the states would lead inevitably to the destruction of the balance between the general government and the states. A use of the federal spending power for such a purpose or, regardless of purpose, a use, which has that direct and necessary effect, is not a constitutional means of relieving unemployment.

In *Franklin Township* v. *Tugwell*, 85 Fed. (2d) 208, 221, (which the government did not seek to have reviewed by this Court), the same principle was declared by the United States Circuit Court of Appeals for the District of Columbia, as follows:

> "Thus we think it clear from the limitations placed upon the power of Congress to tax and spend for the general welfare that that power can never be used to destroy the federal balance established by the Constitution between the general government and the States, that that power may be exercised only within the limitations imposed by the Constitution, and not beyond, and that it cannot be directed to matters of local concern which belong exclusively to the States."

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 29, 30, the Court construed and limited the application of the National Labor Relations Act of 1935 so as to exclude any invasion of the reserved powers of the states over their local concerns. The Court said that unless so construed and limited in its application—

> "the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *Schechter Corp.* v. *United States*, 295 U. S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

The federal spending power like the other powers of the Federal Government must be exercised in the light of our dual system of government and our indestructible union of indestructible states.[1] Story, *The Constitution*, (3rd Ed., Sec. 416); *United States* v. *Butler*, 297 U. S. 1, 68. It must be exercised in a manner to "consist with the letter and spirit of the constitution". *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. And this prohibits any exercise of the power which would have the direct and necessary effect of invading the powers reserved to the states and impairing their separate existence and independent self-government. *Kansas* v. *Colorado*, 206 U. S. 46.

CONCLUSION.

For the foregoing reasons, it is submitted that the petitioner has legal standing to question the authority in law of the respondents to authorize and finance the projects here involved; that the respondents have no authority in any law of the United States to do what has been done here; that Congress could not confer such authority under the Constitution, and that, therefore, the decree of the United States Court of Appeals for the District of Columbia should be reversed and the cause remanded to the District Court of the United States for the District of Columbia with direction to enter a permanent injunction against the respondents.

Respectfully submitted,

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[1] This principle applies even more strictly to the federal spending power than to the other powers of the Federal Government, because the spending power, different from most of the other powers, involves only the power to spend, and, as Hamilton said does "not carry the power to do any other thing not authorized in the Constitution, either expressly or by implication". *Hamilton's Works*, (Const. Ed.) Vol. IV, p. 152.

APPENDIX.

I.

NATIONAL INDUSTRIAL RECOVERY ACT:

[PUBLIC—No. 67—73d CONGRESS]

AN ACT

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INDUSTRIAL RECOVERY

DECLARATION OF POLICY.

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

* * * *

TITLE II—PUBLIC WORKS AND CONSTRUCTION PROJECTS

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

SECTION 201. (a) To effectuate the purposes of this title, the President is hereby authorized to create a Federal

Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the "Administrator"), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint.

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

(d) After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended, the President shall not make any further loans or grants or enter upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate: *Provided*, That he may issue funds to a borrower under this title prior to January 23, 1939, under the terms of any agreement, or any commitment to bid upon or purchase bonds, entered into with such borrower prior to the date of termination, under this section, of the power of the President to make loans.

SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed: *Provided*, That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and/or limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft and technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or mortorization of such Army

tactical units as he may designate: *Provided, however,* That in the event of an international agreement for the further limitation of armament to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part, any such naval or military construction or mechanization and motorization of Army units: *Provided further,* That this title shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such Architect is the contracting and/or executive officer.

SEC. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grant to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase; *Provided,* That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; (4) to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; and (5) to advance, upon request of the Commission having jurisdiction of the project, the unappropriated balance of the sum authorized for carrying out the provisions of the Act entitled "An Act to provide for the construction and equipment of an annex to the Library of Congress", approved June 13, 1930 (46 Stat. 583); such advance to be expended under the direction of such Commission and in accordance with such Act: *Provided,* That in

deciding to extend any aid or grant hereunder to any State, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several States, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

* * * *

(d) The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

* * * *

SEC. 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be

used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

* * * * *

ISSUE OF SECURITIES AND SINKING FUND

SEC. 210. (a) The Secretary of the Treasury is authorized to borrow, from time to time, under the Second Liberty Bond Act, as amended, such amounts as may be necessary to meet the expenditures authorized by this Act, or to refund any obligations previously issued under this section, and to issue therefor bonds, notes, certificates of indebtedness, or Treasury bills of the United States.

* * * * *

APPROPRIATION

SEC. 220. For the purposes of this Act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000.

II.

EXECUTIVE ORDER OF THE PRESIDENT, JULY 8, 1933.

ADMINISTRATION OF PUBLIC WORKS

Pursuant to the authority of "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

FRANKLIN D. ROOSEVELT.

The White House
July 8, 1933.

III.

EXECUTIVE ORDER OF THE PRESIDENT, AUG. 19, 1933.

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

A. DELEGATION OF FUNCTIONS AND POWERS.

Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities, and tenure.

2. Under the conditions prescribed in section 203 of said Act, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act; upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

3. In deciding to extend any aid or grant to any State, county, or municipality, to consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof.

4. In his discretion, and under such terms as he may prescribe, to extend any of the benefits of Title II of said Act to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

B. REGULATIONS.

Pursuant to the authority vested in me by section 209 of the National Industrial Recovery Act I hereby prescribe the following rules and regulations as necessary to carry out the purposes of Title II of said Act:

1. No convict labor shall be employed on any project constructed in whole or in part under the provisions of Title II of said Act. No materials manufactured or produced by convict labor shall be used on any such project.

2. No contractor or sub-contractor on any such project who is subject to a code adopted pursuant to Title I of said Act shall permit any employee to work in excess of the hours of labor prescribed in said code. No other contractor or sub-contractor shall permit any employee to work more than 30 hours in any one week, except by authority of the Administrator; *provided* that working time lost in any week because of inclement weather or unavoidable delay may be worked within the succeeding 20 days; *provided further*, that in localities where a sufficient amount of labor is unavailable in the immediate vicinity of the project a maximum of 130 hours of labor in any calendar month may be authorized by the Administrator; *provided further*, that in localities so remote and inaccessible that employees must be housed in camps the Administrator may authorize labor not to exceed 8 hours in any one day and 40 hours in any one week.

3. No employee on any such project shall be paid less than a just and reasonable wage which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. All such wages shall be paid in lawful money of the United States, in the full amount earned by each individual at the time of payment, not less often than once each week, and without deduction on account of goods purchased, rent, or other obligations which obligations shall be subject to collection only by legal process.

4. Each contractor or sub-contractor on any such project shall post in a prominent and easily accessible place at the site of the work a legible statement of all wage rates paid.

5. Should it appear that any individual employed on any such project has been or is being paid less than hereinbefore prescribed, the Administrator shall notify the employer of such individual to pay him all wages due accord-

ing to the prescribed rate. Upon 10 days default on the part of such employer he shall be liable to the penalties provided in said Act for violation of these regulations.

6. Any violation of these rules and regulations may be notified by the Administrator to the District Attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for such violation.

FRANKLIN D. ROOSEVELT.

The White House,
August 19, 1933.

IV.

EMERGENCY RELIEF APPROPRIATION ACT OF 1935.

[PUBLIC RESOLUTION—No. 11—74TH CONGRESS]

[H. J. Res. 117]

JOINT RESOLUTION

Making appropriations for relief purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be used in the discretion and under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of $4,000,000,000, together with the separate funds established for particular areas by proclamation of the President pursuant to section 15 (f) of the Agricultural Adjustment Act (but any amounts thereof shall be available for use only for the area for which the fund was established); not exceeding $500,000,000 in the aggregate of any savings or unexpended balances in funds of the Reconstruction Finance Corporation; and not exceeding a total of $380,000,000 of such unexpended balances as the President may determine are not required for the purposes for which authorized, of the following appropriation, namely: The appropriation of $3,300,000,000 for national industrial recovery contained in the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (48 Stat. 274); the appropriation of $950,000,000

for emergency relief and civil works contained in the Act approved February 15, 1934 (48 Stat. 351); the appropriation of $899,675,000 for emergency relief and public works, and the appropriation of $525,000,000 to meet the emergency and necessity for relief in stricken agricultural areas, contained in the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (48 Stat. 1055); and any remainder of the unobligated moneys referred to in section 4 of the Act approved March 31, 1933 (48 Stat. 22): *Provided*, That except as to such part of the appropriation made herein as the President may deem necessary for continuing relief as authorized under the Federal Emergency Relief Act of 1933, as amended, or for restoring to the Federal Emergency Administration of Public Works any sums which after December 28, 1934, were, by order of the President impounded or transferred to the Federal Emergency Relief Administration from appropriations heretofore made available to such Federal Emergency Administration of Public Works (which restoration is hereby authorized), this appropriation shall be available for the following classes of projects, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: (a) Highways, roads, streets, and grade-crossing elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation, $500,000,000; (c) rural electrification, $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000: *Provided further*, That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or more of the foregoing limitations if he

finds it necessary to do so in order to effectuate the purpose of this joint resolution: *Provided, further,* That no part of the appropriation made by this joint resolution shall be expended for munitions, warships, or military or naval material; but this proviso shall not be construed to prevent the use of such appropriation for new buildings, reconstruction of buildings and other improvements in military or naval reservations, posts, forts, camps, cemeteries, or fortified areas, or for projects for nonmilitary or nonnaval purposes in such places.

Except as hereinafter provided, all sums allocated from the appropriation made herein for the construction of public highways and other related projects (except within or adjacent to national forests, national parks, national parkways, or other Federal reservations) shall be apportioned by the Secretary of Agriculture in the manner provided by section 204 (b) of the National Industrial Recovery Act for expenditure by the State highway departments under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of the Act of June 18, 1934 (48 Stat. 993): *Provided,* That any amounts allocated from the appropriation made herein for the elimination of existing hazards to life at railroad grade crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, shall be apportioned by the Secretary of Agriculture to the several States (including the Territory of Hawaii and the District of Columbia), one-half on population as shown by the latest decennial census, one-fourth on the mileage of the Federal-aid highway system as determined by the Secretary of Agriculture, and one-fourth on the railroad mileage as determined by the Interstate Commerce Commission, to be expended by the State highway department under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of such Act of June 18, 1934 (48 Stat. 993); but no part of the funds apportioned to any State or Territory under this joint resolution for public highways and grade crossings need be matched by the State or Territory: *And provided further,* That the President may also allot funds made available by

this joint resolution for the construction, repair, and improvement of public highways in Alaska, Puerto Rico, and the Virgin Islands, and money allocated under this joint resolution to relief agencies may be expended by such agencies for the construction and improvement of roads and streets: *Provided, however,* That the expenditure of funds from the appropriation made herein for the construction of public highways and other related projects shall be subject to such rules and regulations as the President may prescribe for carrying out this paragraph and preference in the employment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief, where they are qualified, and the President is hereby authorized to predetermine for each State the hours of work and the rates of wages to be paid to skilled, intermediate, and unskilled labor engaged in such construction therein: *Provided further,* That rivers and harbors projects, reclamation projects (except the drilling of wells, development of springs and subsurface waters), and public buildings projects undertaken pursuant to the provisions of this joint resolution shall be carried out under the direction of the respective permanent Government departments or agencies now having jurisdiction of similar projects.

Funds made available by this joint resolution may be used, in the discretion of the President, for the purpose of making loans to finance, in whole or in part, the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers. Such loans shall be made on such terms as the President shall prescribe and shall be repaid in equal annual installments, or in such other manner as the President may determine.

Funds made available by this joint resolution may be used, in the discretion of the President for the administration of the Agricultural Adjustment Act, as amended, during the period of twelve months after the effective date of this joint resolution.

SEC. 2. The appropriation made herein shall be available for use only in the United States and its Territories and possessions. The provisions of the Act of February 15, 1934 (48 Stat. 351), relating to disability or death compensation and benefits shall apply to those persons receiving from the appropriation made herein, for services rendered

as employees of the United States, security payments in accordance with schedules established by the President: *Provided,* That so much of the sum herein appropriated as the United States Employees' Compensation Commission, with the approval of the President, estimates and certifies to the Secretary of the Treasury will be necessary for the payment of such compensation and administrative expenses shall be set aside in a special fund to be administered by the Commission for such purposes; and after June 30, 1936, such special fund shall be available for these purposes annually in such amounts as may be specified therefor in the annual appropriation Acts. The provisions of section 3709 of the Revised Statutes (U. S. C., title 41, sec. 5) shall not apply to any purchase made or service procured in carrying out the provisions of this joint resolution when the aggregate amount involved is less than $300.

SEC. 3. In carrying out the provisions of this joint resolution the President may (a) authorize expenditures for contract stenographic reporting services; supplies and equipment; purchase and exchange of law books, books of reference, directories, periodicals, newspapers and press clippings; travel expenses, including the expense of attendance at meetings when specifically authorized; rental at the seat of government and elsewhere; purchase, operation, and maintenance of motor-propelled passenger-carrying vehicles; printing and binding; and such other expenses as he may determine necessary to the accomplishment of the objectives of this joint resolution; and (b) accept and utilize such voluntary and uncompensated services, appoint, without regard to the provisions of the civil-service laws, such officers and employees, and utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as may be necessary, prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, fix the compensation of any officers and employees so appointed.

Any administrator or other officer, or the members of any central board, or other agency, named to have general supervision at the seat of Government over the program and work contemplated under the appropriation made in section 1 of this joint resolution and receiving a salary of $5,000 or more per annum from such appropriation, and any State or regional administrator receiving a salary of

$5,000 or more per annum from such appropriations (except persons now serving as such under other law), shall be appointed by the President, by and with the advice and consent of the Senate: *Provided,* That the provisions of section 1761 of the Revised Statutes shall not apply to any such appointee and the salary of any person so appointed shall not be increased for a period of six months after confirmation.

SEC. 4. In carrying out the provisions of this joint resolution the President is authorized to establish and prescribe the duties and functions of necessary agencies within the Government.

SEC. 5. In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

SEC. 6. The President is authorized to prescribe such rules and regulations as may be necessary to carry out this joint resolution, and any willful violation of any such rule or regulation shall be punishable by fine of not to exceed $1,000.

SEC. 7. The President shall require to be paid such rates of pay for all persons engaged upon any project financed in whole or in part, through loans or otherwise, by funds appropriated by this joint resolution, as will in the discretion of the President accomplish the purposes of this joint resolution, and not affect adversely or otherwise tend to decrease the going rates of wages paid for work of a similar nature.

The President may fix different rates of wages for various types of work on any project, which rates need not be uniform throughout the United States: *Provided, however,* That whenever permanent buildings for the use of any department of the Government of the United States, or the District of Columbia, are to be constructed by funds appropriated by this joint resolution the provisions of the Act of March 3, 1931 (U. S. C., Supp. VII, title 40, sec. 276a), shall apply but the rates of wages shall be determined in advance of any bidding thereon.

SEC. 8. Wherever practicable in the carrying out of the provisions of this joint resolution, full advantage shall be taken of the facilities of private enterprise.

SEC. 9. Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

SEC. 10. Until June 30, 1936, or such earlier date as the President by proclamation may fix, the Federal Emergency Relief Act of 1933, as amended, is continued in full force and effect.

SEC. 11. No part of the funds herein appropriated shall be expended for the administrative expenses of any department, bureau, board, commission, or independent agency of the Government if such administrative expenses are ordinarily financed from annual appropriations, unless additional work is imposed thereupon by reason of this joint resolution.

SEC. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purposes of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution, for the making of further loans under said Act or under this joint resolution.

SEC. 13. (a) The acquisition of articles, materials, and supplies for the public use, with funds appropriated by this joint resolution, shall be subject to the provisions of section 2 of title III of the Treasury and Post Office Appropriation Act, fiscal year 1934; and all contracts let pursuant to the provisions of this joint resolution shall be subject to the provisions of section 3 of title III of such Act.

(b) Any allocation, grant, or other distribution of funds for any project, Federal or non-Federal, from the appropriation made by this joint resolution, shall contain stipulations which will provide for the application of title III of such Act to the acquisition of articles, materials and supplies for use in carrying out such project.

SEC. 14. The authority of the President under the provisions of the Act entitled "An Act for the relief of unemployment through the performance of useful public work, and for other purposes", approved March 31, 1933, as amended, is hereby continued to and including March 31, 1937.

SEC. 15. A report of the operations under this joint resolution shall be submitted to Congress before the 10th day of January in each of the next three regular sessions of Congress, which report shall include a statement of the expenditures made and obligations incurred, by classes and amounts.

SEC. 16. This joint resolution may be cited as the "Emergency Relief Appropriation Act of 1935."

Approved, April 8, 1935, 4 p. m.

V.

EXECUTIVE ORDER OF THE PRESIDENT, JUNE 7, 1935.

AUTHORIZING THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO CONTINUE TO PERFORM FUNCTIONS UNDER TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND TO PERFORM FUNCTIONS UNDER THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935.

Pursuant to the authority vested in me by the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (Public Resolution No. 11, 74th Congress), I hereby authorize the Federal Emergency Administration of Public Works, under the Federal Emergency Administrator of Public Works;

(a) to continue after June 16, 1935, to perform all of the functions which it was authorized to perform prior to June 16, 1935, under Title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200);

(b) subject to the rules and regulations heretofore and hereafter prescribed by the President to carry out the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, to perform the following functions under said Act:

(1) make loans or grants, or both, for projects of states, territories, possessions, including subdivisions and agencies thereof, municipalities and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project;

(2) carry out projects for slum-clearance or low-cost housing, or both;

(c) to sell any securities acquired under Title II of the National Industrial Recovery Act, approved June 16, 1933, or under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and all moneys realized from such sales shall be available for the making of further loans under the said Title II of the National Industrial Recovery Act or the said Emergency Relief Appropriation Act of 1935, in the performance of the functions herein authorized.

To the extent necessary to carry out the provisions of this Executive Order, the Administrator is authorized to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

* * * *

The unobligated balances on June 30, 1935, of allotments of funds made pursuant to Title II of the National Industrial Recovery Act, approved June 16, 1933, to departments and agencies of the Government which continue to exist after June 16, 1935, for the performance of functions of the Federal Emergency Administration of Public Works, are hereby reallocated for use by said departments and agencies, respectively, after June 30, 1935, for the purposes for

which originally allocated thereto: Provided That upon completion of the project or work any unexpended balances of the aforesaid reallocations shall be reported by the departments or agencies concerned to the Secretary of the Treasury who will cause such balances to be placed to the credit of the appropriations from which said allotments were made.

FRANKLIN D. ROOSEVELT.

The White House
June 7, 1935

VI.

EMERGENCY RELIEF APPROPRIATION ACT OF 1936.

[PUBLIC RESOLUTION—No. 739—74TH CONGRESS]

[HR 12624]

TITLE II—RELIEF AND WORK RELIEF

This title may be cited as the Emergency Relief Appropriation Act of 1936.

* * * * * * * * *

In order to increase employment by providing for useful public works projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the President, use not to exceed $300,000,000 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects: *Provided,* That no part of the sum made available by this paragraph shall be granted for any project unless, in the determination of the Administrator, the completion thereof can be substantially accomplished prior to July 1, 1938, and adequate provision has been made or is assured for financing such part of the entire cost thereof as is not to be supplied through the Federal Emergency Administration of Public Works: *Provided further,* That this limitation upon time shall not apply to any project enjoined in any Federal or State court: *Provided further,* That in no case shall the amount of the grant exceed forty-five per centum of the cost of the project. Nothing herein

shall be construed to increase the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered under existing law to issue and to have outstanding at any one time, and nothing herein shall be construed to limit or curtail in any way any powers which the Federal Emergency Administration of Public Works or the Administrator is now authorized to exercise.

VII.

SECTIONS 10, 11 AND 12 OF THE TENNESSEE VALLEY AUTHORITY ACT OF 1933 48 STAT. 64, AS AMENDED BY SECTION 6 OF THE ACT OF AUGUST 31, 1935, c. 836, 49 STAT. 1076.

The Board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further,* That the Board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of

electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region. *Provided further,* That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: *Provided further,* That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further*: That the terms "States", "counties", and "municipalities" as used in this chapter shall be construed to include the public agencies of any of them unless the context requires a different construction.

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this chapter.

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided*, That if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with an local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further*, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further*, That as to any surplus

power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further,* That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief.

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

Nos. 84 and 85

ALABAMA POWER COMPANY,

Petitioner,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF.

PERRY W. TURNER,
NEWTON D. BAKER,
WILLIAM H. THOMPSON,
R. T. JACKSON,
DEAN ACHESON,
THOMAS V. KUPKER,
Attorneys for Petitioner.

INDEX.

TABLE OF CONTENTS.

	Page
I. Petitioner has right to question validity of proposed loans and grants	1
1. Claim that no right invaded	2
2. Claim based on theory of suit against official	7
II. The threatened grants will vest in the Federal government control over matters reserved to the States by the Tenth Amendment	8
1. Cannot be justified under spending power	9
2. No authority to enter power business	10
III. Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935 unlawfully delegate legislative power	10
1. Claim that administrator's acts have been confirmed	12
IV. The proposed grants are not within the statutes	14
APPENDIX.	
I. Extracts from TVA annual reports relating to resale rates, conditions of service, and disposition of revenue	17
1. Standard power sale contract	17
2. Standard rates fixed for resale of power	19
3. Distribution of power by municipalities	22
4. Disposal of surplus power	23
II. Contracts made with cities and cooperatives for resale of power	25
III. Contract for sale of power by TVA to Sheffield	27
IV. Map showing area in controversy	58

Cases: CITATIONS.

	Page
Ashton v. *Cameron County*, 298 U. S. 513	8
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288	9
Carter v. *Carter Coal Co.*, 298 U. S. 238	7, 8, 9
George Van Camp & Sons Co. v. *American Can Co.* 278 U. S. 245	16
Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426	15
Frost v. *Corporation Commission*, 278 U. S. 515	3
Frothingham v. *Mellon*, 262 U. S. 447	8
Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139	13
Jackson v. *United States*, 230 U. S. 1	5
Kansas v. *Colorado*, 206 U. S. 46	10
Mattingly v. *District of Columbia*, 97 U. S. 687	13
New York Indians v. *United States*, 170 U. S. 1	5
Panama Refining Co. v. *Ryan*, 293 U. S. 388	12
Philadelphia Co. v. *Stimson*, 223 U. S. 605	7
Pierce v. *Society of Sisters*, 268 U. S. 510	3
Schechter Poultry Corp. v. *United States*, 295 U. S. 495	12
Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133	8
Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U. S. 433	14
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297	13
Temple v. *United States*, 248 U. S. 121	5
Texas & Pacific Ry. v. *Pottorf*, 291 U. S. 245	5
United States v. *Butler*, 297 U. S. 1	7, 9, 10
United States v. *Heinszen & Co.*, 206 U. S. 370	13
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522	11

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PETITIONER'S REPLY BRIEF.

I. PETITIONER HAS RIGHT TO QUESTION VALIDITY OF PROPOSED LOANS AND GRANTS.

Right to question the proposed loans and grants, assuming their invalidity, is challenged by the Government at the threshold of the inquiry on the grounds:

1. Petitioner, because its franchises are non-exclusive, is not protected from competition; and since the effect of the grants is to create competition, no legally protected right is invaded.

2. Petitioner, to sue a government official must sue him in his individual capacity, stripped of official position; and since a grant by "a private person" would not be wrongful, such a grant by a government official cannot be questioned.

The propositions advanced are unsound:

1. Claim That No Right Is Invaded.

The argument that because Petitioner is not protected from competition, no legally protected right is invaded, and it therefore cannot challenge the threatened grants, is without merit because:

(a) Granting that municipal competition *per se* would be lawful, yet, if it be brought about through unlawful action, and particularly where (if Petitioner is right in the claims it asserts) it is brought about by unconstitutional means, Petitioner, if injured thereby, is entitled to question the threatened unlawful action as a wrong done to it. This is demonstrated by the cases referred to on pages 24 and 27-28 of Petitioner's opening brief.

(b) But what is more important, the Government's argument proceeds upon a wholly erroneous predicate. It rests upon the premise that the competition which threatens will be lawful. It necessarily follows from the argument made, and the Government in its brief recognizes, that if the competition which threatens be unlawful, then Petitioner *is* in a position to question the means by which it is to be

brought about. *Frost* v. *Corporation Commission*, 278 U. S. 515; *Pierce* v. *Society of Sisters*, 268 U. S. 510.

That it will be unlawful is necessarily true because operation of municipal distribution systems under the plan which Respondents here seek to effectuate necessarily involves invasion by the federal government of the reserved rights of the States in violation of the Tenth Amendment. It was so charged in the bills of complaint, the allegation being (R. Vol. I, 228):

> "In the Tennessee Valley states, and particularly in the State of Alabama, the general plan of the PWA defendants above set forth has been varied by concert of action with TVA, its directors, agents and representatives in such a fashion as to provide, secure and exercise Federal control over intra-state local distribution rates for electric light, heat, and power through TVA rather than directly by PWA."

And further: (R. Vol. I, 239):

> "The grant and loan of Federal moneys to said political subdivisions, under the conditions, penalties, threats and coercion herein set forth, is an attempt by the PWA defendants to acquire for the Federal Government control over matters of a purely intrastate nature, forbidden to it by the Federal Constitution, through the device, expedient and indirect means of contractually requiring the vesting of such control in the Federal Government as a condition of the making of such grants and loans."

To understand how that will be brought about it must be borne in mind, first, that under the plan here contemplated the only source from which the municipalities can get their power, and the source from which they declare they will get it, is the Tennessee Valley Authority, and second, that they can get it only upon surrender to

TVA of the right to fix local resale rates. This is so because under the circumstances outlined in Section 10 of the TVA Act the Authority, upon sale of power, is authorized, and under the circumstances outlined in Section 12, is mandatorily required, to fix "resale rate schedules." Whether the present case falls within Section 10 or within Section 12 is unimportant because the fact is that power can be had from TVA only upon surrender to it of the power to fix intrastate resale rates, to specify the conditions under which service may be rendered to the ultimate consumer, and to determine the manner and order in which municipal revenue therefrom shall be spent.

This unmistakably appears from the fact that every contract which TVA has made with municipalities or cooperative organizations:

1. Fixes the rates at which power is to be resold, and provides that they shall not be changed save by agreement with TVA.

2. Specifies the terms and conditions, and rules and regulations, under which service shall be rendered to the ultimate consumer.

3. Determines the manner and order in which the municipality or cooperative shall dispose of revenue derived from sale of power.

4. Provides that the schedules of terms, conditions, rules and regulations, and the schedules of rates and charges upon the resale of the power, are of the essence of the contract.

That this is so, clearly appears from the contracts already executed, a list of which is set forth at pages 25 and 26 of the Appendix hereto. The contracts themselves are set forth in full in the annual reports of TVA at the places

indicated in the Appendix.[1] Because the contract in its essential provisions is identical to every other contract entered into by TVA with municipalities and cooperatives as disclosed by its reports, and in order to indicate the extent to which, in its minutest details, federal power is thus to be exercised over matters of purely state concern, the contract between TVA and Sheffield,[2] one of the cities originally involved in this controversy, is set forth in full in the Appendix hereto, pages 27 to 57.

That the plan, the completion of which Respondent Ickes proposes to effectuate in so far as the cities here in controversy are concerned, necessarily involves the exercise of federal power in a field denied to it by the Tenth Amendment further appears from the Authority's annual reports, extracts from which are set forth in the Appendix, pages 17 to 24. The Authority has said "the terms of resale by non-Federal agencies are a matter of concern to the Authority."[3] The Authority has further said that because the Act creating it stipulates a policy which will permit "use at the lowest possible rates," rates fixed by the Authority "are made a part of all contracts entered into by the Authority for the

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[1] TVA by Section 14 of the TVA Act is required to "file with each annual report * * * copies of all contracts for the sale of power." These reports the court will judicially notice, *Jackson* v. *United States*, 230 U. S. 1, 18; *New York Indians* v. *United States*, 170 U. S. 1, 34, and the information therein contained is of the kind which is within the range of judicial notice, *Texas & Pacific Ry.* v. *Pottorf*, 291 U. S. 245, 254; *Temple* v. *United States*, 248 U. S. 121, 130.

[2] Although, as the Government points out (Br. p. 47) Hoyt Greer, President of the City Commission of Sheffield, testified on the trial which started April 20, and ended May 26, 1936, that Sheffield did not have a contract with TVA, the annual report of TVA for the year ended June 30, 1936, submitted to the Congress on Dec. 31, 1936, sets forth a copy of the contract as required by law, and shows that it was executed "as of the 16th day of March 1936." The same report shows (p. 289) that some service was rendered to Sheffield as early as March 16, 1936. It is Petitioner's understanding that general service to retail customers was not to commence until Dec. 1, 1937.

[3] TVA annual report for year ended June 30, 1935; Appendix hereto, page 22.

distribution of its power.'"[4] That "concern" over the rates at which electricity shall be sold within a state, Respondents here propose to make effective through the questioned grants and loans.

That the plan is, if these grants be sustained, to launch the federal government upon a program of regulation of intrastate electric rates, terms and conditions of service, and the disposition of municipal revenue, further appears from the circumstances of the grants themselves. In the first instance, the contracts made by Respondent Ickes with Decatur, Florence, Sheffield and Tuscumbia contemplated control of resale rates by PWA itself. These contracts, however, were rescinded because, as Mr. Ickes testified, it was feared they might, in view of two lower court decisions, be invalid, and new contracts were thereupon executed eliminating the provisions whereby control of intrastate rates was vested in PWA. Mr. Ickes said (R. Vol. II, 512):

> "In the case of several of the cities whose contracts were involved in this litigation, there was an original contract and subsequently a new contract was executed which was substituted for the old contract. As the result of two court decisions some doubt was raised as to whether or not the Federal Government was assuming or had reserved continuing rights with respect to the carrying out of the contract itself, and, with respect further to the regulation of rates. It seemed to be sound from the Administration's point of view to make certain revisions. We did not agree with the rulings of the court, but they were there and we thought we had better amend in certain particulars."

This change, however, leaves the contracts in question in precisely the same condition, so far as their validity is concerned, as though the rate control provisions were expressly

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[4] TVA annual report for year ended June 30, 1936; Appendix hereto, page 24.

written therein. In other words, Mr. Ickes now proposes to do through the arm of another federal agency, namely TVA, that which he feared he could not do directly. He proposes now to put the control of intrastate rates and other matters, in so far as the present cities are concerned, in TVA, through the threatened loans and grants. That he cannot lawfully accomplish. As this Court said in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, at p. 291:

> "to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed."

The threatened grants Petitioner clearly has the right to challenge, because they are, in the words of *United States* v. *Butler*, 297 U. S. 1, but (p. 58) "a step in an unauthorized plan."

2. Claim Based on Theory of Suit Against Official.

From the premise that a suit to enjoin threatened unlawful governmental action must be brought against the officer in his individual capacity, the conclusion is drawn that because "financial aid" by "a private person" would not be wrongful, the threatened grants here cannot be questioned. The argument is demonstrably unsound because:

(a) The individual, because he is not a governmental official and has no control over governmental action, never could commit the wrong which here threatens. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605. See also cases referred to on page 22 of Petitioner's opening brief. But even the individual, were he to attempt to extend his "financial aid" to these cities, either upon the express condition, or pursuant to a plan which would require, that they surrender sovereign rights to him, or his nominee, would certainly be halted by the court in his attempt, because, as was said in *Carter* v.

Carter Coal Co., 298 U. S. 238, at page 295, "State powers can neither be appropriated on the one hand nor abdicated on the other."

(b) The argument confounds the right to sue with the right to prevail. This clearly appears from *Frothingham* v. *Mellon*, 262 U. S. 447, where this Court, although holding that a federal taxpayer could not question federal expenditures, his interest being (p. 487) "minute and indeterminable," declared that a suit could be brought upon a showing that the claimant (p. 488) "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

II. THE THREATENED GRANTS WILL VEST IN THE FEDERAL GOVERNMENT CONTROL OVER MATTERS RESERVED TO THE STATES BY THE TENTH AMENDMENT.

If the grants and loans here in question are made, Respondent Ickes will through them, by the device discussed above, pages 3 to 7, vest in the federal government control over (a) intrastate electric rates, (b) terms and conditions under which service shall be rendered, and (c) the manner and order in which municipal revenue from sale of power shall be disposed. All of these are matters solely of intrastate concern. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133. Trespass thereon by the federal government is proscribed by the Tenth Amendment. It is no answer that those objects will be accomplished only with the acquiescence of the municipality, for, as this Court pointed out in *Ashton* v. *Cameron County*, 298 U. S. 513, at page 531:

> "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. * * * The sovereignty of the

> State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation."

Neither is it an answer that Respondent Ickes will not directly accomplish this object, he having written out of the contracts the provisions under which he proposed to it directly, for, if indirectly done, the case stands no better. *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

The plan sought to be accomplished amounts in its essential elements to a purchase by use of federal funds of "submission to federal regulation of a subject reserved to the states." *United States* v. *Butler*, 297 U. S. 1, 72. It will not do to call it an appropriation, for "An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution." *United States* v. *Butler*, 297 U. S. 1, 73.

1. Cannot Be Justified Under Spending Power.

Neither is the threatened action to be justified under the power of Congress to spend for the general welfare. While it is now settled that the Congress may spend for the general welfare, it is likewise settled that there are certain limits to that power, one of which is (*United States* v. *Butler*, 297 U. S. 1, 66-8) that the power cannot lawfully be made the means of controlling matters of local concern, or of exercising powers reserved to the States. The exercise of the power to appropriate, just like the exercise of any other power, "must not be contrived to govern the concerns reserved to the States." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 338.

The Government says that because the Administrator here was acting in pursuance of national power, namely to relieve unemployment, neither his nor the Government's motives in exercising that power can be the subject of in-

quiry. This overlooks the proposition that if the necessary effect of the Administrator's action is to invade a field reserved to the States, then the fact that it may also serve some national purpose cannot make legitimate what otherwise would be a prohibited exercise of power. *United States* v. *Butler*, 297 U. S. 1; *Kansas* v. *Colorado*, 206 U. S. 46, 90. The field of regulation in intrastate matters is closed to every federal agency, and there can be no right of entry therein by any such agency even though some national purpose would also thereby be served.

2. No Authority to Enter Power Business.

More than that, the plan here contemplated will just as effectually put the federal government into the power business as though it directly proposed to build power plants and distributing systems in these Alabama towns. For this no warrant lies in the Constitution. On the contrary, the right of entry therein is denied by the Tenth Amendment. See cases referred to on page 67 of Petitioner's opening brief.

III. TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935 UNLAWFULLY DELEGATE LEGISLATIVE POWER.

The grants here in question are to be made under Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935. In so far as these acts undertake to authorize non-federal projects of the kind here in question, they operate unlawfully to delegate legislative power. This is so because they leave to the Administrator, without guide, the determination of what is to be done, whether it is to be done, and under what cir-

cumstances it is to be done. If any guide at all is supplied, it must come, so far as Title II is concerned, from the authorization given by Section 203 to finance projects defined in Section 202 to "include among other things" the:

> "construction * * * of * * * any publicly owned instrumentalities and facilities,"

and so far as the Emergency Relief Appropriation Act of 1935 is concerned, from the appropriation of funds:

> "for projects of states, * * * municipalities."

When it is considered that a state may own literally any facility or instrumentality, as pointed out on page 46 of Petitioner's opening brief, the direction comes to no more than authorization to embark upon any project the Administrator may choose out of the limitless things a state may do or own, if and when, in his uncontrolled discretion, he chooses to do so. This Court pointed out in *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, that although business may be regulated by government when it is affected with a public interest, when it comes to instrumentalities which the State may own, there is almost no limitation. The Court said (p. 537):

> " 'Public use' in such cases would seem to be a term of *wider scope* than where it is used to describe that which clothes property or business 'with a public interest'. * * * In the latter, the use for which the tax is laid may be any purpose in which the State may engage, *and this covers almost any private business* if the legislature thinks the State's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation."

If that be so, then the Administrator by these acts, in so far as non-federal projects are concerned, is authorized to roam at will over the entire field of private business, if

and when he chooses to do so, provided only the contemplated beneficiary is willing to accept the money, and that it be used for "publicly owned facilities and instrumentalities." The Government suggests that there are other limitations also: the amount must not exceed a given per centum of the cost of labor and materials, the loans must be reasonably secured, unemployment must be relieved, certain labor standards must be observed. The difficulty is these limitations do not constitute a standard, they do not announce a legislative policy as to what is to be done to effectuate the object of the statutes to relieve unemployment; they operate only if and when the Administrator has first determined what it would be wise for the federal government to do, whether it should do it, and when. In other words, the Congress has in those parts of the statutes which relate to non-federal projects, prescribed as to details, but the legislative determination of what should be done, it has delegated to the Administrator.

The Administrator, therefore, without restraint, and not the Congress, determines what shall be done to accomplish the announced purpose of the acts "to increase employment." The determination of that question, it is submitted, is a matter of legislative policy which only the Congress can lawfully determine. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

1. Claim That Administrator's Acts Have Been Confirmed.

It is suggested that the Congress has confirmed and approved what the Administrator has done.

First: if the Congress in the subsequent acts referred to by the Government acted with knowledge of allotments for competitive power projects, it also acted with knowledge

of the entire field over which the Administrator had roamed. It did not "confirm" power projects alone; it confirmed, if the Government's claim is sound, all things the Administrator had done. It merely said, for the future, do all things you have done in the past. The claimed confirmation therefore is as much a delegation as was its original act.

Second: if there was here an unlawful delegation of legislative power, it was beyond the power of Congress, after the act, to validate it. To do so would be to delegate not once, but twice. Confirmation necessarily presupposes original power to delegate, as distinguished from the power itself to do the act. *United States* v. *Heinszen & Co.*, 206 U. S. 370, 382. But Congress has no such power. It has only those powers delegated to it, and those powers it alone can exercise. Therefore, having no power to appoint a sub-agent, it has no power to confirm an act done by such appointed sub-agent. Thus, it was said in *Mattingly* v. *District of Columbia*, 97 U. S. 687, at page 690:

> "If Congress or the legislative assembly had the power *to commit* to the board the duty of making the improvements, and to prescribe that the assessments should be made in the manner in which they were made, *it had power to ratify the acts which it might have authorized.*"

But here, lacking the power initially to delegate, it could not confirm.

There is nothing to the contrary in *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, or in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297. In the *Isbrandtsen* case the question was whether, when Congress authorized the President to transfer the functions of any "board," the Shipping Board was included therein. Similarly, in the *Swayne* case, the Court said, not that the Congress could ratify *anything*, but only that it could ratify that "which

it might have authorized." Here the Congress could not in the first instance have "authorized" a delegation of legislative power to the Administrator; it therefore could not ratify or confirm that delegation.

IV. THE PROPOSED GRANTS ARE NOT WITHIN THE STATUTES.

The Government says that the basis for the contention that the proposed grants are not authorized by the statutes, "is not clear." It is this: assuming the statutes to be valid, the threatened grants clearly fall without their terms because:

(a) If the purpose of the statutes be viewed as one to increase employment, the present projects fall without that purpose because they were approved without reference to their relation to employment and solely because they would provide an outlet for TVA power to be resold at rates and under conditions fixed by TVA. See pages 64-66 of Petitioner's opening brief.

Thus in *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, the railroads attacked the Commission's order because (p. 443) "it plainly results from the record" that the order "was based upon the assumption by that body of the possession of a power not conferred by law." In other words, the railroads said (443):

> "that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate."

The Court said (444):

> "the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

The same principle appears in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, where the Court said (p. 434):

> "Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

(b) If anything be clear, it is that the Congressional intent was that under these acts funds should be advanced to relieve unemployment, and to resuscitate, not destroy, private industry.

This is perfectly clear from the policy declared in Title I, section 1: "to promote the fullest possible utilization of the present productive capacity of industries" and "to rehabilitate industry"; from the direction of section 203 of Title II that all the Administrator was to do was to be done "with a view to increasing employment"; and from the announcement of the Emergency Relief Appropriation Act of 1935 that the appropriation was made "in order • • • to increase employment." It is no answer that Congress, in view of the debates before it, knew about appropriations for competitive non-federal projects. Here, so far as the object for which the funds were made avail-

able is concerned, it is certain beyond debate that it was that they should be used to rehabilitate, not destroy, to relieve unemployment, not to cause more of it. That being so, there is no occasion for resort to Congressional debates. As the Court said in *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S. 245, at page 253:

> "we are asked to consider reports of Congressional committees and other familiar aids to statutory construction. But the general rule that 'the province of construction lies wholly within the domain of ambiguity,' *Hamilton* v. *Rathbone*, 175 U. S. 414, 419, 421, is too firmly established by the numerous decisions of this Court either to require or permit us to do so. The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the legislature definitely meant to include."

The grants here proposed run counter to that declared purpose. If made, they can result only in causing further unemployment, and in the destruction of industry. They are therefore without the terms of the statutes.

Respectfully submitted,

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Dec. 2, 1937.

APPENDIX.

I. EXTRACTS FROM TVA ANNUAL REPORTS RELATING TO RESALE RATES, CONDITIONS OF SERVICE, AND DISPOSITION OF REVENUE.

1. Standard Power Sale Contract.

In the annual report of the Tennessee Valley Authority for the fiscal year ended June 30, 1934, the following appears at pages 28-29:

"Standard Power Sale Contract.

A standard form of 20-year contract was devised to govern the sale of power at wholesale to municipal distribution systems, and was first used in a contract with the city of Tupelo, Miss. The Tupelo contract has been published by the Authority and is available for distribution. The major provisions of the standard contract may be summarized as follows:

Power supply.—The contractor agrees to purchase and the Authority to supply the entire power requirements of the contractor, unless exceptions are specified. The maximum demand for power which the Authority agrees to meet is specified, and provision is made for the allotment of additional capacity when needed.

Schedule of rates.—The contractor agrees to pay for power at the Authority's standard wholesale rates and to resell it at the standard schedule of retail rates established by the Authority.

Lower rates to other municipalities.—If at any time during the life of the contract, the Authority extends lower rates to another municipality which are not justified by different conditions of service, the Authority agrees to extend the lower rate to the contractor.

Developmental surcharge.—In order to maintain revenues during the developmental period in which an increased demand for power may not compensate for the greatly reduced resale rates provided by the Authority's schedule, the contractor is permitted to impose

a surcharge on commercial and industrial rates in an amount subject to the approval of the Authority.

Adjustment of rates.—Provision is made for the adjustment of wholesale and retail rates in the event of a major increase or decrease in the general price level.

Reduction in rates.—The Authority agrees to reduce wholesale rates whenever such reductions become feasible through a decline in the cost of generating and transmitting energy.

Distribution without discrimination.—The contractor agrees to distribute electrical energy to ultimate consumers without discrimination between consumers of the same class, and to avoid the granting of any discriminatory rate, rebate, or other special concession. The contractor agrees to observe the principle that the sale of energy for industrial use shall be a secondary purpose.

Disposition of contractor's revenues.—The contractor agrees to apply electric-system revenues against the following items in the order named:

Operating expenses.

Interest on electric-system bonds or other indebtedness.

Amortization of electric-system bonds or other indebtedness.

Reasonable reserves for new construction or contingencies.

Payments in lieu of taxes at rates equivalent to the taxes assessed against other property of a similar nature.

A return on the equity of not more than 6 percent per annum.

After all of these items have been covered, the contractor agrees that all remaining revenue shall be applied to reduction in rates.

Administration of contractor's system.—The contractor agrees to administer its electric system as a separate department and not to mingle funds or accounts with those of any other of its operations, to keep its electric-system accounts in accordance with a uni-

form system of accounting prescribed by the Authority, to furnish such operating and financial statements as may be requested by the Authority, and to allow the agents of the Authority to have free access to all books and records relating to electric-system operations.

Service to near-by areas.—The contractor agrees to serve near-by rural areas whenever such service can feasibly be rendered.

Conformance to specifications.—All equipment, material, and work in connection with contractor's electrical installation must conform to specifications and plans acceptable to the Authority and must be maintained in a safe and satisfactory condition.

Other rules and regulations.—The contractor agrees to be bound by any other rules and regulations adopted in the future which are standard and of uniform applicability to customers of the Authority."

2. Standard Rates Fixed For Resale of Power.

In the Annual Report of the Tennessee Valley Authority for the fiscal year ended June 30, 1934, the following appears at pages 35-36:

"Standard Residential Resale Rates.

The municipal and nonprofit customers of the Authority agree to adopt the following resale rates for residential customers:

Rate block:	Cents per kilowatt-hour.
First 50 kilowatt-hours consumed per month	3.00
Next 150 kilowatt-hours consumed per month	2.00
Next 200 kilowatt-hours consumed per month	1.00
Next 1,000 kilowatt-hours consumed per month	.40
Excess kilowatt-hours consumed per month	.75

The minimum monthly bill is $0.75 per meter.

In the case of nonprofit distributors, such as the Alcorn County Electric Power Association, residential rates are subject to a surcharge of 1 cent per kilowatt-hour for the first 100 kilowatt-hours used per month, the surcharge to be not less than $0.25 nor more than $1 per customer per month. These surcharges are in the nature of an investment by the ratepayers, the proceeds being used either to purchase the electric distribution system or to retire debt outstanding against it. The surcharges are for a temporary period only and will be abandoned upon completion of amortization of indebtedness or purchase cost.

Surcharges imposed by municipal distributors are confined to commercial and industrial customers and do not apply to residential customers.

The rates stated above are net, and gross rates 10 percent higher apply if payment is not made within 10 days of the billing date.

Standard Commercial Resale Rates.

The following resale rates are approved for all commercial and all small nonresidential customers whose average monthly usage does not exceed 4,000 kilowatt-hours:

Rate Block:	Cents per kilowatt-hour.
First 250 kilowatt-hours consumed per month	3.0
Next 750 kilowatt-hours consumed per month	2.0
Next 1,000 kilowatt-hours consumed per month	1.0
Excess kilowatt-hours consumed per month	0.8

The minimum monthly bill is $1 per meter.

Commercial rates may be subject in all cases to a developmental surcharge, the amount of which is determined by the distributor. Surcharges are temporary in character and are used to maintain revenues during developmental periods when increased demand

may not fully compensate for reductions in rates. The highest surcharge in effect on June 30 for commercial and industrial customers was 10 percent of net monthly bills plus an amortization charge of 1 cent per kilowatt-hour for the first 100 kilowatt-hours per month, and not less than $0.25 per month.

The above rates are net, and gross rates 10 percent higher apply if payment is not made within 10 days.

Standard Industrial Resale Rates.

Basic industrial rates are available to all industrial and large nonresidential customers having demands of not less than 10 kilowatts. The rates include a demand charge of $1 per kilowatt of demand per month, demand being defined as the highest integrated load during any 30-minute period during the month for which determination is made. The demand charge may be adjusted to compensate for power factors lower than 85 percent. The energy charge is as follows:

Rate block:	Cents per kilowatt-hour.
First 10,000 kilowatt-hours consumed per month	1.00
Next 25,000 kilowatt-hours consumed per month	0.60
Next 65,000 kilowatt-hours consumed per month	0.40
Next 400,000 kilowatt-hours consumed per month	0.30
Excess kilowatt-hours consumed per month	0.25

The minimum monthly bill is 60 percent of the highest monthly demand charge occurring during the previous consecutive 12 months' period.

Provisions for surcharges and penalties for delinquency in payment of bills are the same as for commercial customers."

3. Distribution of Power by Municipalities.

In the Annual Report of the Tennessee Valley Authority for the fiscal year ended June 30, 1935, the following appears at pages 26-27:

"The Authority, with limited and temporary exceptions, is not engaged in the distribution of electricity to the ultimate consumer. Its functions, in the main, terminate with delivery of power in bulk to the lines of distribution agencies, public and private. The statute, however, requires the Authority to encourage wide use of the power thus sold in bulk, so that the terms of resale by non-Federal agencies are a matter of concern to the Authority, and are covered by the contract for sale of bulk supply.

Power generated at Wilson Dam reaches the ultimate consumer through four principal types of distribution facilities:

1. *Municipalities.*—Cities which own their distribution systems may contract with the Authority to supply them with power at wholesale rates. A standard form of 20-year contract was devised to apply to the sale of power at wholesale to municipal distribution systems, and was first used in a contract with the city of Tupelo, Miss. All of the Authority's contracts with municipalities for the sale of power are filed with this report, as required by law. The provisions of chief interest in these contracts may be mentioned. The contractor agrees to purchase its entire power requirements from the Authority, unless exceptions are specified. The contractor agrees to pay for power at the Authority's standard wholesale rates. The electricity is resold at retail rates established by agreement between the contractor and the Authority. The contractor agrees to apply electric-system revenues against the following items in the order named:

Operating expenses.

Interest on electric-system bonds or other indebtedness.

Amortization of electric-system bonds or other indebtedness.

Reasonable reserves for new construction or contingencies.

Payments in lieu of taxes at rates equivalent to the taxes assessed against other property of a similar nature.

A return on the equity of not more than 6 percent per annum.

After all these items have been covered, the contractor agrees that all remaining revenue shall be applied to reductions in rates. The contractor agrees to administer its electric system as a separate department and not to mingle funds or accounts with those of its other operations, to keep its electric-system accounts in accordance with a uniform system of accounting prescribed by the Authority, and to furnish such operating and financial statements as may be requested by the Authority."

4. Disposal of Surplus Power.

In the Annual Report of the Tennesee Valley Authority for the fiscal year ended June 30, 1936, the following appears at pages 6-7:

"With the disposal of surplus power, however, we begin to follow a course in which the Federal Government must enlist the cooperation and depend upon the initiative of State and local governments and of voluntary groups of citizens. The Authority's right to seek a market has been upheld by the Supreme Court of the United States in the Ashwander case, cited elsewhere in this report. Since at present there is no competitive bidding for its power at the dams, it must build, buy, or acquire the use of transmission lines if it is to have a choice as to the distributors to whom it will sell. Some of these transmission lines serve the further purpose of interconnecting the power-houses at the several dams, making it possible to transmit

power back or forth according to demand and supply, so that the system can be operated as a unit.

Where is the market to be found? The statute says that the Authority must give preference to "States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit but primarily for the purpose of supplying electricity to their own citizens or members." It stipulates a policy which "will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity." In order that such rates may prevail they are made a part of all contracts entered into by the Authority for the distribution of its power."

II. CONTRACTS MADE WITH CITIES AND COOPERATIVES FOR RESALE OF POWER.

The Tennessee Valley Authority by Section 14 of the TVA Act is required to "file with each annual report • • • copies of all contracts for the sale of power." The reports for 1935 and 1936† show that the Authority has entered into contracts with sixteen municipalities and nine cooperatives for the resale of power. Each contract:

(a) fixes the rates at which power is to be resold, and provides that the city or cooperative shall not depart therefrom except with consent of the Authority;

(b) specifies the terms and conditions and rules and regulations under which service shall be rendered to the ultimate consumer;

(c) determines the manner and order in which the municipality or cooperative shall dispose of revenue derived from sale of power;

(d) provides that the schedules of terms, conditions, rules and regulations and the schedules of rates and charges are of the essence of the contract.

The contracts with municipalities, their date of execution, and the place where they are set forth in full in the annual reports of the Tennessee Valley Authority are:

Municipality.	Date.	1935 Report page.
Tupelo, Miss.	Nov. 13, 1933	157
Pulaski, Tenn.	Mar. 8, 1934	162
Amory, Miss.	Mar. 9, 1934	167
Athens, Ala.	Apr. 6, 1934	173
Dayton, Tenn.	Sept. 12, 1934	187
New Albany, Miss.	Sept. 13, 1934	194
Muscle Shoals, Ala.	Jan. 19, 1935	201
Okolona, Miss.	Apr. 23, 1935	215

† 1937 report is not yet available.

Municipality.	Date.	1936 Report page.
Dickson, Tenn.	Oct. 23, 1935	144
Holly Springs, Miss.	Nov. 12, 1935	158
Memphis, Tenn.	Nov. 23, 1935	169
Bolivar, Tenn.	Dec. 31, 1935	141
Milan, Tenn.	Dec. 31, 1935	189
Somerville, Tenn.	Dec. 31, 1935	237
Knoxville, Tenn.	Feb. 19, 1936	166
Sheffield, Ala.	Mar. 16, 1936	223

The contracts with cooperatives, their date of execution, and the place where they are set forth in full in the annual reports of Tennessee Valley Authority are:

Cooperative	Date	1935 Report page.
Alcorn County Electric Power Corporation	June 1, 1934	179
Pontotoc County Electric Power Association	Feb. 15, 1935	206
Prentiss County Electric Power Corporation	Jun. 13, 1935	226
Monroe County Electric Power Association	July 19, 1935	192
Tishomingo County Electric Power Association	July 19, 1935	240
Meigs County Electric Membership Corporation	Oct. 14, 1935	186
Tombigbee Electric Power Association	Oct. 19, 1935	245
Pontotoc Electric Power Corporation	Feb. 12, 1936	218
North Georgia Electric Membership Corporation	June 15, 1936	205

III. CONTRACT FOR SALE OF POWER BY TVA TO SHEFFIELD.

The contract executed March 16, 1936, between the Tennessee Valley Authority and the City of Sheffield, Alabama, is set forth in full in the annual report of the Tennessee Valley Authority for the fiscal year ended June 30, 1936, at pages 223-237, and reads as follows:

"Power Contract Between Tennessee Valley Authority and City of Sheffield, Ala.

This agreement, made and entered into as of the 16th Page 2
day of March 1936, pursuant to the Tennessee Valley Authority Act of 1933, between the Tennessee Valley Authority, hereinafter called Authority, a corporation created by and acting under said act, and the city of Sheffield, hereinafter called municipality, a municipal corporation duly organized, created, and existing under and by virtue of the laws of the State of Alabama.

Whereas Authority, by section 10 of said act, is authorized to sell the surplus power generated by it and not used in its operations, and is directed to give preference to States, counties, municipalities, and co-operative organizations of citizens or farmers not organized or doing business for profit; and

Whereas by section 11 of said act it is provided that the sale of power by Authority shall be primarily for the benefit of the people of the section as a whole and par- Page 2
ticularly the domestic and rural consumers to whom the power can economically be made available; and

Whereas the electors of the municipality have by referendum authorized municipality to acquire by construction or purchase a municipal electric distribution system, and municipality intends, with all possible diligence and expedition, to acquire by construction or purchase and to operate such a system; and

‡ The marginal references are to pages of Annual Report of TVA for the year ended June 30, 1936.

Whereas municipality desires to purchase power from Authority for municipal purposes and for resale and proposes to pay therefor; and

Whereas municipality has by ordinance of its council duly authorized the making of this contract, and Authority, by its by-laws and resolutions, has likewise so authorized;

Now, therefore, for and in consideration of the mutual covenants herein contained, and subject to all of the provisions of the Tennessee Valley Authority Act of 1933, the parties hereto mutually covenant and agree as follows:

1. *Term of contract.*—This contract shall be effective as of the 16th day of March, 1936, and all service and payment periods hereinafter referred to shall be computed as from that date. The contract shall continue in effect for 20 years.

2. *Acquisition of system.*—Municipality agrees to use all reasonable diligence in acquiring by construction or purchase a complete municipal distribution system for the city of Sheffield, and to do all acts and things which it may legally do, which may be necessary or helpful in effectuating such acquisition.

3. *Power supply.*—Authority will, from the effective date of this contract to the expiration thereof, supply electricity to municipality for municipal purposes and for resale. Municipality agrees to purchase from Authority, and Authority agrees to supply, the entire electricity requirements of municipality. Should municipality during the period of this contract desire to increase its purchases in excess of 4,500 kilowatts, Authority shall deliver such excess upon written demand and after reasonable notice, provided that the requirements of Authority and/or the United States reasonably enable it to do so. Reasonable notice shall be defined as 9 months after date of demand if the additional requirements are 5,000 kilowatts or less, 12 months after date of demand if the additional requirements are over 5,000 kilowatts, but not over 10,000 kilowatts, and 2

years after date of demand if additional requirements are in excess of 10,000 kilowatts. Said energy shall be delivered in the form of 3-phase, alternating current, at approximately 60 cycles per second and approximately 11,000 volts, or at such other voltage as the parties may from time to time agree. While it is not the function of Authority to guarantee accurate time by the maintenance of accurate frequency, Authority agrees to supply such frequency as is recognized to be good commercial frequency on a hydroelectric system.

4. *Point of delivery.*—Authority shall deliver the electricity purchased hereunder at the metering equipment situated at the west boundary of the United States Government reservation known as nitrate plant No. 2, or at such other point or points as shall be mutually agreed upon.

5. *Schedule of rates.*—Attached hereto, and hereby made a part hereof, is a schedule of rates and charges. Municipality agrees to pay for the energy supplied by Authority at the rates fixed in schedule A-1 entitled "Wholesale power rate." All payments shall be made to Authority at its offices at Wilson Dam, Ala., or at such other place as Authority may from time to time designate.

6. *Resale rates.*—In order to facilitate the disposition of surplus power generated by Authority and not needed by it in its operations, and in order to carry out the intention of Congress to encourage the more abundant use of electricity throughout the area in which municipality operates, municipality agrees to charge consumers the rates set forth for the several classes thereof in schedules B-1 to B-5, inclusive, of the said schedule of rates and charges, and not to depart therefrom except by agreement of the parties. Additional resale schedules for special classes of consumers or special uses of electricity may be added from time to time by agreement of the parties. The term "contractor" in said schedule shall be construed to mean municipality. If it should appear that the rates provided for in said resale sched-

ules with the surcharge provided for therein do not produce revenues sufficient to operate and maintain municipality's electric system on a self-supporting and financially sound basis, then municipality shall, by agreement with Authority, prescribe and enforce such changes in rates as will provide for the increased revenues necessary to place the system upon such a self-supporting and financially sound basis.

Page 225

7. *Disposition of municipality's revenues.*—Municipality, deeming it necessary for the purposes of this contract, and for the purpose of providing reasonable rates for electric service pursuant to this contract and to the law, agrees to dispose of its gross revenues from electric operations in the following manner:

(a) Revenues shall first be used for the payment of all current operating expenses, including salaries, wages, cost of materials and supplies, power at wholesale, and insurance.

(b) From remaining revenues municipality shall next currently provide for the payment at maturity of interest accrued on all bonds or other indebtedness applicable to municipality's electric system, and for amortization charges on all such bonds or other indebtedness and/or sinking-fund payments thereon.

(c) Thereafter revenues shall be used currently to set up reasonable reserves for replacements, new construction, and for contingencies, and to provide a reasonable amount of cash-working capital.

(d) From remaining revenues municipality shall thereafter pay into its general fund a return on its investment and a tax equivalent as provided in the financial and accounting policy in the schedule of terms and conditions attached hereto.

(e) All remaining revenues shall be considered surplus revenues and may be devoted by municipality to the purchase of retirement of bonds or other indebtedness applicable to the electric system before maturity, and if not so devoted shall serve as the basis for the reduction or elimination of surcharges to consumers, and

thereafter for the reduction of rates. Surplus revenues shall be computed as of December 31 and June 30 of each year.

8. *Payment for municipality's energy requirements.*—Municipality agrees to pay into its electric funds from appropriate general or special funds for all electric service required by municipality for street lighting, water pumping, and other operations and uses, at the resale rates as set forth in the schedule of rates and charges, with such modifications and additions as may from time to time be agreed upon by the parties.

9. *Terms and conditions; rules and regulations.*—Attached hereto, and hereby made a part hereof, are two schedules, entitled respectively "Schedule of terms and conditions" and "Schedule of rules and regulations." The provisions of either or both schedules may from time to time be changed or supplemented by agreement of municipality and Authority, without limitation on the right of municipality from time to time, upon not less than 10 days' written notice to Authority, to prescribe and enforce such additional reasonable rules and regulations as it may determine, not inconsistent with this contract (including the schedules thereof). The term "distributor" in the latter schedule shall be construed to mean municipality. It is understood and agreed that the several provisions of the said schedules, with such changes as may from time to time be adopted pursuant hereto, as well as the several provisions of this contract and of the schedule of rates and charges, are of the essence of this contract. Municipality hereby adopts such schedule of rules and regulations as the rules and regulations of municipality.

10. *Reports to Authority.*—Municipality agrees that, not later than the 1st day of September of each year, it will render to Authority a complete report, in such form as Authority may prescribe, of the results of its operations for the preceding year ending June 30, the

condition of its property, and such other information as Authority may reasonably request. Municipality agrees promptly to render such additional reports and information to Authority as Authority may from time to time reasonably request.

11. *Discrimination.*—Municipality agrees that the surplus power purchased hereby shall be sold and distributed to the ultimate consumer without distribution between consumers of the same class, and that no discriminatory rate, rebate, or other special concession will be made or given to any customer.

12. *Waiver of defaults.*—Any waiver at any time by either party hereto of its rights with respect to any default of the other party hereto and/or with respect to any other matter arising in connection with this contract shall not be considered a waiver with respect to any subsequent default or matter.

13. *Contract not transferable.*—Neither this contract or any interest therein shall be transferable or assignable by municipality to any other party without the consent of Authority.

ge 226 14. *Renewal or extension.*—Authority agrees to enter into negotiations with municipality looking to the renewal or extension of this contract, so far as may be permitted by law, at least 2 years before the expiration thereof.

In witness whereof the parties hereto have caused this instrument to be signed and attested in duplicate, by their duly authorized officers, the day and year first above written.

TENNESSEE VALLEY AUTHORITY,
[SEAL.] By ARTHUR E. MORGAN,
Chairman, Board of Directors.
Attest: CHARLES E. HOFFMAN,
Assistant Secretary,
City of Sheffield.
[SEAL.]
By HOYT GREER,
President of the Board of Commissioners and ex-Officio Mayor.
Attest: PETER STOUT (?),
City Clerk.

Schedule of Rates and Charges—Wholesale Power Rate—Schedule A-1.

Rate.

Demand charge.—Ninety cents per kilowatt of demand per month.

Energy charge.—First 100,000 kilowatt-hours consumed per month, at 4 mills per kilowatt-hour; next 200,000 kilowatt-hours consumed per month, at 3 mills per kilowatt-hour; next 700,000 kilowatt-hours consumed per month, at 2.5 mills per kilowatt-hour; excess over 1,000,000 kilowatt-hours consumed per month, 2 mills per kilowatt-hour. Charge for energy in excess of 360 times the demand shall be subject to a reduction of 6.5 mill per kilowatt-hour from the otherwise applicable rate.

Determination of Demand.

Demand measurement shall be made by suitable instruments at the point or points of delivery. Demand for any month shall be defined as the highest integrated simultaneous load during any 60-minute period during the month for which determination is made.

Adjustment of Demand Charge for Power Factor.

Demand charge may be adjusted if and when Authority deems necessary to correct for power factors lower than 85 percent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of 85 percent power factor.

Minimum Monthly Bill.

Ninety conts per kilowatt of demand, but in no case shall the minimum bill be less than the charge for 60 percent of the highest demand occurring during any months within the previous consecutive 12-month period.

Allowance on Sales to Residental Consumers.

Authority will adjust bill so that contractor shall be billed at 2 mills per kilowatt-hour for at least so much

energy as may be sold by contractor under the residential resale schedule at 4 mills per kilowatt-hour.

Discount.

Because the power sold to contractor is non-transmitted power, bills shall be subject to a discount of 10 percent.

Standard Residential Rate—Schedule B-1.

Availability.

Available for domestic use to all residential customers served from local alternating current distribution systems.

'age 227

Character of Service.

Alternating current service at approximately 60 cycles, 110 or 220 volts, either single-phase, two-wire, or three-wire; or, three-phase, three-wire, or four-wire, as may be required by contractor.

Rate.

First 50 kilowatt-hours consumed per month, at 3 cents per kilowatt-hour; next 150 kilowatt-hours consumed per month, at 2 cents per kilowatt-hour; next 200 kilowatt-hours consumed per month, at 1 cent per kilowatt-hour; next 1,000 kilowatt-hours consumed per month, at 0.4 cent per kilowatt-hour; excess over, 1,400 kilowatt-hours consumed per month, at 0.75 cent per kilowatt-hour.

Minimum Monthly Bill.

Seventy-five cents per meter.

Payment.

Above rates are net, the gross rates being 10 percent higher. In the event that the current monthly bill is not paid within 10 days from date of bill, the gross rates shall apply.

Service under this classification is subject to rules and regulations of contractor.

Basic Commercial Rate—Schedule B-2.

Availability.

Available to all commercial and all small nonresidential light, heat, and power customers having demands not greater than 20 kilowatts and whose average monthly usage does not exceed 4,000 kilowatt-hours. Customers with demands exceeding 20 kilowatts and/or using on the average in excess of 4,000 kilowatt-hours per month will be billed according to the basic industrial rate, schedule B-3.

Character of Service.

Alternating current service from the local distribution system at approximately 60 cycles, 110 or 220 volts; either single-phase, two-wire, or three-wire; or, three-phase, three-wire, or four-wire, as may be required by contractor.

Rate.

First 250 kilowatt-hours per month at 3 cents per kilowatt-hour; next 750 kilowatt-hours per month at 2 cents per kilowatt-hour; next 1,000 kilowatt-hours per month at 1 cent per kilowatt-hour; excess over 2,000 kilowatt-hours per month at 0.8 cent per kilowatt-hour.

Determination of Demand.

In the event of question arising as to the demand, or upon the written request of the customer, it shall be determined by inspection or test, at the option of contractor. The demand for any month shall be defined as the highest integrated load during any 30-minute period during the month for which the determination is made.

Minimum Monthly Bill.

$1 per meter.

Surcharge.

Rate is subject to a surcharge as provided in schedule of terms and conditions.

Payment.

Above rates including surcharge are net, the gross rates being 10 percent higher. In the event the current monthly bill is not paid within 10 days from date of bill, the gross rates shall apply.

Service under this classification is subject to rules and regulations of contractor.

Page 228

Basic Industrial Rate—Schedule B-3.

Availability.

Available to all industrial and all large nonresidential light, heat, and power customers having demands greater than 20 kilowatts and/or customers whose average monthly usage exceeds 4,000 kilowatt-hours. Customers with demands not greater than 20 kilowatts and using on the average not in excess of 4,000 kilowatt-hours per month will be billed according to the basic commercial rate, schedule B-2.

Character of Service.

Alternating current, three-phase, 60 cycles. Voltage supplied will be at the discretion of contractor and will be determined by the voltage available from distribution lines in the vicinity and/or other conditions.

Rate.

Demand charge.—$1 per kilowatt of demand per month.

Energy charge.—First 10,000 kilowatt-hours consumed per month at 10 mills per kilowatt-hour; next 25,000 kilowatt-hours consumed per month at 6 mills per kilowatt-hour; next 65,000 kilowatt-hours consumed per month at 4 mills per kilowatt-hour; next 400,000 kilowatt-hours consumed per month at 3 mills per kilo-

watt-hour; excess over 500,000 kilowatt-hours consumed per month at 2.5 mills per kilowatt-hour.

Determination of Demand.

Demand measurement shall be made by suitable instruments at the point or points of delivery, except, at the option of contractor, demand may be determined by inspection or test. Demand for any month shall be defined as the highest integrated load during any 30-minute period during the month for which determination is made.

Adjustment of Demand Charge for Power Factor.

Demand charge may be adjusted, if and when contractor deems necessary, to correct for power factors lower than 85 percent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of 85 percent power factor.

Mipimum Monthly Bill.

$1 per kilowatt of demand, but in no case shall the minimum bill be less than the charge for 60 percent of the highest demand occurring during any month within the previous consecutive 12-month period.

Surcharge.

Rate is subject to a surcharge as provided in schedule of terms and conditions.

Payment.

Above rates including surcharge are net, the gross rates being 10 percent higher. In the event the current monthly bill is not paid within 10 days from date of bill, the gross rates shall apply.

Service under this classification is subject to rules and regulations of contractor.

Seasonal Industrial Rate (Optional)—Schedule B-4.

Availability.

Available for seasonal service not to exceed 6 consecutive months per year, only to industrial and large power users having demands not less than 25 kilowatts, whose operations and business are by nature seasonal.

Page 229

Character of Service.

Alternating current, 3-phase, 60 cycles. Voltage supplied will be at the discretion of contractor and will be determined by the voltage available from distribution lines in the vicinity and/or other conditions.

Application of Rate.

For the first 4 consecutive months per season, customer will be billed according to part I of the schedule, and for remainder of such season (not to exceed 2 months) customer will be billed according to part II of the schedule. Rules governing payment and deposit and other rules and regulations for service under this classification apply to both parts I and II of this schedule.

Rate—Part I.

Demand Charge.—$1.60 per kilowatt of demand per month.

Energy charge.—First 10,000 kilowatt-hours per month at 10 mills per kilowatt-hour; next 25,000 kilowatt-hours per month at 6 mills per kilowatt-hour; next 65,000 kilowatt-hours per month at 4 mills per kilowatt-hour; next 400,000 kilowatt-hours per month at 3 mills per kilowatt-hour; excess over 500,000 kilowatt-hours per month at 2.5 mills per kilowatt-hour.

Determination of Demand.

Demand measurement shall be made by suitable instruments at the point or points of delivery, except,

at the option of contractor, demand may be determined by inspection or test. Demand for any month shall be defined as the highest integrated load during any 30-minute period during the month for which determination is made.

Adjustment of Demand Charge for Power Factor.

Demand charge may be adjusted, if and when contractor deems necessary, to correct for power factors lower than 85 percent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of 85 percent power factor.

Minimum Monthly Bill.

Minimum monthly bill shall be $1.60 per kilowatt of demand, but in no case shall the minimum charge for the season be less than $4.80 per kilowatt of the highest demand occurring during any month of the seasonal period.

Surcharge.

Rate is subject to a surcharge as provided in schedule of terms and conditions.

Rate—Part II.

Demand charge.—None.

Energy charge.—First 250 kilowatt-hours per month at 3 cents per kilowatt-hour; next 750 kilowatt-hours per month at 2 cents per kilowatt-hour; next 1,000 kilowatt-hours per month at 1 cent per kilowatt-hour; excess over 2,000 kilowatt-hours per month at 0.8 cent per kilowatt-hour.

Minimum Monthly Bill.

$3 per meter.

Surcharge.

Rate is subject to a surcharge as provided in schedule of terms and conditions.

Payment.

Above rates including surcharge are net, the gross rates being 10 percent higher. In the event the current monthly bill is not paid within 10 days from date of bill the gross rates shall apply.

Page 230

Deposit.

A deposit or suitable guaranty may be required from each customer, such deposit to be not more than twice the amount of the customer's normal monthly bill as established by application of part I of this schedule.

Service under this classification is subject to rules and regulations of contractor.

Standard Street Lighting Rate—Schedule B-5.

Availability.

Available for street or roadway lighting for term of not less than 1 year.

Character of Service.

Alternating current service, either series or multiple system or combination.

Application of Rate.

Where contractor's electric system bears the cost of operation and maintenance of the equipment used in the street or roadway lighting system, the rate consists of an energy charge at basic commercial rate, schedule B-2, and a maintenance charge.

Where contractor's electric system does not bear the cost of operation and maintenance of the equipment used in the street or roadway lighting system, only the energy charge will apply.

Rate.

Energy charge.—First 250 kilowatt-hours per month at 3 cents per kilowatt-hour; next 750 kilowatt-hours per month at 2 cents per kilowatt-hour; next 1,000 kilo-

watt-hours per month at 1 cent per kilowatt-hour; excess over 2,000 kilowatt-hours per month at 0.8 cent per kilowatt-hour.

Maintenance charge.—

Lamp rating:	Unit charge per month
1,000 lumen series, or 100-watt multiple	$0.80
2,500 lumen series, or 150-watt multiple	1.05
4,000 lumen series, or 200-watt multiple	1.40
6,000 lumen series, or 300-watt multiple	1.70
10,000 lumen series, or 500-watt multiple	2.15

Surcharge.

Energy charge is subject to a surcharge as provided in schedule of terms and conditions.

Payment.

Above rates including surcharge are net, the gross rates being 10 percent higher. In the event the current monthly bill is not paid within 10 days from date of bill the gross rates shall apply.

Service under this classification is subject to rules and regulations of contractor.

Schedule of Terms and Conditions.

1. *Measurement of demand, energy, and power factor.*—Demand and energy measurements shall be made by suitable instruments at the point or points of delivery or may, at the option of Authority, be made at some other point or points where housing facilities are available or may be made available and/or operation simplified. In the event metering is effected at some other location than at point of delivery, suitable correction shall be made by Authority of the amounts determined at such location so that the adjusted amounts will so far as possible reflect the exact quantities delivered at the actual point or points of delivery.

Authority will, at its own expense, install and maintain the necessary meters for measuring the maximum

demand and the amount of energy furnished municipality. Should these meters fail on be found inaccurate the maximum demand and amount of energy delivered will be estimated by Authority from the best information available. Authority may also, at its option, from time to time measure power factor. Municipality shall permit the use of its housing facilities, ducts, and supports for Authority's metering equipment.

Municipality shall have the right to install, equip, and maintain at its own expense suitable instruments for measuring demand, power factor, and energy adjacent to Authority's measuring devices for purposes of a check on said devices, and Authority agrees that it will, so far as practicable, provide suitable facilities for the installation of such metering devices within its substation enclosures.

2. *Meter tests.*—Authority will, at its own expense, and in the presence of representatives of municipality, make periodical tests and inspections of its meters in order to maintain a high standard of accuracy. Authority will make additional tests or inspections of its meters at the request of municipality, and in the presence of representatives of municipality. If such additional tests show that the meter is accurate within 2 percent, slow or fast, no adjustment will be made in municipality's bill and the testing charge will be paid by municipality. In case the tests show the meter to be in excess of 2 percent, fast or slow, an adjustment shall be made in municipality's bill over a period of not over 30 days prior to date of such test, and cost of making test shall be borne by Authority.

3. *Municipality's lines and equipment, ownership.*—All lines and substations from point of delivery (as defined in the contract of which these terms and conditions are a part), and all electrical equipment, except the metering equipment of Authority, located on municipality's side of such point of delivery, shall be furnished and maintained by municipality.

4. *Inspections.*—Authority shall have the right, but shall not be obligated, to inspect any installation before electricity is introduced or at any later time, and reserves the right to reject any wiring or equipment not in accordance with Authority's reasonable standards; but such inspection, or failure to inspect, or to reject, shall not render Authority liable or responsible for any loss or damage resulting from defects in the installation of any electrical equipment or from violation of the contract of which these terms and conditions are a part or from accidents which may occur upon municipality's premises.

5. *Municipality's responsibility for Authority's property.*—All meters, service connections, and other equipment furnished by Authority shall be, and remain, the property of Authority. Municipality shall exercise proper care to protect the property of Authority on municipality's premises and in the event of loss or damage to Authority's property, arising from neglect of municipality to care for same, the cost of necessary repairs or replacement shall be paid by municipality.

6. *Right of access.*—Authority's identified employees shall have access to municipality's premises at all reasonable times for the purpose of reading meters, and for testing, repairing, renewing, or exchanging any or all equipment belonging to Authority.

7. *Additional load.*—The service connection, transformers, meters, and equipment supplied by Authority for municipality have definite capacity and no addition to the equipment or load connected thereto, in excess of such capacity, shall be made except after reasonable notice to Authority. Failure to give such notice of additions or changes in load shall render municipality liable for any damage to Authority's lines or equipment caused by the additional or changed installation.

8. *Municipality's lines and equipment, standards.*—All lines and equipment of municipality must conform to accepted modern practice, as exemplified by the requirements of the National Electrical Safety Code and the National Electric Code.

9. *Accounting and handling of funds.*—Municipality agrees:

(*a*) To administer its electric system as a separate department, to establish and maintain a separate fund for its revenues from electrical operations, and not to mingle funds or accounts with those of any other of its operations.

(*b*) To keep the general books of accounts of its electric system according to a system of accounts to be prescribed by Authority after conference with municipality, which system of accounts will so far as possible be uniform with other systems prescribed and applied in other municipalities purchasing electrical energy from Authority. Authority will render such advisory accounting service in the setting up and administering of such accounts as Authority may deem reasonable.

Page 232

(*c*) To furnish promptly to Authority such operating and financial statements relating to electric-system operations as may reasonably be requested by Authority.

(*d*) To allow the duly authorized agents of Authority to have free access at all reasonable times to all books and records relating to electric-system operations.

10. *Financial and accounting policy.*—Municipality agrees to be bound by the following statement of financial and accounting policy:

(*a*) *Present value of electric system.*—Wherever accounting records are complete and have been properly kept, the present value of the electric system as of the date of initial delivery shall be taken as the actual historical cost of the property then in use or useful in the distribution of electricity as shown on the books, in-

cluding reasonable spare capacity for expansion and reasonable quantities of materials and supplies, less accrued depreciation, plus property under construction and a reasonable amount of cash working capital. If adequate reserves have not been set up for depreciation, the amount of depreciation accrued shall be estimated by engineering appraisal. Wherever accounting records are incomplete or have not been kept in such manner as to permit the determination of actual historical cost, the present value shall be determined as the replacement cost new of the property in use or useful in the distribution of electricity, less accrued depreciation. For the purpose of determining replacement cost new all existing property devoted to the distribution of electricity shall be included in a physical inventory. The items of such physical inventory shall then be priced on the basis of labor and materials cost then prevailing. The total direct cost of construction shall be increased by not more than 15 percent for general overheads.

(*b*) *Municipality's investment.*—The initial investment of municipality shall be defined as the present value of the system (i. e., as of the date of initial delivery), less all outstanding liabilities incurred in connection with the construction or acquisition of the electric system. Wherever general obligations have been issued by municipality, the proceeds of which have been used for both electric construction or operations and for general city purposes, an estimate shall be made of the amount of such proceeds which actually were used in the electric system. That part of the total indebtedness which is represented by this amount shall then be allocated or assigned as an obligation of the electric system. The initial investment as above defined shall be increased only as herein specifically provided and by the payment of moneys from the funds of municipality (other than the electric fund) for the payment of debt incurred by or on account of the electric system or otherwise for the benefit of the electric system.

(*c*) *Maximum return.*—The amount of municipality's investment in the electric system shall be determined as of the date of initial delivery and shall thereafter be adjusted as necessary from time to time and in any case at the end of each fiscal year. Municipality shall receive a return on this investment each month not to exceed one-half of 1 percent per month, computed on the basis of the investment as of the last day of the month next preceding.

(*d*) *Payments in lieu of taxes.*—Municipality may take from the electric department revenues or funds for the general funds of municipality an amount in lieu of taxes, to be determined as follows:

(1) The prevailing municipal property tax rate shall be applied to the value of the property used in electric operations within the municipal limits.

(2) The tax equivalent paid to municipality's general funds under (1) above shall be increased by application of the county and State tax rates to the value of the electric system, unless the county and/or State governments levy property taxes upon the electric system, in which case municipality shall not take the county and State tax equivalents for such taxes as are assessed.

(3) In determining the amount of which municipality is entitled in lieu of taxes under (1) and (2) above the tax rate shall be applied to the value of the property as determined in paragraph (a) above, plus additions, less retirements. The tax computations and remittances in lieu of such taxes shall be made monthly and shall be based upon the value as determined in paragraph (a) above, plus additions, less retirements, as shown by the books at the beginning of each current taxable year.

Page 233

(*e*) *Payment by electric department for services.*—The electric department shall pay the salary of those persons who devote their full time to the operation of the electric system, and an equitable portion of the

salary of those persons devoting part time to the operation of the electric system.

(*f*) *Withdrawals and reinvestments by municipality.*—If, at any time, municipality should withdraw from the funds of the electric department for municipality's general funds amounts in excess of the allowable return on investment and of the tax equivalent, municipality's investment shall be reduced in the amount of such excess withdrawals. Withdrawals of municipality's investment shall be made only at such times and in such amounts as will not interfere with the efficient operation of the electric system, including requirements for expansion. In no event shall the excess withdrawals by municipality exceed the amount of municipality's investment in the electric system. If, at any time, municipality should fail to withdraw the full amount due on account of its investment and/or on account of tax equivalent, that part or whole of the return and/or tax equivalent which is not withdrawn shall be added to municipality's investment to the extent such amounts are needed by or used in the operation of the electric system.

(*g*) *Short-term loans and advances.*—The electric department may lend funds or extend credit to the general fund of municipality only on a short-term basis (1 year or less, without the right of renewal). The amount so lent shall bear a rate of interest the same as the rate of return on investment determined by the governing body of municipality, not to exceed 6 percent per annum, payable monthly. At the end of each fiscal year all such matured loans and advances not yet paid shall be paid or closed out by adjustment of municipality's investment account.

(*h*) *Action by governing body of municipality.*—Except as limited in this statement, the governing body of municipality shall determine the rate of return on municipality's investment and/or the interest rate on loans and advances to it.

(i) *Publication of statement of municipality's investment.*—Municipality shall publish a statement of the amount of municipality's investment in the electric system and the outstanding loans and advances, at the close of each fiscal year. A copy of such statement shall be forwarded to Authority immediately at its office at Wilson Dam, Ala. After the closing of the books at the end of each month, municipality shall make known upon demand to any taxpayer of municipality or to any customer of the electric system the amount of municipality's investment in said electric system.

11. *Billing.*—Payment for energy used in any calendar month shall be due on the fifteenth of the succeeding month, or 5 days after receipt of bill from Authority, whichever is the later. Upon failure of municipality to pay for the energy used in any calendar month within 60 days after due date, Authority shall have the right, upon reasonable notice, to discontinue the supply of energy and refuse to resume delivery so long as any part thereof remains unpaid. Discontinuance of supply under this section will not relieve municipality of its liability for the agreed minimum monthly payment during the time the supply of energy is so discontinued. To any amount remaining unpaid on the first day of the calendar month following the due date, there shall be added a penalty of 1 percent and an additional 1 percent shall be added on the first day of each succeeding month until the amount is paid in full. All payments shall be made to Authority at its offices at Wilson Dam, Ala., or at such other place as Authority may from time to time designate.

12. *Interruption of service.*—Authority will furnish energy as agreed upon continuously so far as reasonable diligence will permit; but Authority, its officers, agents, or employees shall not be liable for damages when, for any reason, suspensions of the operation of the generation and transmission system serving municipality, or any part thereof, interfere with the de-

livery of electric energy to municipality, nor shall such an interruption constitute a breach of this contract on the part of Authority, but Authority shall make appropriate adjustment of the demand charge in the event of an interruption.

13. *Lower rates to other municipalities.*—If at any Page 234 time during the term of this agreement Authority should supply electricity to any municipality, municipal division, or department, or cooperative association, at a lower rate schedule than that applicable to municipality, and such lower rate schedule shall not be justified in the judgment of Authority by different conditions of service, making the cost to such other municipality, division, department, or cooperative relatively less than to municipality, such lower rate shall be made available to municipality so long as such lower rate schedule shall be given to such other municipality while this contract is in force.

14. *Developmental surcharge.*—In order to maintain municipality's revenues in the developmental period in which the increased demand for power may not compensate for the greatly reduced rates provided for in schedule B, municipality may also impose a surcharge upon those classes of consumers subject to a surcharge under the provisions of said schedule. Municipality may initially determine and may from time to time vary such surcharges, with the understanding, however, that all surplus revenues (as defined in the contract of which this schedule is a part) shall serve as the basis for the reduction or elimination of such surcharges. Surcharges shall be based on a straight percentage of bills, and shall apply uniformly to all members of classes as to which surcharges are authorized.

15. *Adjustment of rates.*—In the event of a major increase or decrease in general price and wage levels of such a substantial character as materially and substantially to change the cost basis upon which the wholesale rates fixed by this contract are predicated, the parties hereto agree to an adjustment of such

rates. Should the cost-of-living index for the United States as a whole compiled by the Department of Labor of the United States show a decrease for a period of 6 consecutive calendar months, or for any month in said period if index figures are not reported for each month thereof, of 30 percent or more under the index figures for the index period including the month in which this contract is signed, or for any month in said period if index figures are not reported for each month thereof, municipality and Authority agree to such a reduction in rates as will conform to the decreased costs of electricity supply, and should such index figures show a 30 percent or more increase for the same period or month, as the case may be, Authority and municipality agree to such an increase in rates as will conform to the increased costs of electricity supply. Municipality and Authority agree, promptly upon receipt of a request by the other, to confer with each other on the changes in rate necessary to conform to changes in the cost of electricity supply, and to endeavor to agree upon new rates which shall so conform. The new rates shall be substituted for the wholesale rates set forth in the contract of which this schedule is a part. The procedure of adjustment herein set forth shall be applicable should other major changes in price levels require further adjustment of rates.

16. *Reduction in rates.*—Authority agrees to reduce the wholesale rates herein fixed whenever, in the opinion of Authority, reductions in the cost of generating and transmitting energy make feasible such reductions in rates; the intention of the parties being that municipality shall participate in the benefits of reductions in the cost of generation and transmission.

17. *Voltage fluctuations caused by municipality.*—Electric service must not be used in such a manner as to cause unusual fluctuations or disturbances to Authority's system. Authority may require municipality at its own expense to install suitable apparatus to reasonably limit such fluctuations.

18. *Balancing of loads.*—Municipality shall at all times take and use energy in such manner that the load will be balanced between phases to within nominally 10 percent. In the event of unbalanced polyphase loads, Authority reserves the right to require municipality at its own expense to make the necessary changes to correct this condition, or to compute the balancing demand on the assumption that the load of each phase is equal to that on the greatest phase.

19. *Notice of trouble.*—Municipality shall notify Authority immediately should the service be unsatisfactory for any reason, or should there be any defects, trouble, or accidents affecting the supply of electricity. Such notices, if verbal, should be confirmed in writing.

20. *Single-point delivery.*—Unless otherwise specifically provided in this contract, if service is rendered for more than one substation, or through more than one transformation at the same substation, Authority will bill municipality for energy (but not demand) at each substation or additional transformation separately. Page 235

21. *Submetering.*—Municipality shall not sell electricity for submetering or further resale.

22. *Conflict.*—In case of conflict between any express contractual provision or any provision of the schedule of rates and charges and these terms and conditions, the contract or rate schedule shall apply.

Schedule of Rules and Regulations.

1. *Application for service.*—Each prospective customer desiring electric service may be required to sign distributor's standard form of application for service or contract before service is supplied by the distributor.

2. *Determination of classification.*—Service under the standard residential rate shall apply only to elec-

tric service in a single private dwelling and its appurtenances, the major use of which is for lighting and household appliances, for the personal comfort and convenience of those residing therein. Private dwellings in which space is occasionally used for the conduct of business by a person residing therein will be served under the standard residential rate. Where premises have mixed use the classification shall be determined by predominating use of floor space. The residential rate shall not apply to service to:

(*a*) Institutions such as clubs, fraternities, orphanages, or homes.

(*b*) Recognized rooming or boarding houses.

(*c*) The space in an apartment or other residential building primarily devoted to use as an office or studio for professional or other gainful purposes.

Availability of service under the Standard Commercial and Industrial rates shall be determined according to the schedule of rates and charges.

3. *Deposit.*—A deposit or suitable guaranty not exceeding twice the average monthly bill may be required of any customer before electric service is supplied. Distributor may at its option return deposit to customer after 1 year. Upon termination of service, deposit may be applied by distributor against unpaid bills of customer, and if any balance remains after such application is made, said balance shall be refunded to customer.

4. *Point of delivery.*—The point of delivery is the point, as designated by distributor, on customer's premises where current is to be delivered to building or premises. All wiring and equipment beyond this point of delivery shall be maintained by the customer.

5. *Customer's wiring-standards.*—All wiring of customer must conform to municipal requirements and accepted modern standards, as exemplified by the requirements of the National Electrical Safety Code, and the National Electric Code.

6. *Inspections.*—Distributor shall have the right, but shall not be obligated, to inspect any installation before electricity is introduced or at any later time, and reserves the right to reject any wiring or appliances not in accordance with distributor's standards; but such inspection or failure to inspect or reject shall not render distributor liable or responsible for any loss or damage resulting from defects in the installation, wiring, or appliances, or from violation of distributor's rules, or from accidents which may occur upon customer's premises.

7. *Underground service lines.*—Customers desiring underground service lines from distributor's overhead system must bear the excess cost incident thereto. Specifications and terms for such construction will be furnished by distributor on request.

8. *Customer's responsibility for distributor's property.*—All meters, service connections, and other equipment furnished by distributor shall be, and remain, the property of the distributor. Customer shall provide a space for, and exercise proper care, to protect the property of distributor on its premises; and in the event of loss or damage to distributor's property, arising from neglect of customer to care for same, the cost of necessary repairs or replacements shall be paid by customer.

9. *Right of access.*—Distributor's identified employees shall have access to customer's premises at all reasonable times for the purpose of reading meters, testing, repairing, removing, or exchanging any or all equipment belonging to distributor.

10. *Billing.*—Bills will be rendered monthly and shall be paid within 10 days from date of bill at the office of distributor. Failure to receive bill will not release customer from payment obligation. Should bills not be paid as above, the distributor may at any time thereafter, upon 5 days' written notice to customer, discontinue service. Bills paid on or before the final date

Page 236

of payment shall be payable at the net rates, but thereafter the gross rates shall apply, as provided in schedule of rates and charges. Should the final date for payment of the bill at the net rates fall on a Sunday or holiday, the business day next following the final date will be held as a day of grace for delivery of payment. Net rate remittances received by mail after the time limit for payment of said net rates will be accepted by distributor, if the incoming envelope bears United States Post Office date stamp of the final date for payment of the net amount, or any date prior thereto.

11. *Discontinuance of service by the distributor.*—The distributor may refuse to connect or may discontinue service for the violation of any of its rules and regulations, or for violation of any of the provisions of the schedules of rates and charges, or of the application of customer or contract with customer. Distributor may discontinue service to customer for the theft of current or the appearance of current theft devices on the premises of customer. The discontinuance of service by distributor for any causes as stated in this rule does not release customer from his obligation to distributor for the payment of minimum bills as specified in application of customer or contract with customer.

12. *Reconnection charge.*—Whenever service has been discontinued by distributor, as provided above, a charge of not less than $1 may be collected by distributor before service is restored.

13. *Termination of contract by customer.*—Customers who have fulfilled their contract terms and wish to discontinue service must give at least 3 days' written notice to that effect, unless contract specifies otherwise. Notice to discontinue service prior to expiration of contract term will not relieve customer from any minimum or guaranteed payment under any contract or rate.

14. *Service charges for temporary service.*—Customers requiring electric service for a period not exceeding 30 days may be required by distributor to pay all costs for connection and disconnection incidental to the supplying and removing of service. This rule applies to circuses, carnivals, fairs, temporary construction, and the like.

15. *Interruption of service.*—The distributor will use reasonable diligence to provide a regular and uninterrupted supply of current, but in case the supply of current should be interrupted for any cause, distributor shall not be liable for damages resulting therefrom.

16. *Voltage fluctuations caused by customer.*—Electric service must not be used in such a manner as to cause unusual fluctuations or disturbances to distributor's system. Distributor may require customer, at his own expense, to install suitable apparatus which will reasonably limit such fluctuations.

17. *Additional load.*—The service connection, transformers, meters, and equipment supplied by distributor for each customer have definite capacity, and no addition to the equipment or load connected thereto will be allowed except by consent of distributor. Failure to give notice of additions or changes in load, and to obtain distributor's consent for same, shall render the customer liable for any damage to any distributor's lines or equipment caused by the additional or changed installation.

18. *Stand-by and resale service.*—All purchased electric service (other than emergency or stand-by service) used on the premises of customer shall be supplied exclusively by distributor, and the customer shall not directly or indirectly, sell, sublet, assign, or otherwise dispose of, the electric service or any part thereof.

19. *Single-point delivery.*—The rates named in the schedule of rates and charges for each class of service

are based upon the supply of service to the entire premises through a single delivery and metering point, and at a single voltage. Separate supply for the same customer at other points of consumption, or at a different voltage, shall be separately metered and billed.

20. *Notice of trouble.*—Customer shall notify distributor immediately should the service be unsatisfactory for any reason, or should there be any defects, trouble, or accidents affecting the supply of electricity. Such notices, if verbal, should be confirmed in writing.

Page 237

21. *Nonstandard service.*—The customer shall pay the cost of any special installation necessary to meet his peculiar requirements for service at other than standard voltages, or for the supply of closer voltage regulation than required by standard practice.

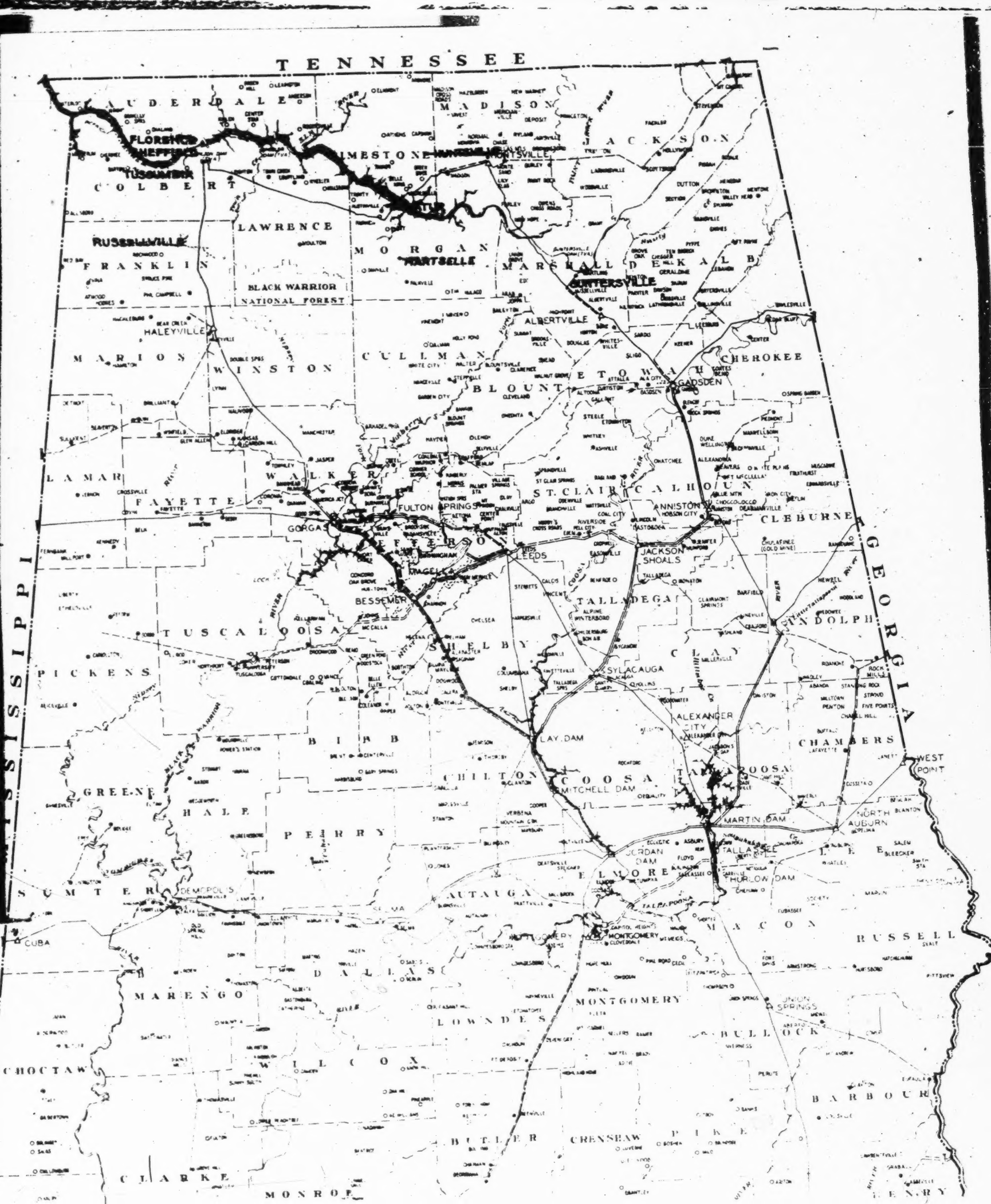
22. *Meter tests.*—Distributor will, at its own expense, make periodical tests and inspections of its meters in order to maintain a high standard of accuracy. Distributor will make additional tests or inspections of its meters at the request of customer. If such tests show that the meter is accurate within 2 percent, slow or fast, no adjustment will be made in customer's bill and the testing charge of $1 per meter will be paid by customer. In case the test shows meter to be in excess of 2 percent, fast or slow, an adjustment shall be made in the customer's bill over a period of not over 30 days prior to date of such test, and cost of making test shall be borne by distributor.

23. *Filing and posting.*—A copy of these rules and regulations, together with a copy of distributor's schedule of rates and charges, shall be kept open to inspection at the offices of distributor.

24. *Scope.*—This schedule of rules and regulations is a part of all contracts for receiving electric service from distributor, and applies to all service received from distributor whether the service is based upon contract, agreement, signed application, or otherwise.

25. *Revisions.*—These rules and regulations may be revised, amended, supplemented, or otherwise changed from time to time. Such changes, when effective, shall have the same force as the present rules and regulations.

26. *Conflict.*—In case of conflict between any provision of any rate schedule and the schedule of rules and regulations, the rate schedule shall apply."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BLACK WARRIOR
NATIONAL FOREST
HALEYVILLE
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CALHOUN
FAYETTE
FULTON SPRINGS
GORGAS
ANNISTON
CLEBURNE
JEFFERSON
LEEDS
JACKSON SHOALS
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LEE
SUMTER
DEMOPOLIS
JORDAN DAM
ELMORE
TALLASSEE
HURTSBORO DAM
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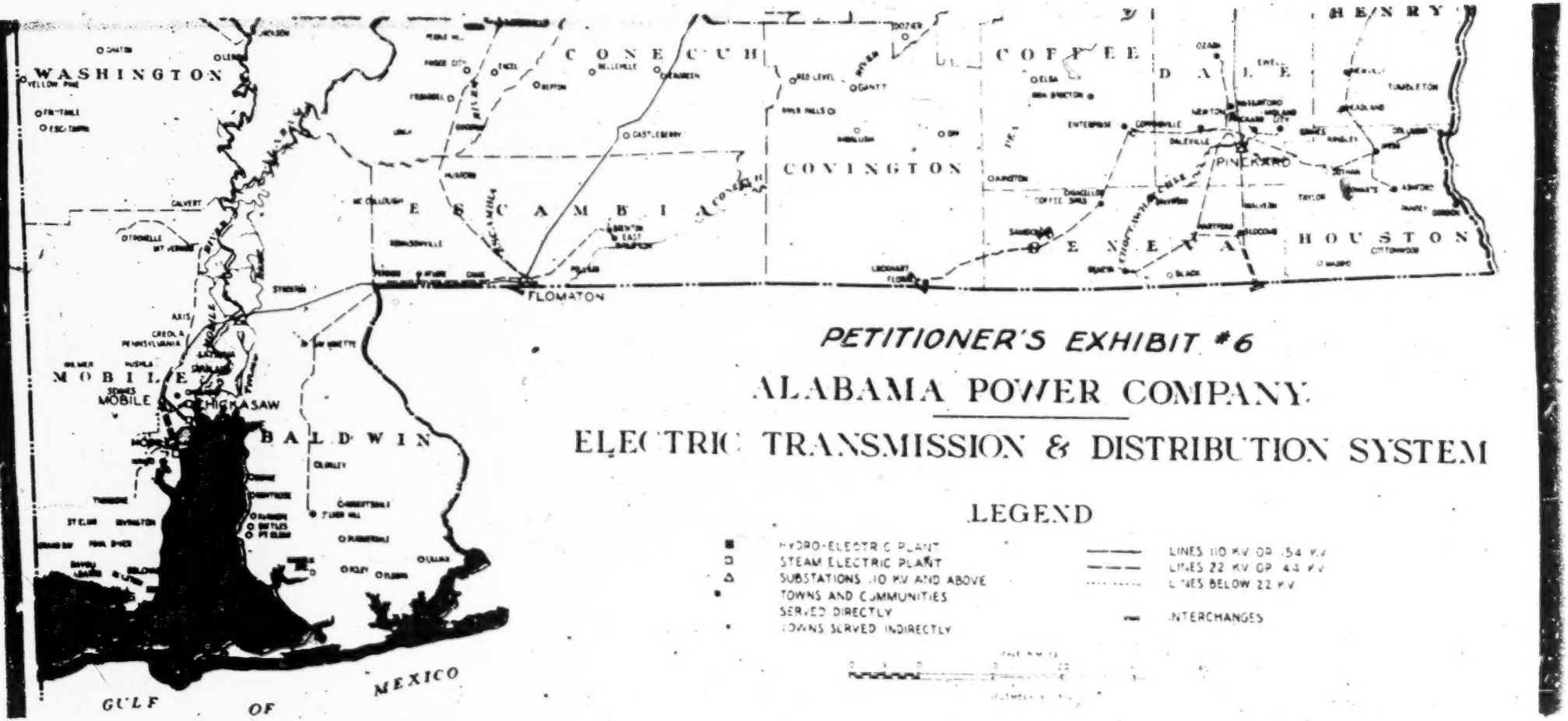

PETITIONER'S EXHIBIT #6

ALABAMA POWER COMPANY

ELECTRIC TRANSMISSION & DISTRIBUTION SYSTEM

LEGEND

- ■ HYDRO-ELECTRIC PLANT
- □ STEAM ELECTRIC PLANT
- △ SUBSTATIONS 110 KV AND ABOVE
- • TOWNS AND COMMUNITIES SERVED DIRECTLY
- • TOWNS SERVED INDIRECTLY

- ——— LINES 110 KV OR 154 KV
- — — LINES 22 KV OR 44 KV
- ····· LINES BELOW 22 KV
- INTERCHANGES

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	11
Conclusion	28

CITATIONS

Cases:

Allegan, City of, v. *Consumers Power Co.*, 71 F. (2d) 477, certiorari denied, 293 U. S. 586 — 11

American Steel Foundries Co. v. *Tri-City Council*, 257 U. S. 184 — 18

Angle v. *Chicago, St. Paul, &c. Ry.*, 151 U. S. 1 — 18

Arkansas-Missouri Power Co. v. *Kennett*, 78 F. (2d) 911 — 11, 18

Beardsley v. *Kilmer*, 236 N. Y. 80 — 19

Benton v. *Pratt*, 2 Wend. 385 — 18

Campbell v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560 — 17, 18

Chicago Junction Case, 264 U. S. 258 — 13, 15

Cincinnati Soap Co. v. *United States*, No. 659, Oct. Term 1936 — 22

Claiborne-Annapolis Ferry Co. v. *United States*, 285 U. S. 382 — 17

Corporation Commission v. *Lowe*, 281 U. S. 431 — 17

Deon v. *Kirby Lumber Co.*, 162 La. 671 — 19

Edward Hines Trustees v. *United States*, 263 U. S. 143 — 15

Franklin Township v. *Tugwell*, 85 F. (2d) 208 — 16

Frost v. *Corporation Commission*, 278 U. S. 515 — 17

Gibson v. *Fidelity and Casualty Co.*, 232 Ill. 40 — 19

Greenwood County v. *Duke Power Co.*, 81 F. (2d) 986, reversed, 299 U. S. 259 — 11, 21

Helena Water Works Co. v. *Helena*, 195 U. S. 383 — 12

Helvering v. *Davis*, No. 910, Oct. Term, 1936 — 21, 22

Hitchman Coal and Coke Co. v. *Mitchell*, 245 U. S. 299 — 18

Holbrook v. *Morrison*, 214 Mass. 209 — 19

Isbrandtsen-Moller Co. v. *United States*, No. 307, Oct. Term, 1936 — 24

Iowa Southern Utilities Co. v. *Cassill*, 69 F. (2d) 708 — 18

Kansas Gas & Electric Co. v. *City of Independence*, 79 F. (2d) 32 — 12

147304—37——1

Cases—Continued. Page

Kansas Utilities Co. v. *City of Burlington*, 141 Kan. 926, certiorari dismissed, 296 U. S. 658 11
Keen v. *Mayor of Waycross*, 101 Ga. 588 17
Madera Water Works v. *Madera*, 228 U. S. 454 12
Milwaukee Horse and Cow Commission Co. v. *Hill*, 207 Wis. 420 16
Puget Sound Power & Light Co. v. *Seattle*, 291 U. S. 619 12
Railroad Co. v. *Ellerman*, 105 U. S. 166 ..... 12, 21
Reichelderfer v. *Quinn*, 287 U. S. 315 20
Rice v. *Manley*, 66 N. Y. 82 18
Sonzinsky v. *United States*, No. 614, Oct. Term, 1936 24
Springfield Gas Co. v. *Springfield*, 257 U. S. 66 12
Sprunt & Son v. *United States*, 281 U. S. 249 14
Steward Machine Co. v. *Davis*, No. 837, Oct. Term, 1936 ..... 21, 22
Swayne & Hoyt, Ltd. v. *United States*, No. 494, Oct. Term, 1936 23
Tasker v. *Stanley*, 153 Mass. 148 18
United States ex rel. New York Warehouse Assn. v. *Dern* 68 F. (2d) 773, certiorari denied, 292 U. S. 642 15
United States Fidelity & Guaranty Co. v. *Millonas*, 206 Ala. 147 19

Statutes:

Emergency Relief Appropriation Act of 1935, c. 48, 49 Stat. 115, sec. 12 2
First Deficiency Act, Fiscal Year 1936, approved June 22, 1936, c. 689, 49 Stat. 1608, 1609, Title II 24
National Industrial Recovery Act, c. 90, 48 Stat. 200, Title II 2

Miscellaneous:

Senate Doc. 184, 74th Cong., 2d Sess. (Rep. of Adm. Pub. Wks.) March 6, 1936 ..... 23, 24
Senate Resolution 235, Jan. 16, 1936 ..... 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 1024

ALABAMA POWER COMPANY, A CORPORATION, PETITIONER

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF, ET AL.

No. 1025

ALABAMA POWER COMPANY, A CORPORATION, PETITIONER

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF, ET AL.

No. 1026

IOWA CITY LIGHT AND POWER COMPANY, A CORPORATION, PETITIONER

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court appears in the record at I, 437. The opinion of the Court of Appeals, not yet reported, appears in the record at II, 1279.

JURISDICTION

The petition was filed May 26, 1937. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that petitioners, as holders of non-exclusive franchises for the generation and distribution of electric power, have no standing to challenge the validity of proposed loans and grants of Federal funds to municipalities for the construction by them of electric distribution systems, the construction and operation of which are admittedly lawful undertakings of the municipalities.

STATUTES INVOLVED

In No. 1024 the proposed loans and grants are to be made pursuant to Title II of the National Industrial Recovery Act, c. 90, 48 Stat. 200, as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, c. 48, 49 Stat. 115. In Nos. 1025 and 1026 the proposed loans and grants are to be made pursuant to the Emergency Relief Appropriation Act of 1935, *supra*.

STATEMENT

As originally brought, these were five suits in the District Court for the District of Columbia, seeking to enjoin the making of loans and grants by the United States to ten municipalities for the construction of electric-power distribution systems by those municipalities as part of a national program of public works. The plaintiffs were, respectively, the Texas Utilities Company, the Alabama Power Company (in two cases), the Oklahoma Utilities Company, and the Iowa City Light and Power Company. The defendants are the Federal Emergency Administrator of Public Works and certain of his subordinates, together with the Secretary of the Treasury, the Treasurer of the United States, and the Chief Disbursing Officer of the United States (Fdgs. 1–12, R., Vol. I, 447–450. These cases were chosen for trial by agreement of counsel as representative of fifty-seven similar cases pending in the District Court for the District of Columbia.

Prior to submission in the court below, several of the cases had become moot by virtue of agreements reached between the cities and the companies. This is true of the suits by the Texas Utilities Company and the Oklahoma Utilities Company, and of the suit of the Alabama Power Company in so far as it related to the proposed loans and grants to the Cities of Florence and Tuscumbia, Alabama. The cases remaining are as follows:

1. *Alabama Power Company* v. *Ickes et al.*, No. 1024, involving loans and grants to two cities in Alabama: Decatur and Sheffield. The bill of complaint in this case appears at pp. 216–248 of Volume I of the Record, and the answer of the defendants at pp. 250–259.

2. *Alabama Power Company* v. *Ickes et al.*, No. 1025, involving loans and grants to three cities in Alabama: Guntersville, Hartselle, and Russellville. The bill of complaint in this case appears at pp. 334–366 of Volume I of the Record, and the answer of the defendants at pp. 368–377.

3. *Iowa City Light & Power Co.* v. *Ickes et al.*, No. 1026, involving a proposed grant only, to Iowa City, Iowa. The pleadings in this case are printed in a separate volume. The bill of complaint appears at pp. 2–30 (exclusive of exhibits) and the answer of the defendants at pp. 102–113.

The loans and grants involved in case No. 1024 are proposed to be made under the authority of Title II of the National Industrial Recovery Act, 48 Stat. 200, as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, 49 Stat. 115. The loans and grants involved in cases No. 1025 and No. 1026 are proposed to be made under the authority of the Emergency Relief Appropriation Act of 1935 (Conclusion 11, R., Vol. 1, 470). Each of the bills of complaint sought injunctive relief on the ground that the statutes authorizing the proposed loans and grants are un-

constitutional and that the loans and grants themselves are unauthorized by the statutes.

The cases were consolidated for trial before Chief Justice Wheat. The trial consumed fifteen days (R. II, 1). Forty witnesses were called and numerous documents were introduced. After the conclusion of the trial, the Chief Justice rendered an opinion, holding that the statutes involved are constitutional, that the action contemplated by the defendants is authorized by the statute, and that the plaintiffs were entitled to raise these questions (R., Vol. I, 437–447). Thereafter the court entered comprehensive findings of fact and conclusions of law (R., Vol. I, 447–468, 468–472).[1] The basic facts as disclosed by the record and found by the trial court are as follows:

The plaintiffs' franchises.—None of the plaintiffs has an exclusive franchise. The franchises granted to the Alabama Power Company by the cities of Sheffield and Tuscumbia expired in Octo-

[1] The findings of fact and conclusions of law of the trial court as they appear in the Record are headed by the caption "Defendants' Proposed Findings of Fact and Conclusions of Law." Findings and conclusions were prepared by counsel for plaintiffs and counsel for defendants at the request of the trial court after the opinion in the cases had been rendered. The draft submitted by the defendants was changed by the court in several respects after much discussion with counsel for both plaintiffs and defendants. The words "Defendants' Proposed" were inadvertently left in the caption of the findings and conclusions as they appear in the Record and have no significance.

ber 1932 (Fdg. 15, R., Vol. I, 451). The franchise of the Alabama Power Company granted by the city of Decatur became effective on January 27, 1920, for a period of thirty years. The franchises granted to the same company by the towns of Hartselle, Guntersville, and Russellville are indeterminate, non-exclusive franchises (*ibid.*). The franchises granted to the Iowa City Light & Power Company expired in 1932 (Fdg. 16, R., Vol. I, 451). The question of a renewal of the franchise was submitted to a popular vote in October 1932, and the renewal was rejected. The franchise thereafter expired on January 11, 1934, in accordance with its terms (*ibid.*).

Authority of cities to build plants.—All the cities are authorized under State law to construct and operate municipal electric plants and distribution systems, and to issue bonds for the purpose of financing construction of such plants and to receive grants for that purpose (Fdg. 19, R., Vol. I, 452–453).

Applications of the cities for loans and grants.—It was conceded by counsel for the plaintiff, as stated in the opinion of the District Court, that not only do the cities have the legal power to build competing municipal plants, but that "prior to the enactment of the statutes involved they had a desire to build such plants" (R., Vol. I, 438). In each of the cities involved a public election was held to determine whether the city should erect a munici-

pal power plant. In each instance the proposal carried by substantial majorities (Fdgs. 20–30, R., Vol. I, 453–459).

The procedure for handling applications is outlined in Finding 31 (R., Vol. I, 459–461). Loans and grants for the financing of municipal electric projects were dealt with in the same manner and judged by the same tests as other projects (Fdg. 32, R., Vol. I, 461).

The loan and grant agreements.—Each of the existing agreements which are the subject matter of the present suits is set out in full in the record as follows:

Decatur	R., Vol. I, 259–278.
Sheffield	R., Vol. I, 297–315.
Guntersville	R., Vol. I, 378–397.
Hartselle	R., Vol. I, 398–417.
Russellville	R., Vol. I, 417–436.
Iowa City, Iowa	Iowa Record 114–131.

Each of the agreements, except that with Iowa City, is for a loan and grant. In the case of Iowa City, only a grant was requested and is proposed to be made. An examination of the contracts will indicate that those entered into pursuant to the 1933 Act provide for a grant in an amount not to exceed 30% of the cost of the labor and materials employed upon the project; those entered into pursuant to the 1935 Act provide for a grant not to exceed 45% of the cost of the project.

The contracts are all substantially the same. They provide for the purchase by the United States of revenue bonds of the borrower which bear 4% interest per annum and mature serially. The de-

tailed provisions of the contracts relate to the continued responsibility of the borrower and its ability to complete the project, the filing of plans and specifications, the furnishing of information concerning progress of the work, and the carrying of insurance on the project. These provisions are, of course, designed to safeguard the security of the loans. The agreements also provide as conditions precedent to the making of loans and grants that certain labor conditions be met by the cities in the construction of the plants.

With respect to rates, the agreement with Iowa City, which is for a grant only, contains no provision. The agreements for loans and grants to the other cities contain the following provisions with respect to rates. (For illustration, the agreement with the city of Decatur, Alabama, is quoted:)

> 13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.
>
> 14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There

> are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof (R. I., 266).

Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed (Fdg. 38, R., Vol. I, 463).

No attempt was made by the plaintiffs in any case, except with respect to Plainview, Texas, to prove that the loans were not reasonably secured and that the projects were not self-liquidating (Fdg. 42, R., Vol. I, 465). In the case of Plainview, Texas, which has become moot and is not before this Court, extensive testimony was presented by both sides on this question, and the District Court found that there was substantial evidence to support the determination of the Administrator that the project was self-liquidating and that the loan was reasonably secured (*ibid.*).

Each of the projects herein involved has been approved by the Administrator and by the President of the United States (Fdg. 43, R., Vol. I, 465; II, 339–346; 355–361).

Pursuant to the Emergency Relief Appropriation Act of 1935, the President has determined that in the case of the projects to be constructed in the cities of Iowa City, Iowa, and Hartselle, Russellville, and Guntersville, Alabama, with funds appropriated under that Act, 25% of the loan or grant

or the aggregate thereof, will be expended for work on each project (Fdg. 44, R., Vol. I, 465; II, 345–358).

The Public Works program.—A total of 7,957 projects, of many different types and extending into every county in the United States except three, have been approved by the Public Works Administration and funds allocated therefor. Of this number 260 are electric power projects, only 85 being located in places where privately owned electric facilities are now being operated. The amount allotted for all non-Federal P. W. A. projects is $1,222,636,961. The total allotted for the 85 competing electric projects is $58,768,800, representing 1.1% of the total number of allotments and 4.8% of the total amount of allotments (Fdg. 40, R., Vol. I, 464–465; II, 539).

On June 26, 1936, the trial court entered a decree dismissing the bills on the merits (R. I. 472). On appeal to the Court of Appeals the decree of dismissal was unanimously affirmed on the ground that the plaintiffs were without standing to challenge the validity of the loans and grants to the cities. The court held that no legal right of plaintiffs was invaded, since the plaintiffs have no interest which is legally protected against admittedly lawful municipal competition, inasmuch as damages resulting from such lawful competition, however substantial, are *damnum absque injuria*.

The petition for certiorari contains no assignment of error with respect to the findings of the

trial court or to the action of the Court of Appeals in not disturbing the findings.

ARGUMENT

1. The decision of the Court of Appeals that the petitioners have no standing to challenge the validity of the loans and grants is in accord with the decision of every appellate court which has passed upon the question. The same result was reached by the Circuit Court of Appeals for the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *Kennett,* 78 F. (2d) 911, and by the Circuit Court of Appeals for the Fourth Circuit in *Greenwood County* v. *Duke Power Co.,* 81 F. (2d) 986, reversed on other grounds, 299 U. S. 259. In addition, the Circuit Court of Appeals for the Sixth Circuit has held a complainant situated like petitioners to be without standing to raise the question of the validity of the loan and grant agreement, though the opinion therein discusses the interest of the plaintiff company solely as a taxpayer and property owner, and not as a franchise holder. *City of Allegan* v. *Consumers Power Co.,* 71 F. (2d) 477, certiorari denied, 293 U. S. 586. The Supreme Court of Kansas has reached the same result as the court below, and upon similar grounds, adding as an independent reason that the Administrator was not a party to the suit. *Kansas Utilities Co.* v. *City of Burlington,* 141 Kan. 926, petition for certiorari dismissed on motion of petitioner, 296 U. S. 658. In the Circuit Court of

Appeals for the Tenth Circuit the question was expressly passed over, the court holding that the statute and the action of the Administrator were valid. *Kansas Gas and Electric Co.* v. *City of Independence,* 79 F. (2d) 32.

There is thus no conflict of decisions.

2. The decision below is sound in principle and is in harmony with applicable decisions of this and other courts in related situations.

It is settled beyond question that the holders of non-exclusive franchises have no interest entitling them to be free from municipal competition which is, as here, lawful in itself. *Helena Water Works Co.* v. *Helena,* 195 U. S. 383; *Madera Water Works* v. *Madera,* 228 U. S. 454; *Springfield Gas Co.* v. *Springfield,* 257 U. S. 66; *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619. As the petitioners have no interest which is legally protected against the competition of the cities, they have no standing to inquire into the validity of the acts of third parties which make that competition possible. Such was the principle announced by this Court in *Railroad Co.* v. *Ellerman,* 105 U. S. 166. There the plaintiff, the operator of a wharf, challenged the authority of the defendant railroad company, owner of another wharf, to lease it and make it available to the public in competition with the plaintiff to his direct and substantial damage. This Court held that the alleged unlawfulness of the defendant's undertaking gave the plaintiff no standing to complain of the resulting competition. "The dam-

age", said Mr. Justice Matthews (p. 173–174), "is attributable to the competition, and to that alone. But the competition is not illegal. * * * The only injury of which [plaintiff] can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right."

While the *Ellerman* case involved specifically acts of a public service corporation alleged to be *ultra vires*, the decision has had its chief exposition and application in cases involving acts of Government officers. A notable instance is *The Chicago Junction Case*, 264 U. S. 258. There a number of railroads brought suit to annul an order of the Interstate Commerce Commission approving a plan by which the New York Central had arranged to acquire control of terminal railroads in Chicago. Previously the terminal facilities had been under neutral control. The plaintiffs alleged that the order of the Commission would result in irreparable injury in the amount of millions of dollars, and that the order was void because there was no evidence to support an essential finding by the Commission. On the question of the standing of plaintiffs to attack the order this Court divided. The majority held that the suit could be maintained, but solely on the ground that the Transportation Act, 1920, conferred upon the plaintiffs a

statutory right to equality of treatment which was violated by the order of the Commission; since the plaintiffs had such a statutory right, they had a cause of action against the Commission for infringing upon that right and the defendants could justify only by showing that they were acting pursuant to a valid order. The minority was of opinion that the Transportation Act, 1920, created no such right to equality of treatment. Mr. Justice Sutherland, delivering the minority opinion, which was not challenged in so far as it stated the applicable principles apart from the 1920 Act, cited the *Ellerman* case as establishing those principles. There was no disagreement as to the result apart from the question of a statutory right conferred by the 1920 Act. The opinion of the majority distinguished the *Ellerman* case, not on the ground that it was inapplicable to Government officers, but solely on the ground that it was not brought under the Interstate Commerce Act, which conferred upon the railroads a statutory right to equality of treatment (264 U. S. at 269, note 12).

In other cases involving orders of the Interstate Commerce Commission giving rise to competition with resulting substantial damage to the complainant, but where the complainant was not afforded special statutory protection, this Court has held that there was no standing to challenge the orders. In *Sprunt & Son* v. *United States*, 281 U. S. 249, shippers brought suit to set aside as void an order of the Commission establishing a new rate struc-

ture which deprived the plaintiffs of a special business advantage which they had previously enjoyed over their competitors, with resulting serious financial loss to the plaintiffs. The Court pointed out that "the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs * * * were not subjected to or threatened with any legal wrong." (281 U. S. at 256–257, citing *Edward Hines Trustees* v. *United States*, 263 U. S. 143.) In the *Sprunt* case, the *Chicago Junction* case was expressly distinguished on the ground that there "an independent legal right of the plaintiff was affected by the order which it was sought to set aside", because "the order violated the plaintiff's right under paragraph 2 of Section 5 to equal treatment (281 U. S. at 257, and 257 note).

The lower Federal courts and the State courts have likewise recognized that there is no standing to complain of lawful, fair, and voluntary competition on the ground that it could not have occurred but for an allegedly invalid act of a Government officer.

In *United States ex rel. New York Warehouse Assn.* v. *Dern*, 68 F. (2d) 773 (App. D. C.), several warehouse companies brought an action against the Secretary of War asking that a lease entered into between that official and a corporation known as the Mercur Company be cancelled. It was alleged (see record in this Court, No. 903, 1933 term) that the plaintiffs were terminal warehouse companies

owning millions of square feet of storage space; that the purported lease was in violation of the statutory authority of the Secretary of War, and that the Comptroller General had so ruled; that the lessee (a corporation with a nominal capital leasing millions of dollars of Government property at a fixed rental of but $1.00 a year plus a percentage of the income from the operation of the warehouse) was in open and direct competition with plaintiffs, with a marked competitive advantage over plaintiffs, and had obtained some of their business and would obtain more, "to the substantial detriment" of plaintiffs. The case was decided on demurrer. The court held that the prospective loss to the plaintiffs as a result of the lease gave them no standing to question the legality of the action of the Secretary of War. This Court denied certiorari. 292 U. S. 642.

Similarly in *Franklin Township* v. *Tugwell*, 85 F. (2d) 208 (App. D. C.), it was held that an owner of property was without standing to complain of the acquisition of land by Government officers which it was alleged would reduce the rental value of the plaintiff's land by virtue of the resulting competition in securing tenants.

Similar results have been reached by the State courts. In *Milwaukee Horse and Cow Commission Co.* v. *Hill*, 207 Wis. 420, it was held that the plaintiff company was without standing to complain of the alleged invalidity of a lease by Government officers which would place the lessee in

competition with the plaintiffs to their substantial damage. See also *Keen* v. *Mayor of Waycross,* 101 Ga., 588, per Lumpkin, P. J.

The decision in *Frost* v. *Corporation Commission,* 278 U. S. 515, pressed upon the courts below but not relied on here, is not to the contrary, as was pointed out by the Court of Appeals. In that case the holder of a franchise was held entitled to complain of the invalidity of a certificate under which a competitor proposed to operate. The competition of the defendant in that case was itself unlawful. See *Corporation Commission* v. *Lowe,* 281 U. S. 431, 435. As was pointed out in *Claiborne-Annapolis Ferry* v. *United States,* 285 U. S. 382, 392, "An invalid certificate would leave the situation as though none had issued." The *Frost* case would be applicable to the present case only if the proposed undertakings by the cities were beyond their lawful authority. The contrary, as has been pointed out, is clearly established and conceded here. The Circuit Court of Appeals for the Eighth Circuit has expressly distinguished between the situation where the municipal competition is itself unlawful and that where the municipal competition is free from illegality. In *Campbell* v. *Arkansas-Missouri Power Co.,* 55 F. (2d) 560, that court held, on the authority of the *Frost* case, that a utility company was entitled to restrain the city from constructing a competing plant because the issuance of bonds by the city to finance such construction was in excess of its charter powers.

The court held that in those circumstances the city was in the same position as a rival company threatening to compete without having obtained a valid franchise. See, to the same effect, *Iowa Southern Utilities Company* v. *Cassill,* 69 F. (2d) 703 (C. C. A. 8th). In the *City of Kennett* case, *supra,* 78 F. (2d) 911, where the situation was like that in the case at bar, the court expressly distinguished its holding in the *Campbell* case and held that the company was without standing to attack the loan and grant by the Administrator. The other Federal cases cited by petitioners (Pet. 15) are all of the same character as the *Campbell* case. No appellate court has failed to perceive the distinction between such cases, where there is illegality in the action of the municipality, and cases like those at bar, where the action of the municipality is wholly lawful.

The other authorities cited by petitioners (Br. 13–14) are even less in point. *Benton* v. *Pratt,* 2 Wend. 385, and *Rice* v. *Manley,* 66 N. Y. 82, involved fradulent representations resulting in damage; *Angle* v. *Chicago, St. Paul, &c. Ry.,* 151 U. S. 1, and *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229 (as explained in *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 194, 211), involved inducement accompanied by fraud or intimidation; in *Tasker* v. *Stanley,* 153 Mass. 148, the court denied recovery for persuading a wife to leave her husband, in the absence of a showing of fraud or malice. In *United States Fidelity & Guaranty Co.* v. *Millonas,* 206 Ala. 147, and *Gibson*

v. *Fidelity and Casualty Co.*, 232 Ill. 49, the defendants did the acts which terminated in financial loss to plaintiff with the sole and malicious motive or purpose or intention of causing such injury (Cf. the discussion in *Beardsley* v. *Kilmer*, 236 N. Y. 80; *Holbrook* v. *Morrison*, 214 Mass. 209). In *Deon* v. *Kirby Lumber Co.*, 162 La. 671, the court, while sustaining a complaint alleging a coerced boycott springing from private malice, rejected a complaint where the defendant acted as a business competitor in promoting a boycott.

In not a single case cited by petitioners has a cause of action been sustained for merely persuading or inducing another to do a lawful act; nor has it ever been even intimated that a cause of action could be maintained for persuading or inducing or making it possible for another (without malice or fraud) to engage in lawful, fair, and bona fide competition, resulting in damage, however substantial, to a plaintiff.

Petitioners attempt to distinguish between competition and elimination (Pet. 14), and point to the fact that where their franchises have expired, the cities have indicated an intention to order their removal (Pet. 5–6). But that intention is of no significance, since where their franchises have not expired petitioners will in any event withdraw of their own will in the face of municipal competition (Pet. 14). It cannot be seriously contended, we submit, that there is greater standing to complain where a franchise has expired than where it has not.

We do not assert, nor did the court below hold, as stated by petitioners (Pet. 10–11), that no one, no matter how seriously injured, can question the legality of the acts of a public official whose acts cause the injury, "provided its impact upon the plaintiff comes from the intervening legal act of a third party." We do maintain that there is no standing to challenge the acts of a public officer which make possible lawful competition resulting in damage to the plaintiff, and the decisions uniformly so hold.

The courts have been careful to avoid, in the form of an extension of procedural rights, the enlargement of rights of property. "Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights." *Reichelderfer* v. *Quinn*, 287 U. S. 315, 319. This has been notably true in respect of attacks upon voluntary, fair, and lawful competition. Holders of franchises like petitioners have for decades unsuccessfully endeavored to have this Court widen by implication the limited freedom from competition conferred by their franchises. This suit is one more effort to extend such limited rights; to prevent the sovereign States, acting through their municipalities, from exercising the powers reserved to them by the Constitution; and, by indirection, to convert a temporary and for-

tuitous *de facto* monopoly into a legal monopoly, "to create and protect a monopoly which the law does not give." *Railroad Co.* v. *Ellerman, supra,* 105 U. S., at p. 174.

3. The granting of certiorari in *Duke Power Co.* v. *Greenwood County, supra,* should not, we submit, be regarded as controlling here. In that case the petition was devoted in large part to questions of procedural irregularity, upon which the decision of this Court ultimately turned, and to questions of constitutional power, which had been decided by the Circuit Court of Appeals. In the present case the decision below presents no such questions for review.

Furthermore, the questions of constitutional power pretermitted by the decision below have been clarified by opinions of this Court rendered subsequently to the decision of this Court in the *Duke* case.

Objections to the loans and grants based upon a narrow interpretation of the general welfare clause, upon the Tenth Amendment and upon charges of coercion appear to be set at rest by the decisions in *Steward Machine Co.* v. *Davis,* No. 837, and *Helvering* v. *Davis,* No. 910, announced on May 24, 1937. Those cases make it plain that expenditures for the relief of nation-wide unemployment are a proper exercise of Congressional power. Petitioners must therefore contend that,

despite the judgment of Congress and expert opinion, financial aid to States and their subdivisions for a nation-wide program of public works is an inadmissible means of relieving unemployment; or that there must be excluded from such a program the construction of power plants, even though the municipal applicant chooses that type of public works project rather than other eligible types. Indeed, even the features which some of the members of the Court found objectionable in the *Steward* and *Davis* cases are wanting here. The inducement in the present cases is simply the encouragement of public works projects of an extremely diversified character, with complete freedom in States and subdivisions to seek financial aid for any or none of these types of projects. Moreover, no control can be exercised by the Federal Government over the operation of the projects; the rights of the United States are expressly limited to those of a bondholder under the laws of the State, and, of course, cease when the bonds are no longer held by the United States.

On the question of delegation of power, the opinion in *Cincinnati Soap Co.* v. *United States*, No. 659, announced May 3, 1937, is pertinent:

> The validity of the act disposing of the tax is also attacked as constituting an unlawful delegation of legislative power. That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be

plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be alloted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* v. *Hanson,* 167 Fed. 881, 884–885.

In any event, the question of delegation of power is not now involved, since Congress has confirmed and approved the proposed expenditures herein by making subsequent appropriations for the program of public works with specific notice of the proposed loans and grants involved in the cases at bar. *Swayne and Hoyt, Ltd.* v. *United States,* No. 494, present term, decided March 1, 1937.[2]

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[2] On January 16, 1936, Senate Resolution 235 was passed, which directed the Administrator to report to the Senate "a list of all projects involving the generation, transmission, or distribution of electric power, and all projects for the

With respect to the assertion of invalidity because of collateral consequences of the statute, the decision in *Sonzinsky* v. *United States,* No. 614, present term, announced March 29, 1937, is applicable.

And on the question of the effect of the alleged improper motives of the respondent Administrator, a persuasive answer, apart from the findings of the District Court expressly negativing such a charge (R. 462–463), is furnished by the opinion in *Isbrandtsen-Moller Co.* v. *United States,* No. 307, announced February 1, 1937. The contention that

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production and distribution of gas, for which allotments have been made by the Public Works Administration, and to include in such report which projects are under construction, and those which have been delayed because of injunction or other litigation." In response to that Resolution a report was submitted by the Administrator on March 6, 1936, and is printed as Senate Document 184, 74th Congress, 2nd Session. That report contains a list of all approved non-Federal electric power projects as of February 15, 1936, including the amount of the allotment for each and its status in litigation. *Each of the projects involved in the present cases appears in that list.* The Alabama projects appear at p. 3 and the Iowa City project at p. 6.

After the receipt of this report Congress enacted the First Deficiency Act, Fiscal Year 1936, approved June 22, 1936. Title II of that Act (49 Stat. 1608, 1609) authorizes additional expenditures by the Public Works Administration and provides that the limitation upon time with respect to projects financed thereunder shall not apply in the case of projects enjoined in any State or Federal court. The enactment of this statute in these circumstances constituted Congressional approval and ratification of the proposed loans and grants enumerated in the Administrator's report.

the order there involved "sprang from illegal motives, namely, to regulate and stabilize freight rates for the benefit of carriers belonging to steamship conferences, to compel appellant to join a conference, and to create a monopoly in trans-oceanic shipping" was held to be untenable in view of "the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it."[3]

4. Petitioners stress the public importance of the questions involved as a ground for the granting of the writ. We submit that, on the contrary, the public interest will be served by denial of the petition.

In view of the full consideration which this Court has had occasion to give to the problem of unemployment and its continued existence, it is unnecessary to argue that any avoidable delay in valid governmental action which is designed to bring about substantial reemployment would be inimical to the general welfare of the United States. We respectfully call attention to the fact

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[3] The suggestion in the petition (p. 21) of the possible scope of the concept of public works projects is answered by the administrative interpretation of the statutes, as shown in the Administrator's Report of March 1934 (Def. Ex. 10), pp. 124–147, listing the approved non-Federal projects, and in the Administrator's testimony in the Hearings on the First Deficiency Appropriation Bill, 1936, H. R. 12624, 74th Cong., 2d Sess., before a subcommittee of the Senate Committee on Appropriations, containing a later classified list of approved non-Federal projects.

that the denial of certiorari will mean the prompt employment of many thousands of men pursuant to the declared policy of Congress to provide work relief and to relieve unemployment by the construction of public works, whereas the granting of the writ, if the Court adjourns before decision on the merits, will result in the denial for not less than four months of the opportunity to create such employment.

The cases at bar have been pending since the latter part of 1935. There are pending in the District Court for the District of Columbia approximately 50 cases involving issues identical with those involved in the cases at bar. In this group of cases temporary injunctions have been granted preventing the performance of 44 agreements (including two enjoined in part) between the United States and municipalities, calling for the expenditure of over $60,000,000 for the construction of public works projects. As these agreements are obligations of the United States, the sums segregated for expenditure pursuant to the agreements cannot be utilized for other public works projects while these cases are pending.

The trial court found, on the basis of a study undertaken by the Bureau of Labor Statistics, that six complete municipal power projects, financed pursuant to the statute involved in the cases at bar, for which a total of $461,628 was expended for labor and materials, created over 465,000 man-

hours of labor at the site of construction and in fabricating, transporting, and producing the materials used in construction (Finding 46, R. 467). Applying those figures, it can be approximately estimated that the expenditure of the sums involved in the cases at bar and in the other pending cases above referred to, will create more than 60 million man-hours of employment.

Neither the petitioners nor the plaintiffs in the other suits pending in the District Court for the District of Columbia have given any substantial bonds as a condition of the issuance of the interlocutory injunctions which stay the expenditure of the funds. And it is problematical whether the United States can recover any substantial damages because of the delay thereby caused, should those injunctions hereafter be dissolved, for the reason that the injury to the national welfare, to the persons who might otherwise have been employed, and to the cities to whom the use of the money has been denied is incapable of ascertainment in money terms.

The serious consequences of unnecessary delay in these cases were suggested to the Court of Appeals in opposition to petitioners' motion therein to stay the mandate in order to allow the filing of the petition after the adjournment of this Court; and it was doubtless in the light of that factor that the motion to stay the mandate was denied.

CONCLUSION

In view of the uniformity and soundness of the decisions holding that petitioners have no legal interest entitling them to challenge the proposed loans and grants, and the public interest in a prompt determination of the litigation, it is respectfully submitted that the petition should be denied.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
A. The basic facts	3
B. The alleged improper purpose of the administrator	14
Summary of argument	56
Argument	62
I. Petitioners have no standing to challenge the constitutionality of the Federal statutes or assert a violation thereof	62
Introductory	62
1. The municipal competition is lawful and the threatened damage is attributable to that competition	66
2. Petitioner is not entitled to challenge the validity of loans and grants which will make possible the competition of the cities	74
3. The nature of suits against Government officers discloses the deficiency in petitioner's claim	89
4. The authorities relied on by petitioner, not involving lawful competition, but dealing with coercion or fraud or malice, have no application	99
II. The proposed loans and grants are authorized by the statutes	104
III. The statutes are not invalid as a delegation of legislative power	114
1. Congress has confirmed and approved the action taken by the Administrator and challenged in these cases	115
2. Congress has provided adequate standards for the expenditure of the money appropriated	118
3. There are numerous precedents in related fields	136

28255—37——1

Argument—Continued. Page
IV. The statutes are constitutional as an exercise of the power of Congress to spend public funds to promote the general welfare ---- 144
V. There is no violation of the tenth amendment ---- 156
VI. The alleged improper policy or nonstatutory standard or criterion ascribed to the Administrator cannot invalidate his acts ---- 171
Conclusion ---- 181

CITATIONS

Cases:

Aikens v. *Wisconsin*, 195 U. S. 194 ---- 102
American Bank & Trust Co. v. *Federal Reserve Bank*, 256 U. S. 350 ---- 102
American Steel Foundries v. *Robertson*, 262 U. S. 209 ---- 92
American Steel Foundries v. *Tri-City Council*, 257 U. S. 184 ---- 102
Anchor Coal Co. v. *United States*, 25 F. (2d) 4 ---- 179
Angle v. *Chicago, St. Paul, etc. Ry. Co.*, 151 U. S. 1 ---- 103
Anicker v. *Gunsberg*, 246 U. S. 110 ---- 177
Appalachian Electric Power Co. v. *Smith*, 67 F. (2d) 451 ---- 179
Arkansas-Missouri Power Co. v. *City of Kennett*, 78 F. (2d) 911 ---- 56, 62, 71, 73, 85
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 ---- 47, 51, 59, 139, 176
Atchison, T. & S. F. Ry. Co. v. *Interstate Commerce Comm'n*, 190 Fed. 591 ---- 179
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 284 U. S. 248 ---- 146, 179
Ayers, In re, 123 U. S. 443 ---- 57, 90, 92, 93
Baldwin Co. v. *Robertson*, 265 U. S. 168 ---- 92
Baltimore & Ohio Ry. Co. v. *United States*, 298 U. S. 349 ---- 37
Baltimore National Bank v. *State Tax Commission*, 297 U. S. 209 ---- 146
Beardsley v. *Kilmer*, 236 N. Y. 80 ---- 101
Bell v. *City of Fayette*, 28 S. W. (2d) 356 ---- 171
Benton v. *Pratt*, 2 Wend. 385 ---- 103
Boise Artesian, etc., Water Co. v. *Boise*, 213 U. S. 276 ---- 94
Butte City Water Co. v. *Baker*, 196 U. S. 119 ---- 59, 138
Campbell, City of v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560 ---- 56, 70, 71
Chicago Junction Case, 264 U. S. 258 ---- 57, 78
Cincinnati Soap Co. v. *United States*, 301 U. S. 308 ---- 58, 118, 120, 135, 136, 138
Citizens Electric Illuminating Co. v. *Lackawanna & Wyoming Valley Power Co.*, 255 Pa. 145 ---- 72
City of Allegan v. *Consumers Power Co.*, 71 F. (2d) 477, certiorari denied, 293 U. S. 586 ---- 56, 62

Cases—Continued. Page

Claiborne-Annapolis Ferry Co. v. *United States*, 285 U. S. 382 82
Clark v. *South Carolina Public Service Authority*, 177 S. C. 427 171
Clark Distilling Co. v. *Western Maryland Railway Co.*, 242 U. S. 311 134
Colorado v. *Toll*, 268 U. S. 228 97
Colorado Central Power Co. v. *Municipal Power Development Co.*, 1 F. Supp. 960 71
Corporation Commission v. *Lowe*, 281 U. S. 431 69
Cumberland Coal Co. v. *Board of Revision*, 84 U. S. 23 180
Cunningham v. *Macon & Brunswick R. Co.*, 109 U. S. 446 90
Dakota Central Telephone Co. v. *South Dakota*, 250 U. S. 162 ..... 62, 174, 176, 178
De Cambra v. *Rogers*, 189 U. S. 119 177
Deon v. *Kirby Lumber Co.*, 162 La. 671 103
Duke Power Co. v. *Greenwood County*, 81 F. (2d) 986, 91 F. (2d) 665, pending on certiorari, No. 397, 1937 Term 14, 27, 36, 55, 56, 62, 64, 71, 88, 97, 111, 114, 124, 143, 178, 179
Duplex Printing Press v. *Deering*, 254 U. S. 443 101
Edelman v. *Boeing Air Transport Co.*, 289 U. S. 249 124
Farmers & M. National Bank v. *Deering*, 91 U. S. 29 77
Federal Radio Commission v. *Nelson Bros. & Co.*, 289 U. S. 266 130
Fenner v. *Boykins*, 271 U. S. 240 95
Forbes Boat Line v. *Board of Commissioners*, 258 U. S. 338 118
Fortier v. *Bank*, 112 U. S. 439 77
Frost v. *Corporation Commission*, 278 U. S. 515 ..... 57, 68, 70
Frothingham v. *Mellon*, 262 U. S. 447 ..... 89, 91, 98
Gallardo v. *Porto Rico Ry. L. & P. Co.*, 18 F. (2d) 918 69
Garfield v. *Goldsby*, 211 U. S. 249 77
Georgia v. *Stanton*, 6 Wall. 50 98
Gibson v. *Fidelity & Casualty Co.*, 232 Ill. 49 101
Goltra v. *Weeks*, 271 U. S. 536 ..... 77, 90
Graham & Foster v. *Goodcell*, 282 U. S. 409 107
Great Northern Ry. Co. v. *Weeks*, 297 U. S. 135 146
Greenleaf Lumber Co. v. *Garrison*, 237 U. S. 251 92
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146 92
Hamilton v. *Regents*, 293 U. S. 245 163
Hamilton Gas Light Co. v. *Hamilton City*, 146 U. S. 258 67
Hammer v. *Dagenhart*, 247 U. S. 251 ..... 92, 100
Helena Waterworks Co. v. *Helena*, 195 U. S. 383 67
Helvering v. *Davis*, decided May 24, 1937, No. 910, Oct. Term 1936 144
Herkness v. *Irion*, 278 U. S. 92 177
Hines, Edward, Trustee v. *United States*, 263 U. S. 143 ..... 78, 81
Hitchman Coal and Coke Co. v. *Mitchell*, 245 U. S. 229 102
Holbrook v. *Morrison*, 214 Mass. 209 101

Cases—Continued. Page

Home Bldg. & Loan Assn. v. *Blaisdell*, 290 U. S. 398 146
Hygrade Provision Co. v. *Sherman*, 266 U. S. 497 95
Insurance Co. v. *Bailey*, 13 Wall. 616 94
Interstate Commerce Commission v. *United States ex rel. Humboldt Steamship Co.*, 224 U. S. 474 177
Iowa Southern Utilities Co. v. *Cassill*, 69 F. (2d) 703 71
Isbrantson-Moller Co. v. *United States*, 300 U. S. 139 ..... 62, 117, 118, 175, 178
Kansas Gas & Electric Co. v. *City of Independence*, 79 F. (2d) 32 ..... 63, 71, 73, 114, 124
Kansas Utilities Company v. *City of Burlington*, 141 Kans. 926, certiorari dismissed on motion of petitioner, 296 U. S. 658 ..... 56, 63
Keen v. *Mayor and Council of Waycross*, 101 Ga. 588 86
Kentucky Whip & Collar Co. v. *Illinois Central R. R. Co.*, 299 U. S. 334 96
Knoxville Water Co. v. *Knoxville*, 200 U. S. 22 67
Lane v. *Watts*, 234 U. S. 525 ..... 92, 95
La Prade, Ex parte, 289 U. S. 444 ..... 57, 90, 92, 93
Legal Tender Cases, 12 Wall. 457 153
Lipke v. *Lederer*, 259 U. S. 557 92
Louisiana v. *McAdoo*, 234 U. S. 627 177
Luther v. *Borden*, 7 How. 1 98
Madera Water Works v. *Madera*, 228 U. S. 454 66
Marin Water & Power Co. v. *Sausalito*, 168 Cal. 587 171
Massachusetts v. *Mellon*, 262 U. S. 482 ..... 160, 169
McCulloch v. *Maryland*, 4 Wheat. 316 ..... 59, 77, 139, 161
Milwaukee Horse & Cow Commission Co. v. *Hill*, 207 Wis. 420 85
Mississippi Power Co. v. *City of Starkville*, 4 F. Supp. 833 71
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282 82
Missouri Utilities Co. v. *City of California*, 8 F. Supp. 454 73
Morgan v. *United States*, 298 U. S. 468 178
Morrison v. *Work*, 266 U. S. 481 91
Nashville, C. & St. L. Ry. v. *Walters*, 294 U. S. 405 168
National Bank v. *Matthews*, 98 U. S. 621 77
National Bank v. *Whitney*, 103 U. S. 99 77
New State Ice Co. v. *Liebmann*, 285 U. S. 262 69
Noble v. *Union River Logging R. R. Co.*, 147 U. S. 165 ..... 77, 92
Norris v. *Alabama*, 294 U. S. 587 180
Oklahoma Utilities Co. v. *City of Hominy*, 2 F. Supp. 849 71
Old Colony Trust Co. v. *Seattle*, 271 U. S. 426 93
Oppenheim v. *City of Florence*, 229 Ala. 50 ..... 9, 63, 66, 157
Pacific Telephone Co. v. *Oregon*, 223 U. S. 118 98
Pacific Tel. & Tel. Co. v. *Seattle*, 291 U. S. 300 124
Panama Refining Co. v. *Ryan*, 293 U. S. 388 ..... 115, 142
Philadelphia & Trenton R. R. Co. v. *Stimpson*, 14 Pet. 448 176

Cases—Continued.

	Page
Philadelphia Co. v. *Stimson*, 223 U. S. 605	93
Pierce v. *Society of Sisters*, 268 U. S. 510	92, 100, 101
Poindexter v. *Greenhow*, 114 U. S. 270	90, 92, 93
Puget Sound Power & Light Co. v. *Seattle*, 291 U. S. 619	66, 67, 170
Railroad Company v. *Ellerman*, 105 U. S. 166	57, 74, 77, 86, 89
Regal Drug Co. v. *Wardell*, 260 U. S. 386	92
Reichelderfer v. *Quinn*, 287 U. S. 315	88
Reynolds v. *Bank*, 112 U. S. 405	77
Rice v. *Manley*, 66 N. Y. 82	103
Schechter Corp. v. *United States*, 295 U. S. 495	115, 142
School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94	92
Schuyler National Bank v. *Gadsden*, 191 U. S. 451	77
Scully v. *Bird*, 209 U. S. 481	92
Smith v. *Kansas City Title & Trust Co.*, 255 U. S. 180	141
Sonzinsky v. *United States*, 300 U. S. 506	170, 180
Southern Pacific Co. v. *Interstate Com. Comm'n*, 219 U. S. 433	178
Spielman Motor Sales Co. v. *Dodge*, 295 U. S. 89	94
Springfield Gas Co. v. *Springfield*, 257 U. S. 66	68
Sprunt & Son v. *United States*, 281 U. S. 249	57, 81
Stephenson v. *Binford*, 287 U. S. 251	124
Steward Machine Co. v. *Davis*, Decided May 24, 1937, No. 837, Oct. Term, 1936	59, 60, 100, 144, 157, 169
Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297	117
Tasker v. *Stanley*, 153 Mass. 148	103
Terrace v. *Thompson*, 263 U. S. 197	100
Thacker Coal Co. v. *Burke*, 59 W. Va. 253	102
Thomas v. *McHugh*, 256 N. W. 763 (N. D., 1934)	171
Thompson v. *Bank*, 146 U. S. 240	77
Truax v. *Raich*, 239 U. S. 33	92, 100
Turnpike Co. v. *The State*, 3 Wall. 210	67
United States v. *Arizona*, 295 U. S. 174	108, 117
United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454	178
United States v. *Butler*, 297 U. S. 1	145, 157
United States v. *Chemical Foundation*, 272 U. S. 1	59, 139, 176
United States v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492	109
United States v. *Fox River Butter Co.*, 61 Treas. Dec. 1047, certiorari denied, 287 U. S. 628	87
United States v. *Grimaud*, 220 U. S. 506	59, 139
United States v. *Hanson*, 167 Fed. 881	59, 120, 137
United States v. *Midwest Oil Co.*, 236 U. S. 459	108, 117, 138
United States v. *San Jacinto Tin Co.*, 125 U. S. 273	98
United States v. *Wilbur*, 283 U. S. 414	138
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United States Fidelity & C. Co. v. *Millonas*, 206 Ala. 147	101

Cases—Continued. Page

Walker v. *Cronin*, 107 Mass. 555 101
Walla Walla City v. *Walla Walla Water Co.*, 172 U. S. 1 70
West v. *Hitchcock*, 205 U. S. 80 177
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379 148
Wisconsin v. *Duluth*, 96 U. S. 379 117
Young, Ex parte, 209 U. S. 123 ..... 57, 92, 93, 95

Statutes:
Act of 1803, 2 Stat. 225 162
Alabama Laws, Extra Session 1933:
No. 102 ..... 129, 155
No. 107 ..... 129, 155, 157
U. S. Code, Title 31:
Sec. 752 142
Sec. 753 142
Sec. 754 142
Sec. 755 142
Sec. 756 142
Sec. 757 142
Constitution, Art. I, Sec. 10 171
Assumption Act of 1790, 1 Stat. 138, 142 161
Act of 1836, 5 Stat. 52, 55 162
Morrill Act of 1862, 12 Stat. 503 ..... 163, 164, 165
Hatch Act of 1887, 24 Stat. 440 164
Morrill Act of 1890, 26 Stat. 417 165
Reclamation Act of 1902, 32 Stat. 388, Sec. 4 136
Adams Act of 1906, 34 Stat. 63 164
Smith-Lever Act of 1914, 38 Stat. 372 165
Smith-Hughes Act of 1917, 39 Stat. 929 166
Transportation Act, 1920 ..... 79, 82
Sheppard-Towner Act of Nov. 23, 1921, c. 135, 42 Stat. 224, Sec. 2 169
Employment Stabilization Act of 1931, c. 117, 46 Stat. 1084 152
Emergency Relief and Construction Act of 1932, c. 520, 47 Stat. 709, Sec. 201 ..... 120, 125, 153
Federal Emergency Relief Act of 1933, c. 30, 48 Stat. 55 149
National Industrial Recovery Act, c. 90, 48 Stat. 200, 1056 ..... 2, 4, 7, 120, 124, 126, 159
Sec. 202 ..... 105, 121
Sec. 205 ..... 122, 123
Sec. 206 123
Sec. 301 153
Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (c. 48, 49 Stat. 115) 2, 4, 11, 58, 109, 111, 125, 156
First Deficiency Appropriation Act, fiscal year 1936, Title II, approved June 22, 1936, c. 689, 49 Stat. 1597, 1608, 1609 ..... 110, 111, 116, 126
Public Works Administration Extension Act of 1937 (Title II, Public Res. No. 47, 75th Cong.), Sec. 201 113

Miscellaneous: Page

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P. 65 — 147
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P. 11 — 110
P. 12 — 160
P. 15–16 — 12, 110
P. 19 — 110

Miscellaneous—Continued. Page

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H. Doc. 854, 62d Cong., 2d Sess ---- 135
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In the Supreme Court of the United States

OCTOBER TERM, 1937

NOS. 84 AND 85

ALABAMA POWER COMPANY, PETITIONER

v.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ALABAMA POWER COMPANY, PETITIONER

v.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT ADMINISTRATOR

OPINIONS BELOW

The opinion of the District Court appears in the record at I, 437. The opinion of the Court of Appeals, 91 F. (2d) 303, appears in the record at I, 509.

JURISDICTION

The petition was granted June 1, 1937. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners, as holders of non-exclusive franchises for the generation and distribution of electric power, have standing to challenge the validity of proposed loans and grants of Federal funds to municipalities for the construction by them of electric distribution systems, the construction and operation of which are admittedly lawful undertakings of the municipalities.

2. If the first question is answered in the affirmative, then whether the loan and grant agreements are authorized by Title II of the National Industrial Recovery Act and by the Emergency Relief Appropriation Act of 1935; and whether that application of the statutes is in violation of the Federal Constitution.

STATUTES INVOLVED

In No. 84 the proposed loans and grants are to be made pursuant to Title II of the National Industrial Recovery Act, c. 90, 48 Stat. 200, as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, c. 48, 49 Stat. 115. In No. 85 the proposed loans and grants are to be made pursuant to the Emergency Relief Appropriation Act of 1935. The statutes will be found in the Appendix, separately printed.

STATEMENT

A. THE BASIC FACTS

As originally brought, these were five suits in the District Court for the District of Columbia, consolidated for trial, to enjoin the making of loans and grants by the United States to ten municipalities to finance or aid in financing the construction of electric power distribution systems by those municipalities. The plantiffs were, respectively, the Texas Utilities Company, the Alabama Power Company (in two cases), the Oklahoma Utilities Company, and the Iowa City Light and Power Company. The defendants are the Federal Emergency Administrator of Public Works, as the principal defendant, and, as formal parties, certain of his subordinates, the Secretary of the Treasury, the Treasurer of the United States, and the Chief Disbursing Officer of the United States.

At a previous stage of the litigation, motions to dismiss the bills of complaint in four of the five cases (excluding Iowa City) were granted by the District Court. Plaintiffs appealed to the Court of Appeals for the District of Columbia, which on motion of the defendants remanded the causes to the District Court for the reason that the loan and grant agreements between the Government and the municipalities had been changed in material respects subsequent to the order of the District Court. All five cases were thereafter consolidated for trial before Chief Justice Wheat, who rendered decrees

dismissing the bills on the merits. On appeal to the Court of Appeals for the District of Columbia, the decrees of the lower court were affirmed.

The suits brought by the Texas Utilities Company, the Oklahoma Utilities Company, the Iowa City Light and Power Company, and by the Alabama Power Company insofar as it relates to the proposed loans and grants to the cities of Florence, Sheffield, and Tuscumbia, Alabama, are moot. The cases which remain are as follows:

1. *Alabama Power Company* v. *Ickes et al.*, No. 84, involving loan and grant to the city of *Decatur, Alabama.* The Bill of Complaint in this case appears at pp. 216–248 of Vol. I of the Record, and the answer of the defendants at pp. 250–259.

2. *Alabama Power Company* v. *Ickes et al.*, No. 85, involving loans and grants to the cities of *Hartselle, Guntersville, and Russellville, in Alabama.* The Bill of Complaint in this case appears at pp. 334–366 of Vol. I of the Record, and the answer of the defendants at pp. 368–377.

Each of the bills of complaint sought injunctive relief on the ground that the statutes authorizing the proposed loans and grants are unconstitutional, and that the loans and grants themselves are unauthorized by the statutes. The loan and grant involved in case No. 84 is proposed to be made under authority of Title II of the National Industrial Recovery Act, 48 Stat. 200, as continued

by Sec. 12 of the Emergency Relief Appropriation Act of 1935, 49 Stat. 115. The loans and grants involved in case No. 85 are proposed to be made under authority of the Emergency Relief Appropriation Act of 1935.

After an extensive trial, lasting seventeen days, the district court rendered an opinion holding that the statutes involved are constitutional, that the action contemplated by the respondents is authorized by the statute, and that the petitioner was entitled to raise these questions (R. Vol. I, 437–447). Thereafter, though no mention is made of it in petitioner's brief, the court entered comprehensive findings of fact and conclusions of law (R. Vol. I, 447–468, 468–472).

The decrees dismissing the bills on the merits were filed June 26, 1936 (R. Vol. I, 472). The cases were appealed to the Court of Appeals, and on May 10, 1937, that court affirmed the decrees of the District Court on the ground that petitioner was without standing to question the validity of the statutes or the action of the Administrator (R. Vol. I, 508–515).

Certain basic facts, as found by the trial judge, are not subject to controversy (pp. 5–14, *infra*).

Petitioner's franchises

Petitioner has no exclusive franchise in any of the cities. The non-exclusive franchise granted by the City of Decatur became effective on January 27, 1920, for a period of 30 years. The franchises

granted to the same Company by the towns of Hartselle, Guntersville, and Russellville are indeterminate, non-exclusive franchises (Fdg. 15, R. Vol. I, 451).

Authority of cities to build plants

All of the cities are authorized under state law to construct and operate municipal electric plants and distribution systems, and to issue bonds for the purpose of financing construction of such plants and to receive grants for that purpose (Fdg. 19, R. Vol. I, 452–453).

Applications of the cities for loans and grants

It was conceded by counsel for the petitioner, as stated in the opinion of the District Court, that not only do the cities have the legal power to build competing municipal plants, but that "prior to the enactment of the statutes involved, they had a desire to build such plants" (R. Vol. I, 438). In each of the cities involved, a public election was held to determine whether the city should erect a municipal power plant. In each instance the proposal carried by substantial majorities (Fdgs. 20–30, R. Vol. I, 453–457).

The loan and grant agreements

Each of the existing agreements, which are the subject matter of the present suits, is set out in full in the record as follows:

Decatur, R. Vol. I, 259–278;
Guntersville, R. Vol. I, 378–397;

Hartselle, R. Vol. I, 398–417;
Russellville, R. Vol. I, 417–436.

Each of the agreements is for a loan and grant. An examination of the contracts will indicate that the one with Decatur, entered into pursuant to the 1933 Act, provides for a grant in an amount not to exceed 30% of the cost of the labor and materials employed upon the project; those with the other cities, entered into pursuant to the 1935 Act, provide for a grant not to exceed 45% of the cost of the project.

An earlier agreement with the City of Decatur was executed on December 6, 1934 (R. Vol. I, 120–138). This agreement contained provisions requiring the city to enter into a contract with the Tennessee Valley Authority for the purchase of power as a condition precedent to receiving a loan and grant. This agreement was terminated on December 2, 1935 (R. Vol. I, 139), and on December 6, 1935, the existing contract was executed. The new contract contains no provision with respect to the purchase of power. The trial court found that, under the existing contracts, neither the United States nor any of the defendants has any right or power to designate the person or agency from whom the municipality must purchase its power, and that the provisions of earlier contracts containing such requirements were eliminated before any action was taken pursuant thereto by any of the municipalities (Fdg. 37, R. Vol. I, 463).

All of the existing contracts are substantially the same. They provide for the purchase by the United States of revenue bonds of the borrower which bear 4% interest per annum and mature serially. The detailed provisions of the contracts relate to the continued responsibility of the borrower, and its ability to complete the project, the filing of plans and specifications, the furnishing of information concerning progress of the work, and the carrying of insurance on the project. These provisions are of course designed to safeguard the security of the loans. The agreements also provide as conditions precedent to the making of loans and grants, that certain labor conditions be met by the cities in the construction (not the operation) of the plants. With respect to rates, the agreements contain the following provision: (For illustration, the agreement with the City of Decatur, Alabama, is cited.)

> 13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.
>
> 14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any con-

ditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof (R. I, 266).

The statute of Alabama under which the proposed bonds of the municipalities are to be issued (Act 107, approved April 6, 1933, Appendix, p. 52), authorizes a City to mortgage the plant or any part thereof, and also to pledge all or any part of the revenues derived from the operation of the plant, as security for the loan. The loan and grant agreement between the Government and each of the municipalities provides that the bonds shall be payable as to both principal and interest solely from and secured by a first pledge of the revenues derived from the operation of the plant after the deduction of reasonable operating and maintenances expenses. The Supreme Court of Alabama, in *Oppenheim* v. *City of Florence,* 229 Ala. 50, has held that under the statute above referred to a City may stipulate that the bonds shall be paid only from revenues, without, at the same time, giving a mortgage on the physical properties. As a result of this holding and of the terms of the agreements between the Government and the cities, there will be no right in the bondholders, in the event of default, to foreclose on the property of the municipalities or to require their sale or themselves to take them over and operate them.

In discussing the remedies of a bondholder, in the case above referred to, the Supreme Court of Alabama said (229 Ala. at 58):

> The covenants and agreements impose duties which may subject the city to mandatory proceedings for their enforcement or injunctive proceedings to prohibit their disregard and create a relation of trust in funds derived from the sale of the bonds and the operation of the plant traceable and enforceable in equity, when diverted, on the same principles which generally obtain in respect to such relief in equitable proceedings. No lien is created upon the new property itself.

Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed (Fdg. 38, R. Vol. I, 463).

No attempt was made by the plaintiffs in any case, except with respect to Plainview, Texas, to prove that the loans were not reasonably secured and that the projects were not self-liquidating (Fdg. 42, R. Vol. I, 465). In the case of Plainview, Texas, which has become moot and is not before this Court, extensive testimony was presented by both sides on this question, and the District Court found that there was substantial evidence to support the determination of the Administrator that the project was self-liquidating and that the loan was reasonably secured (*Ibid.*).

Each of the projects herein involved has been approved by the Administrator and by the President of the United States (Fdg. 43, R. Vol. I, 465; II, 339–346; 355–361).

As required by the Emergency Relief Appropriation Act of 1935, the President has determined that in the case of the projects to be constructed in the cities of Hartselle, Russellville, and Guntersville, Alabama, with funds appropriated under that Act, at least 25% of the loan or grant or the aggregate thereof will be expended for work on each project (Fdg. 44, R. Vol. I, 465; II, 344–345, 358).

The Public Works Program and competitive electric projects

As of the date of the trial, a total of 7,957 projects, of many different types and extending into every county in the United States except three, had been approved by the Public Works Administration and funds allocated therefor. Of this number, 260 are electric power projects, only 85 (less than one-third) being located in places where privately owned electric facilities are now being operated, 175 being non-competitive. The amount allotted for all non-Federal P. W. A. projects is $1,222,636,961. The total allotted for the 85 competing electric projects is $58,768,811, representing but 1.1% of the total number of allotments and 4.8% of the total amount of allotments (Fdg. 40, R. Vol. I, 464–465; II, 539). These figures include water power projects and others which are only in part electric projects.

A fair and accurate picture of the extent of the Public Works program can be obtained by reference to the testimony of the Administrator during the hearings on the First Deficiency Appropriation Bill, 1936, H. R. 12624, 74th Congress, 2nd Session, before a Sub-Committee of the Senate Committee on Appropriations, May 18, 1936. In that testimony the Administrator submitted a schedule of non-Federal projects theretofore approved, classified according to type. The classification of such projects as there given is as follows (pp. 15–16):

Type of Project	Number of projects
Grand total all types	8,010
Street and highways	741
Roads and highways	352
Streets	345
Grade crossing elimination	12
Miscellaneous	32
Utilities	2,742
Sewer systems	883
Sewage disposal plants	460
Sanitary sewers	275
Storm sewers	80
Combined sewers	68
Sewer and water	115
Water systems	1,497
Water mains	177
Filtration plants	59
Reservoirs	119
Complete waterworks	1,142
Garbage and rubbish disposal	23
Gas plants	23
Electric power excluding water power	134
Electric distribution systems	27
Power construction	107
Miscellaneous	67
Buildings	3,996
Educational buildings	3,074
Secondary schools	2,789
Colleges and universities	230
Other educational institutions	21
Public libraries	34

Type of Project	Number of projects
Buildings—Continued.	
Municipal auditoriums and armories	52
Courthouses and city halls	239
Hospitals and institutions	363
Penal institutions	85
Social, recreational buildings	27
Residential buildings	6
Office and administrative buildings	31
Warehouses, laboratories, shops, etc	26
Housing projects	7
Miscellaneous	86
Flood control, water power, reclamation	75
Dams and canals	27
Channel rectifications, levees, etc	7
Storage reservoirs	3
Water-power development	10
Miscellaneous	28
Water navigation aids	18
Dams and canals	3
Channel rectifications, levees, etc	6
Other navigation aids	9
Engineering structures	221
Bridges and viaducts	166
Wharves, piers, docks	33
Subways and tunnels	5
Other	17
Aviation	9
Recreational	54
Miscellaneous	122
Railroads	32

As to the above facts, there was no dispute in the evidence. The only conflict in the evidence related to the purpose or policy of the Administrator in making the loans and grants and whether construction of the projects was brought about as a result of solicitation or inducement by the Public Works Administration. (The conflict in the evidence as to the reasonable security of the Plainview, Texas, loan is no longer of consequence, since that case has become moot.)

B. THE ALLEGED IMPROPER PURPOSE OF THE ADMINISTRATOR

The size of the record is due largely to the testimony introduced or offered by petitioner with respect to the alleged policy or purpose or motive of the Administrator in making the loans and grants. That, however, is a wholly immaterial issue. The relevant issues, in addition to the standing of petitioner to complain, are whether the statutes are constitutional and whether the proposed loans and grants are authorized by the statutes. In the first place, the motives or purposes of a defendant officer are legally irrelevant, for obviously, they cannot affect the constitutional validity of the statutes themselves nor can they serve to invalidate his acts which, viewed objectively, fully conform with the statutes. See the discussion, *infra,* pp. 171 to 180. In the second place, the motives or purposes are factually irrelevant in the cases at bar, for petitioner has properly recognized (Br., p. 69) that regardless of defendant's purpose the inevitable and foreseeable consequence of making the loan and grant agreements will be the same; that is, the financial loss to the petitioner will ensue if the Administrator has fully complied with the statutes, regardless of the propriety of his motives or intentions.[1]

[1] In the brief of the petitioner in the *Duke Power Co.* case this position is urged even more emphatically at pages 53, 63, 73, 74. Thus at pages 63–64 it is said: "*The necessary and inevitable effect* of financing the establishment of the pro-

In that view it is manifest that the motives, purposes, and intentions of the defendant become irrelevant, for petitioner's position is merely that the validity of defendant's acts must be judged with reference to their necessary foreseeable effects upon petitioner's business.

Nevertheless, petitioner devotes so considerable a part of its brief to a discussion of the alleged purpose and intention, plan, or motive of the Administrator (sometimes called "criterion") in an attempt to show that the Administrator made the loans and grants to foster municipal competition for the purpose of reducing power rates to consumers, that it is desirable to show that the assertions made with respect to the Administrator's purposes and intentions are unfounded in fact. It is our position that even if the Court should consider the policies or purposes of the Administrator relevant to this controversy, the evidence fully sustains the finding of the trial court that the defendants were not "motivated by a desire to cause injury or financial loss to the plaintiffs or to regulate their rates, or electric rates generally, or to foster municipal ownership of utilities" (Finding 35, R. Vol. 1, 462–463).

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posed plant, as a Federal public works project, *will be to lower and control power rates* in the territory in which the Federally subsidized and controlled plant will operate." At page 73 it is said that the injury to petitioner "*will be the inevitable result of the act of the Federal Administrator in authorizing the project*," and that the effect upon petitioner's business was "reasonably foreseeable." [Italics supplied.]

Out of a trial that lasted seventeen days, with dozens of witnesses and several hundred exhibits, petitioner has selected portions of the testimony of two witnesses and of one exhibit on which it bases its claim that the Administrator acted pursuant to an improper power policy. The evidence relied upon by petitioner consists of (1) P. W. A. Press Release No. 989, dated September 27, 1934 (Plaintiff's Exhibit 33), (2) the testimony of a United Press correspondent named Harkness and (3) the testimony of Otto M. Rau, formerly a member of the Electric Power Board of Review—a subordinate body with only advisory powers.

Press Release No. 989

With respect to Press Release No. 989, dated September 27, 1934 (R. II, 253–255), the Administrator testified that, standing alone, it did not represent the policy of the Public Works Administration with respect to municipal power projects. When this release was issued, the Administrator's policy in this regard had not yet crystallized. As he stated, the policy was an evolving one (R. II, 541.) In the response to a question on cross-examination the Administrator testified (in May 1936):

> I do not think that is an accurate statement of what our policy finally crystallized into. We were working out this thing as we went along; and that statement taken in connection with a sentence in the concluding paragraph "We believe it is for the munici-

> pal applicant to determine whether or not it desires to compete with privately owned utilities" that in the final analysis, was our policy. The statement just read would be in error if taken by itself; yes. The whole thing is to be considered together as a statement of policy (R. Vol. II, 525).

He further stated (R. II, 508):

> That press release was not designed as an administrative order. It was merely run-of-the-mine publicity.

As a reading of the release will show, it was obviously intended to answer criticisms of two kinds: (1) objections made by power companies to Federal aid for municipal power projects, and (2) complaints from those municipalities whose applications for such aid had been rejected. The release makes the following explanations in answer to such criticisms:

(a) The fundamental policy of the Administrator was *to leave to the States and their municipalities, as a matter of local concern, the question whether the construction of competitive power plants was desirable.*

(b) If a power company reduced its rates, with the consequence that the municipality could not earn sufficient revenues to make the loan secure, then the application of the municipality would be rejected. If, however, such a reduction of rates by a power company appeared to be only temporary, then that factor would be disregarded.

(c) Experience has shown that in many instances power companies, by lowering their rates, have earned increased profits.

(d) A rejection by the Public Works Administration of an application for a loan to construct a municipal plant on the ground that the existing utility had lowered its rates was not without collateral advantages to the city.

(e) *The Public Works Administration would not relax its requirements to aid the construction of power projects;* they were required to meet "qualifications necessary for public works projects" (R. II, 253–255).

While a selected portion of the Press Release, taken from its context, might be subject to a different construction, we submit that the release, read as a whole, is not inconsistent with the finding of the trial court as to the policies and purposes of the Administrator.

Testimony of Harkness

Petitioner quotes (pp. 11–12) a part of the testimony of their witness, Mr. Harkness, a newspaper correspondent, as to what occurred at the Administrator's press conference on December 21, 1934, with reference to the allotment to Iowa City. The remainder of the witness Harkness' testimony, as well as his testimony on cross-examination, omitted by petitioner, shows conclusively that petitioner has drawn improper inferences from a portion of Mr. Harkness' testimony. When to the

extract quoted in petitioner's brief the following is added:

> I attended a press conference about August 20, 1935, at which Mr. Ickes announced the loan and grant which he made to Iowa City. At that conference he said this: that municipalities in some instances could afford to pay something to have private utilities out of their city and not meddle in politics and government. As I remember it, he did not say that specifically regarding Iowa City. He said that the City of Chicago could well have afforded to have paid something to Mr. Insull—Could have afforded to have paid something to keep him in Greece, to have built him an acropolis (R. II, 362). * * *
>
> Well, Mr. Ickes has always, according to my impressions from what he has said, held the ability of the project to be self-liquidating, one of the prime requirements of any project (R. II, 362).

it no longer appears from the testimony of this witness that the purpose of the Public Works Administration "power policy" was to regulate intrastate rates.

Testimony of Rau

Petitioner also quotes from the testimony of its witness, Otto M. Rau, formerly one of three members of the Electric Power Board of Review but no longer with the Government at the time of the trial. This Board had been created by a written order of the Administrator dated May 9, 1934 (R. II, 251), which shows by its terms that the Board

was established solely to gather information and give advice to the Administrator given by his other subordinates, the three regular examining divisions of the Public Works Administration (Engineering, Finance, and Legal). The Board's functions were not only purely advisory but were limited to power projects, the Board having been created because applications relating to such projects had been exceptionally retarded (R. Vol. II, 250). The Board was given no power to formulate policies or itself to take any action whatever in rejecting or approving proposed projects, that function having been reserved by the Administrator to himself. The trial judge found that the Board was empowered only to obtain information and to make advisory reports to the Administrator (Fdg. 33, R. I, 462). As the other subordinates of the Administrator advised him regarding other aspects of the proposed projects, the Board restricted itself primarily to a consideration of rates.

The Board was dissolved by written order of the Administrator on March 16, 1935, some ten months after its creation, because the Administrator was not satisfied with the way in which it was functioning (R. Vol. II, 508). The Administrator testified (R. Vol. II, 508):

> Under the order dated May 9, 1934 (Plaintiffs' Exhibit No. 32), an Electric Power Board of Review was set up to be advisory to the Administrator with particular reference to applications which had not been approved by the three reviewing

> divisions. Its authority was never enlarged. It had no power to formulate policies. I never authorized it to make determinations as to action to be taken by me or anyone for me. The Board was dissolved March 16, 1935. I was not satisfied with the way it was functioning. It seemed to me to have taken unto itself powers which it had never been intended it should have. I so admonished the Board.

Petitioner correctly points out that Mr. Rau was interested in the lower rates which local utility companies stated they intended to put into effect. Much is made of the fact that Mr. Rau and the Board were not interested in the amount of employment which a proposed project would create, in the effect of municipal competition on surrounding towns and country communities, or in engineering testimony as to the economic features of a proposed project. It is obvious that Mr. Rau was interested only in the utility companies' rates because he was hired as a rate expert by the Administrator (R. II, 244), and he had no authority to consider any other feature of a pending application. But the fact that Mr. Rau or the Electric Power Board of Review was not interested in the amount of employment to be created by a project, or in any other particular feature of a pending application, does not mean that these matters were not carefully considered by the Administrator or by the persons charged with the responsibility of examining into them and advising him with re-

spect thereto. Mr. Rau's basic function was to advise the Administrator with regard to the ability of a municipality to repay a loan in a case where the utility business in a community would be divided between the municipality and a competing privately owned company. Manifestly, the rate presently charged, and any reduction of rates contemplated by the privately owned company, were matters of prime importance to Mr. Rau in performing the functions assigned him.

The only occasions on which the Public Works Administration was interested in rates of local utility companies, and the reason for the interest on such occasions, were concisely put by the Administrator in the following testimony:

> Wherever the P. W. A. were proposing to make a grant only to aid in financing municipal power projects, and no loan whatever, I did take into account the rates to be charged by the city and the competing private companies. Also, where money was lent on general obligation bonds to a *city of good credit,* P. W. A. was not concerned about rates. But where money lent was evidenced by *revenue bonds,* then P. W. A. did concern itself with the rates to be charged by the city and by the competing companies for the purpose of being assured that the rates charged would yield sufficient revenue to operate the plant, take care of overhead, and leave a surplus to take care of the loan (R. II, 507). [Italics supplied.]

It thus appears that in cases where an application was filed with the Public Works Administration for a grant, without a loan, in aid of a municipal project, the rates to be charged for the services of the proposed project were not taken into consideration in approving or disapproving the application. That was true whether the project was a waterworks, sewage-disposal system, bridge, or power project. As the evidence shows, even in a case where the project would compete with an existing privately owned utility, if the application was for a grant only, the Administrator did not concern himself with the rates which would be charged by the applicant or by a competing privately owned company.

The foregoing facts must be kept in mind in considering the testimony of Mr. Rau, one of the members of the Electric Power Board of Review. He testified that, soon after its organization, the Board attempted to work out a definite policy with regard to municipal electric projects. The Board discussed the question of "social desirability" which was interpreted to mean that if the cost of service to consumers from the project would be lower than under existing conditions, the project was considered desirable from a social standpoint (R. Vol. II, 252–253). He further testified that in conversations with representatives of utility companies, he had advised them that if a lower rate were proposed by the utility, which affected the

earnings of the proposed plant, so that it would not be self-liquidating, the project would not be approved.

It is submitted that the fair inference from all the testimony of this witness is that rates were considered by the Board primarily with regard to the question of reasonableness of the security for the loan. It is, of course, clear that if the municipal rates were higher than those of the private utility, the municipal plant would probably not procure any patronage, and the loan could not be repaid. At times this general question was referred to with the connotation "social desirability." But an analysis of the evidence clearly indicates that this was merely another way of saying that if the proposed municipal rate were higher than the rate the utility company put into effect, the project would not be approved. Since the rate question had to be considered in any event, what it was called, whether "social desirability" or something else, is obviously immaterial.

But if the testimony of Harkness and Rau, and Press Release No. 989, left any doubt as to the policy of the Public Works Administration with respect to power projects, that doubt is set at rest by the testimony of the Administrator quoted *supra*, p. 22.

Petitioner's brief creates the impression that all the things said and done by any members of the Electric Power Board of Review out of the pres-

ence of the Administrator were known to, authorized by, and acquiesced in by the Administrator. But the evidence shows that such was not the fact, and that, not long before the Board was dissolved, the Administrator became aware of the fact that the Board was exceeding its purely advisory functions, and accordingly strictly admonished it to stay within the limited bounds he had set for it. On January 30, 1935, the Administrator wrote a memorandum to Mr. Hunt, Chairman of the Board, which appears as Defendant's Exhibit 11, (R. Vol. II, 511). This memorandum is as follows:

> On June 20, last, a P. W. A. allocation was made on Docket No. 3412 for a power plant for the Village of Hiram, Ohio. This allotment was approved by the President on June 27. Subsequently the loan agreement was executed, both by the Village and myself, and apparently all requirements for putting through this loan have been complied with.
>
> Meanwhile, it appears that on December 18 you wrote to the Village recommending the withdrawal of the application. This was without my knowledge and in spite of an order that I issued several months ago to the effect that no one on the staff had the power to overrule the President.
>
> In setting up the Electric Power Board of Review, it was my thought that it should pass upon power projects and report to me

> in case of disagreement with the action taken by the P. W. A. staff. I never for a moment supposed that I was creating a body that, without consulting me, would overrule not only me, but the President, and assume the right of direct negotiation with the municipalities involved.
>
> I would be glad to have you submit to me any facts which you think would make it my duty to rescind this allotment. *In the future the powers of the Electric Power Board of Review will be strictly confined to what I originally intended them to be, namely, the review of power projects and the making of reports and recommendations to me for my decision.* [Italics supplied.]

Nor is there any substance in the contention that special attention was given to applications for publicly owned power plants. This argument is refuted by the testimony of the Administrator, as well as by the testimony of witness Rau. The Administrator testified (R. II, 512):

> My order dated July 31, 1935, Plaintiffs' Exhibit 144, created the Power Division. I had abolished the Power Board of Review, but still felt the need of some division in P. W. A. that would be charged with particular responsibility with respect to power applications, so I set up the new Division.
>
> Referring to orders in evidence directing that preference should be given by state officers to the examination of municipal power projects, I felt that, whether or not there had been some clever sabotaging in my

> own organization on power applications, they had not had a fair break. They had been retarded for one reason or another, and it was to bring them up to a parity with respect to time with other applications that I issued that order.

And Rau testified that in his opinion the reason he had been appointed to the Electric Power Board of Review was (R. II, 250):

> No doubt the creation of my position there was due to the fact that all of the other classes of projects, such things as bridges, sewers, and waterworks, buildings and such things, would go through with reasonable promptness, while the municipal electric projects were lagging.

It thus clearly appears that, regardless of any inference that may be drawn from the testimony of Mr. Rau and the other witnesses as to the improper policy of the Electric Power Board of Review in handling of power projects, such policy is not attributable to the Administrator. If the testimony of the Administrator as to his policy and the testimony of his advisory subordinates as to their policy can be considered as at all in conflict, clearly the testimony of the Administrator should prevail.[3]

The Administrator's testimony as to his policy, referred to above, is further corroborated by his

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[3] See further, as to the limited authority of Hunt and Rau, the Government's brief in the *Duke* case, No. 397. In that case additional evidence was received concerning the Electric Power Board of Review and its functions.

report to the Senate (73d Congress, 2d Session, Senate Doc. 167, defendant's exhibit 70), wherein he states:

> The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry.

The testimony of the Administrator as to the policy of the Public Works Administration with respect to municipal power projects is clear and unequivocal. It is corroborated by his memorandum of January 30, 1935, to Mr. Hunt with respect to the Hiram, Ohio, application. It is further corroborated by his reports to Congress. None of the evidence adduced by the petitioner at the trial, fairly construed, contradicts the testimony of the Administrator in any way. Considering all the evidence in the case, it is submitted that the trial judge was eminently correct in finding as he did (Finding 35, R. I. 463) that

> there was and is no conspiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to, nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regulate their rates, or electric rates generally, or to foster municipal ownership of utilities.

Alleged Inducement

On the question of inducement, the trial court found as follows: (Finding 35, R. I, 462):

> The determination of whether municipal competition with privately owned utilities, or the elimination of competition by privately owned utilities where their franchises had expired, was desirable, was made by the cities involved and not by P. W. A.
>
> Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the part of any of the defendants, their agents or subordinates.

This finding, too, is amply sustained by the evidence. The Administrator testified, in response to a question by the Court (R. II, 541):

> We in no case stimulated applications. By stimulate I mean direct solicitation for particular projects at particular times. Of course we did hold out to the country that this money had been voted for this purpose. If it had been one of our major policies, instead of having comparatively few municipal power projects in number, we would have had a great many. Our policy from the beginning, without variation—although, as I say, it was an evolving policy—in the final analysis, we always felt that primarily it was up to the municipality to determine what it wanted. We did not inquire into

> the motive of the municipality, any more than we did when they wanted a library.

Mayor Glenn of Florence, Alabama, called as a witness by petitioner, testified that the City of Florence had been interested in municipal ownership since 1927. An application for a loan and grant was filed with the Public Works Administration on November 20, 1933. The Mayor testified (R. II, 142):

> No one in P. W. A. asked me to file this application. And the work was not greatly expedited by P. W. A. I had to bring Congressional and Senatorial pressure, and every other sort of pressure on P. W. A. to get them to do anything. Nobody urged me to make the application except the citizens. They voted about 14½ to 1 to go into the power business, and I was their servant, a public official, and had been attempting to get them into the power business.

Mayor Martin, of Iowa City, testified that Iowa City filed its application of its own free will and accord, and that the Public Works Administration did not ask or solicit or suggest that the City build a municipal electric light plant (R. Vol. II, 475). Similar testimony as to the Plainview, Texas, application was given by the witness Dysart, a member of the City Council of Plainview (R. Vol. II, 490). Officials of each of the Alabama cities whose allotments are involved in these suits were called as witnesses on behalf of petitioner, and not one of them indicated or suggested that their applications were instigated by the Public Works Admin-

istration. In fact, it was conceded by counsel for petitioner that each of the cities involved in these suits had a desire to build a municipal electric plant prior to the enactment of the statute creating the Public Works Administration (R. I, 438). And it is noteworthy that the legislature of Alabama authorized the borrowing of Federal funds for these projects prior to the establishment of the Public Works Administration; the Alabama statute refers in particular to the Reconstruction Finance Corporation. See Appendix, p. 54.

In the face of this overwhelming array of evidence petitioner is driven to the position that the mere enactment of the statutes authorizing the making of loans and grants to municipalities for public works projects, and the public announcement thereof, constituted an improper inducement to the local communities, in that the cities were thereby stimulated to engage in public construction they would not otherwise have undertaken. But this argument completely overlooks the fact that the municipality was absolutely free to select any type of public works project it desired. Any one of the cities involved in the cases at bar, had it so chosen, could have received, as other cities did, financial aid for the construction of schools, parks, hospitals, sewers, libraries, swimming pools, bridges, warehouses, tunnels, docks, markets, canals, viaducts, waterworks, auditoriums, and so forth. That the greatest percentage of construction consisted of the types listed above is indicated by the fact that but

1.1 per cent of the total number and 4.8 per cent of the total amount of allotments were for competing electric projects (Finding 40, R. I, 464–465).

No effort whatever was made by the Administrator to influence the determination by the cities of their choice of the kind of project for which they sought such aid. That determination was left entirely to the States and their cities. There is not a syllable of evidence to the effect that the Administrator made any special effort to bring about the construction of competitive municipally owned power projects. The desire of the particular cities whose projects are involved in the cases at bar to build competitive power plants, as above noted, preexisted the federal statutes involved in these cases and ante-dated the appointment of the defendant or anyone else as Administrator. And the determination to build such plants and to seek financial aid from the Administrator for such purpose was entirely local.

"Social Desirability"

Petitioner refers to the use of the test of "social desirability." The Administrator testified at some length with respect thereto (R. II, 514, 515, 516), stating that the phrase savored "of a general benediction at the end of a speech or a sermon."

The Administrator's testimony shows that many elements were taken into consideration in determining the social desirability or undesirability of a project. If the project would put men to work

on the construction of a municipal project, its social desirability was presumed. The community "sat as a jury" and decided whether the project would be socially desirable and the Administrator would "not attempt to overturn their finding" in the absence of conclusive proof to the contrary (R. II, 516). The Administrator would not approve a project if it was a mere makeshift to supply work (R. V. II, 516). The utmost, then, that can be said by petitioner is the following: (1) The Administrator desired to avoid mere make-work construction. That attitude was expressed by the vague phrase "social desirability", as it had been used as early as July 1933, in Circular No. 1, explaining the public works program (R. II, 363, 373). (2) And that attitude was applicable to all kinds of projects—bridges, schools, waterworks, etc., etc., and not merely to power plants. (3) That vague concept of social desirability was a *negative concept*. In other words, it was not the policy to *give* Federal financial aid to projects *because they were socially desirable* (that aid being given in order to increase employment quickly), but to *withhold such aid*, even to a project that would give employment quickly, *if the project was socially not desirable*. That is to say, social desirability was not one of the *positive* aims of the Administrator; he merely, at most, *rejected* certain applications because the projects were *not* socially desirable. (4) If the local community applied for Federal financial aid

for the construction of a project, it was presumed that the project met that vague negative test of social desirability. And that, again, was true of all kinds of projects and not merely of power projects (R. II, 516–517). If, however, someone in the local community protested that the community had erred with respect to the social desirability of the project, the Administrator would give attention to the protest. In the case of power projects, the protest usually came from a power company, and was generally on the ground that the project was not socially desirable because the rates would not be lower than those of the power company. In such circumstances, at some times, some heed was given to that kind of protest. But that merely meant, at most, that although a project would increase employment quickly and met all of the other requirements of the Federal statute, Federal aid would not be given therefor if the project was not socially desirable. In short, so far as municipal power projects were concerned, the Administrator did not make the loans and grants *in order* to reduce rates, but at some times, *when power companies protested,* he *withheld a loan or grant* because there would be no lowering of rates.

The Administrator testified that the policy on that subject was an evolving one, and the foregoing describes the most extreme version of what at one time may have been his attitude. But when that attitude is expressed in its most emphatic terms,

it comes very far from showing that the Administrator was acting *in order to* bring about lower rates in the local communities, but only that he sometimes refused to give Federal aid to a municipal power project, on the protest of a power company, because the project would not lead to a lowering of rates.

The Administrator testified that his purpose in making allotments for projects which happened to be competitive was always to increase employment quickly as required by the statute, and that considerations such as the benefit to the local community from reduction of rates were "only incidental and collateral" (R. II, p. 542).[3]

Miscellaneous Items of Excluded Evidence

Petitioner (p. 12, footnote) refers to a circular of instructions by Colonel Waite, Deputy Administrator, dated November 8, 1933, which referred to setting up publicly owned utilities as yardsticks. This circular was offered in evidence by petitioner (R. II, 392–393) and excluded (R. II, 394) and no error has been assigned in this court because of that ruling. Since, however, it was admitted in

[3] Of course, as above shown (pp. 21–23), quite aside from such consideration given the rates on the protest of a power company, the Administrator properly considered the prospective rates of a municipal project where the loan was to be evidenced by revenue bonds payable out of the revenues of the project or where the city's general finances were not in good condition.

evidence in the *Duke Power Co.* case, it may be well to discuss it: It is to be noted that petitioner made no effort whatever to prove the authority of Colonel Waite to issue such a memorandum or that it was ever approved by the Administrator. The specific authority of a government officer is not to be presumed. The fact that Colonel Waite was called "Deputy Administrator" indicates nothing as to his authority. The only evidence offered by plaintiffs as to Colonel Waite's authority consists of the following testimony by Mr. Wheeler, called as a witness by plaintiffs (R. Vol. II, pp. 314, 318):

> In 1933 and 1934 Colonel Waite was Deputy Administrator. The Deputy Administrator was the assistant to the Administrator. * * *. I do not know of my own knowledge the scope of the duty of the Deputy Administrator.

Significantly, when the Administrator was subsequently on the witness stand, the petitioner asked him nothing whatsoever as to Colonel Waite's authority. [And the same was true in the *Duke* case, where there was no evidence to show the scope of his authority.]

Petitioner in the court below made many assignments of error as to other excluded items of testimony offered by it. Those assignments were not preserved in the cases as now before this Court. See "Specification of Errors," petitioner's Brief, page 14. Therefore there was and is no occasion for respondents to rebut or explain those items.

Nevertheless, petitioner relies in its brief upon such excluded testimony:

(1) At page 12 of petitioner's brief, footnote, there is quoted a portion of a press release by Director Lilienthal of the Tennessee Valley Authority, referring to the policies and purposes of that Authority. This press release was offered by petitioners (R. Vol. II, 416) as Exhibit 175 for identification, but was not admitted in evidence by the trial court (R. 419–420).

(2) At page 12, footnote, reference is made to an article in a magazine by Administrator Ickes, which the trial court excluded (R. II, 394–395).

(3) Petitioner (Brief, p. 7) refers to the exclusion by the trial judge of the reports or recommendations of the examining divisions of the Public Works Administration. Error was assigned to that exclusion in the Court of Appeals (R. I, 488), but that error was not preserved in the cases that stand before this Court (See petitioner's "Specification of Errors," brief, p. 14). The trial judge excluded that evidence as immaterial on the ground set forth in its finding 33, R. 462, to the effect that the reports were made by mere subordinates of the Administrator, who had merely an advisory function. See *U. S.* v. *Fox River Butter Co.*, 61 Treas. Dec. 1047, certiorari denied, 287 U. S. 628; *Baltimore & Ohio Ry. Co.* v. *United States*, 298 U. S. 349. 370–371.

The charge that the Administrator rejected applications for other types of projects in the Alabama cities and singled out the power projects

As the evidence shows (see *supra*, pp 29 to 31), the determination as to what projects should be applied for by States and cities was left to the States and cities themselves, and no effort was made by the Administrator to induce the making of applications for power projects, competitive or otherwise, or to favor their approval as against other types of projects. Recognizing that these facts undermine its contention as to the Administrator's purposes and motives and policy, petitioner seeks to destroy the effect of that evidence by making an assertion (Brief, pp. 61–62) not made in the courts below, that the Alabama cities and adjacent cities and counties had applied to the Administrator for loans and grants for other types of projects (such as schools, jails, cemeteries, and waterworks), and that allotments based on those applications had for no good reason been withheld at the very time that the Administrator made the allotments for the power projects to the cities involved in the case at bar.

Petitioner has listed certain non-power projects in Alabama contained in reports of the Administrator made to Congress (and introduced as exhibits in the record) which showed that those projects were pending and had not yet been acted upon; and petitioner, on that basis, makes the statement—supported by nothing in the record—

that those projects had not been approved, although presumably valid, while the Alabama power projects were approved (Brief, pp. 61–62). Since petitioner has travelled outside of the record in making that statement we feel justified in noting the following facts, taken in part from the record and in part from the files of the Public Works Administration:

(a) The total allotments for power projects in Alabama to date (including those involved in the case at bar) amount to approximately $2,300,000. The record shows that prior to March 22, 1934, there was an allotment to Birmingham, Alabama (which is in the general region in which the cities in question are located), for a bridge, in the amount of $2,000,000 (Defendant's Exhibit 10, p. 126). The Public Works Administration files show that that allotment was made November 14, 1933. Subsequently, the City of Birmingham amended its application and asked instead for $1,419,000 for a sewerage system. The allotment was made, and the sewerage system was completed on August 12, 1937.

(b) The total allotments for all types of projects in Alabama was in excess of $18,400,000, while the total of allotments for power projects in Alabama aggregates approximately $2,300,000—or about one-eighth of the total of Alabama allotments.

(c) The records of the Public Works Administration show that, with two exceptions, each of the applications listed in petitioner's brief were dis-

approved solely because it was determined either (1) that the loan would not be reasonably secure or (2) that the proposed bonds would not be legally valid. Of the two exceptions referred to, one relates to a requested grant of $13,500 by the City of Decatur for a school. That application was pending at the time of the trial herein; the allotment therefor was subsequently made on August 20, 1936 (after the trial was closed), and the school building has actually been completed. The other related to an application by Morgan County, Alabama, for a loan of $112,000 for a county jail. This was rejected on the ground that the loan would not be reasonably secure. The application was withdrawn and there was substituted an application for a grant in the amount of $24,500. This was approved on October 23, 1936, but no allotment was made. The files do not show and we have been unable to ascertain the reason for the failure to make this one small allotment.

(d) In the 25 northern counties of Alabama allotments for non-power projects have been made in a sum in excess of $11,000,000. These projects include waterworks, sewers, schools, jails, highways, alms houses, hospitals, gas plants, and court houses. Accordingly, in the part of Alabama adjacent to the cities involved in the case at bar, allotments have been made aggregating more than $13,000,000, of which only ~~appropriately~~ APPROXIMATELY $2,300,000 has been for power projects.

It thus appears that petitioner, having assigned no error in this Court to the findings of the trial

court, is asking this Court to set aside or ignore those findings, not on the basis of anything in the record, but on the basis of incorrect conjectures made by petitioner as to non-record facts.

The charge that the sole purpose in approving the loans and grants was to aid the Tennessee Valley Authority

One further contention of petitioner requires notice. That contention is that the Administrator, in determining whether or not to make these loans and grants, applied the sole test of whether such action was or was not necessary to provide retail outlets for Tennessee Valley Authority's power under the rate control of the Authority. No such contention was made in either of the courts below. In its assignments of error in the court below (Assignment No. 25 in Case No. 84 and Assignment No. 26 in Case No. 85, R. Vol. I, 487, 496), petitioner contended that the trial court erred in failing to find that in making the loans and grants the defendants are cooperating with the Tennessee Valley Authority to effectuate a plan to promote public ownership of utilities and to control and regulate intrastate electric rates. In summarizing these assignments in its brief in the Court of Appeals, petitioner stated that the Court erred in failing to find that *one* of the purposes in making the loans and grants in the Alabama cases was to provide a market for electricity generated by the Ten-

nessee Valley Authority (Brief in Court of Appeals, p. 26).

That petitioner has not, until the filing of its present brief, asserted that the Administrator's sole purpose was to provide outlets for Tennessee Valley Authority's power, appears most strikingly from the first petition for certiorari it filed herein, on September 5, 1936, prior to the decision in the court below, but based on the record now before this Court. There petitioner stated (p. 8)—

> The purpose of the grants of 30 or 45% of the cost of labor and materials entering into the proposed projects, the loans repayable only out of net earnings of the proposed projects, was to induce the municipalities to undertake the construction of the proposed projects. *The idea was to "prime the pump" of business by bringing about public construction. In addition,* the respondent Ickes, through the making of the loans and grants for public utility electric power projects is effectuating *"the national power policy"* of the incumbent Federal Administration to make electricity more widely available at cheaper rates by subsidizing through these loans and grants, or threatening to subsidize competitively publicly-owned electricity projects. [Italics added.]

The claim that the allotments were made for the *sole* purpose of furnishing an outlet for power of the Authority is made for the first time in petitioner's present brief (Br. p. 57).

It is easy to understand why the argument was not made heretofore. The cases before Chief Justice Wheat involved the validity of allotments to ten cities seven in Alabama and one each in Oklahoma, Texas, and Iowa. The cities of Hominy, Oklahoma, Plainview, Texas, and Iowa City, Iowa, are far removed from the Tennessee Valley Authority area. Since it was contended that the allotments were all equally invalid, it could not well be said that the desire to aid the Authority was the sole motivating factor in making the loans and grants. By the time the litigation reached the Court of Appeals, the Hominy and Plainview cases had become moot, but the Iowa City case remained, and again the argument could not be made. It was only after the Iowa City controversy was disposed of (while the case was pending in this Court) that the ground of attack shifted and what was theretofore advanced as only one of many factors became the sole test of action. We submit that neither the position taken in the court below nor the position now taken here is the correct one.

The evidence amply demonstrated and *the trial court found* that loans and grants for the financing of municipal electric projects were dealt with in the same manner and *judged by the same tests as other projects* (Fdg. 32, R. I, 461). Petitioner again completely ignores this finding and bases its argument on certain selected bits of evidence from the entire record.

It is first claimed that the applications filed by the cities show that they intended to purchase power from the Tennessee Valley Authority and resell it at rates prescribed by the Authority. The applications are neither incorporated nor referred to in the loan and grant agreements and are prepared by the municipalities and contain no guide to the purposes or policies of the Administrator. But if the applications are of significance, it should be noted while the applications do not appear in full in the record, the record does show that Florence furnished detailed statistics on local unemployment and stated the incidence of material orders (R. II, 107); that Hartselle, Sheffield, Tuscumbia, and Russellville stated their relationship to the Tennessee Valley Authority project under the heading "Long Range Development" (R. II, 111, 122, 124, 127); that Decatur furnished estimates of the labor which would be employed (R. II, 93, 94), described the unemployment situation locally (R. II, 94) and the incidence of material orders (R. II, 94), and under the heading "Economic and social value" stated "In the first place, the construction would put many unemployed men to work" (R. II, 92).

It is next contended that the only reason given for the approval of the Decatur allotment is that the project will aid the Tennessee Valley Authority in obtaining a market for its electrical energy.

The resolution of the Special Board for Public Works with respect to the Decatur project recommends that the project be included in the comprehensive program of public works "for the reason, *among others,* that the Tennessee Valley Authority has acquired the necessary transmission lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its electrical energy" (R. Vol. II, 343, 344).[4] This is a far cry from approving it for the sole purpose of providing a market for the Authority's power. This resolution was adopted in 1934 prior to the execution of the first loan and grant agreement with the City of Decatur, dated December 6, 1934, which contained a provision requiring it to purchase power from the Authority. Whatever may be said as to the validity of the reason given in the resolution, it is no longer pertinent in view of the change in the contract and subsequent elimination of all reference to source of electric power.

The first contracts between the cities of Sheffield and Decatur and the Administrator contained provisions conditioning the loans and grants upon an agreement by the cities to purchase power from the Authority. These contracts were terminated in

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[4] The Special Board for Public Works, like the Electric Power Board of Review, had only advisory powers (Fdg. 33, R. I, 462). The President and the Administrator did not act on the basis of written data alone; in some instances they acted on the basis of oral discussions which were not reduced to writing (Fdg. 31, R. I, 461).

December 1935 and new contracts were executed. The new contracts say nothing about the source of the cities' power. The trial court found—and on this point the evidence is undisputed—that the provisions of earlier contracts designating the agency from whom the municipality must purchase its power were eliminated before any action was taken pursuant thereto by any of the municipalities (Fdg. 37, R. I, 463). The loan and grant agreements with the cities of Russellville, Hartselle, and Guntersville *at no time* contained any provision with respect to the purchase of power, a fact which would seem to dispose completely of the contention on page 57 of petitioner's brief that the Russellville allotment was approved to distribute the Authority's electric energy. So far as the respondents are concerned, each of the cities involved in these suits is free to buy power from whom it will, including the petitioner, Alabama Power Company. If any city decides to contract with the Tennessee Valley Authority for power it will do so of its own free will and accord and in the exercise of its own unfettered discretion. At the time of the trial none of them had done so.

Petitioner relies upon a report of the Tennessee Valley Authority published in December 1936 to show that Sheffield had a contract with the Authority dated *March 1936* which contains a provision requiring that city to re-sell its power at specified rates. The trial in the case at bar began on *April*

20th and ended on *May 26, 1936.* At the trial petitioner called Hoyt Greer, President of the City Commission of Sheffield, as its witness, and on direct examination he testified (R. II, 158–159), "We do not have a contract with Tennessee Valley Authority to supply power to the municipal system when it is built. We did have such a contract which was cancelled possibly in the fall, or maybe in July 1934." There is no record evidence to the contrary.

To make its point, petitioner thus relies on non-record evidence, and solely with respect to Sheffield, as to which the case is now moot. With respect to each of the other cities involved in the cases when tried, there is testimony similar to that given with respect to Sheffield; namely, that there were no contracts with the Authority in existence at the time of the trial (R. II, 130, 149, 155, 158–159).

The charge of conspiracy with the Tennessee Valley Authority

Petitioner, in its bills (R. I, 224–225, 343), in its assignment of errors below (R. I, 487), and its briefs in the court below, charged that the Administrator was engaged in a conspiracy with the Tennessee Valley Authority to cause financial loss to petitioner, and in its present brief (pp. 8, 57–58), by use of selected and truncated portions of the evidence, strives to make it appear that the Administrator improperly held up the allotments to

the cities for that purpose. But when the entire evidence on that question is read it shows the exact contrary, namely, that if there was a "conspiracy" between the Authority and the Public Works Administration, it was a "conspiracy" to induce the Alabama cities to purchase the properties of the Alabama Power Company, rather than construct new plants, in order to avoid a loss to that company. This appears from the following facts (R. II, 128–158, 476–482):

The Authority had agreed to purchase a fractional part of the transmission properties of the Alabama Power Company. (See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 316.) In order to avoid loss to Alabama Power Company, the Authority had also procured an option from that company to acquire its distribution systems in a group of Alabama cities, its purpose in procuring that option being to rehabilitate those distribution systems and then sell them to the respective cities. It was unwilling to do so, however, unless it could induce *all* the cities to buy the systems located within their respective limits (R. II, 473). A witness for petitioner, Mayor Glenn, of Florence, Alabama (one of those cities), testified that Director Lilienthal called the representatives of those cities together and said, "*The Administration was opposed to the confiscation of property,*" and, for that reason, wanted to work out the purchase of the properties of the Alabama Power

Company rather than to have municipal competition (R. II, p. 143). Mayor Glenn also testified (R. II, p. 144):

> I don't think that it was the attitude of either TVA or PWA to have me take steps which would destroy these properties or prevent my purchase of them from the company. They never expressed such an attitude to me, nor did their conduct ever indicate that they had that in mind. On the contrary, they wanted to purchase them and not allow them to be destroyed.

Mayor Glenn further testified that his city was unwilling to buy the distribution system in his city at the price offered, believing that the price was $40,000 too high (R. II, 143–144). At the request of Director Lilienthal the Administrator (R. II, 137) notified Mayor Glenn by telegram (partly quoted in petitioner's Brief, p. 58) that the Public Works Administration would not, at that time, make a loan and grant to Florence which would enable it to build its own competitive plant, because it was felt desirable to cooperate with the Authority. *In other words, the so-called conspiracy was a conspiracy on the part of the Public Works Administration and the Tennessee Valley Authority (1) to have the City of Florence buy property of the power company at what the city considered an excessive price so as to avoid loss to the power company, and (2) thereby to work out a plan for selling all such properties to the several Alabama cities,*

in order to avoid the construction of duplicating plants destructive of the company's business there.

The Administrator sent the telegram to Mayor Glenn, above referred to, because the Administrator was endeavoring not to obstruct the Authority in its desire to have the cities buy from the Authority the properties which it would acquire under its option from Alabama Power Company rather than to have the cities build competing plants. And it was with reference to that attitude that the Administrator testified (R. II, p. 526) as follows:

> I think in the case of Florence, Alabama, we took the position that since T. V. A., which was another government agency created under a separate statute, was trying to work out its problem, we ought to cooperate with it, and I did, as a matter of fact do whatever I could to help T. V. A. work out its problem.

It was in considerable part because Mayor Glenn refused to purchase that property that the Authority's plan of buying the company's property and selling it to the cities fell through (R. II, 143). There is also evidence in the record that negotiations, between Alabama Power Company and others of the Alabama cities, failed because those cities felt that the price asked for the properties was too high. Petitioner in the court below asserted that the cities believed the price to be paid was too high merely because those cities could build competing plants aided by Public Works grants.

The evidence on that subject is in conflict. (See, for instance, R. II, 483; 141.)

The following facts also demonstrate the absurdity of the charge of conspiracy between the Public Works Administration and the Tennessee Valley Authority which would cause financial loss to the Alabama Power Company, and shows how lacking in seriousness was the effort of the Alabama Power Company to sell its properties to those cities:

Mayor Glenn was asked by petitioner at the trial to produce certain letters received from Director Lilienthal explaining why the Authority gave up its efforts to exercise the option to buy the distribution systems from Alabama Power Company and sell them to the cities. Having called for the production of these documents, petitioner did not offer them, and they were later offered by defendants and received in evidence. Those letters, and particularly the memorandum enclosed with the letters of the Authority to the Mayors of the Alabama cities (R. II, 477–482), show that, after the Authority had negotiated with the Alabama Power Company for the purchase of the company's facilities in certain communities in northern Alabama, the indefinite delay and possible obstruction of the transaction occasioned by the resort of certain preferred stockholders of the company to litigation first in the state and later in the Federal courts (see *Ashwander* v. *Tennessee Valley Authority, supra*)

and the insistence by the trustee for the bondholders of the Alabama Power Company on an "independent appraisal" of the properties to be conveyed to the Authority, made it unjustifiable for the Authority to urge that the Alabama communities delay their plans for constructing power projects any longer in reliance upon eventual performance of the contract between it and the Alabama Power Company (R. II, 480–482).

There can be no possible doubt that the Alabama cities desired to engage in municipal operation. There was a question of *how* they should do so—whether (1) by purchasing the Alabama Power Company's properties, or (2) by constructing their own competitive plants. *The record shows plainly that the Public Works Administration aided the Tennessee Valley Authority in trying to persuade the cities not to build competing plants, but to buy the petitioner's facilities in order to avoid loss to the company.*

The trial court found that there was no conspiracy (Fdg. 35, R. I, 463) and further found (R. I, p. 453):

> The Tennessee Valley Authority attempted to persuade the city of Florence to enter into a plan whereby the Authority would exercise its option (later abandoned) to purchase distribution systems in Florence, Alabama, and several other communities, from the Alabama Power Company, rehabilitate them, and turn them over to the communities. *This plan was inaugurated in an attempt by the Tennessee Valley Author-*

> *ity to prevent duplication of existing facilities of the power company and for the purposes of protecting the investment of the Alabama Power Company.* The city of Florence rejected this proposal as disadvantageous to itself, and made a counter-proposal that it purchase the existing facilities of the Alabama Power Company at Florence, and use funds to be supplied by the Public Works Administration for rehabilitation and extensions. Later this plan was abandoned by the Tennessee Valley Authority. P. W. A. refused to make a loan or grant to the City of Florence until this plan had been abandoned. [Italics supplied.]

Nor is it possible for petitioner seriously to urge that the Administrator acted improperly when he sought to avoid interfering, through any of his activities, with the plan of the Authority to have the cities purchase petitioner's properties instead of creating duplicating plants. Suppose that the City of Guntersville, which is located on the Tennessee River, instead of requesting a loan and grant for a power plant had applied for an allotment with which to construct a municipal levee. And suppose that the War Department was at the same time contemplating a program of improving the Tennessee River by the construction of levees at various points along the river. Would it have been improper for the Administrator to withhold consideration of the city's application until he had ascertained whether the construction of its project would be consistent with the program of the War

Department? And if the Administrator found that the city's project would interfere with the War Department's program, could he be criticized for disapproving the city's application?

Petitioner has not assigned error in this court to any of the findings of the trial court. (See Specification of Errors, Pet. Brief, p. 14.) Even if it had, the evidence relied on falls far short of overcoming those findings, including that to the effect that these projects were judged by the same tests as any other projects. What petitioners contention really comes to is that the Administrator should not have approved these projects, though otherwise legal, because the cities might of their own free will decide to purchase power lawfully generated at Wilson Dam. This position is a most anomalous one, since this Court upheld, in the *Ashwander* case, a contract of the Authority to purchase transmission lines in order to be in a position to supply power to some of the very cities involved in these suits.[5]

The Employment Created

The appropriateness of the public works program as a means of increasing employment, and the results of the program as vindicating the judgment of Congress, are discussed *infra*, pp. 149 to

[5] The plaintiffs in the *Ashwander* case attempted to assail the activities of the Public Works Administration, but the lower courts and this Court refused to consider those contentions. The attempt is now made to inject into this case the activities of the Tennessee Valley Authority.

155, in connection with the discussion of the spending power of Congress. As has been noted (p. 11, *supra*), there has been administrative determination that the projects here in question satisfy the requirements of the statutes with respect to the application of the funds for work under each project. Every contractor on a Public Works project is required to furnish detailed data on employment and purchases to the Bureau of Labor Statistics (Fgd. 46, R. I, 467). Neither by examining such data nor otherwise did petitioner attempt to overcome the presumption, arising from executive action, that these projects in fact contributed to an increase in employment.

Nevertheless petitioner stresses the fact that the direct labor at the site on a power project is less than the direct labor furnished at the site by the construction of other types of projects, such as buildings, waterworks, sewers, and roads. But power projects themselves differ in this regard; the construction of a hydroelectric project, including a dam and generating and distribution facilities, such as that involved in the *Duke Power Co.* case, doubtless requires a relatively large amount of labor at the site. The construction of a distribution system alone doubtless requires a greater relative expenditure for labor away from the site, in the fabrication and transportation of materials to be used in the project. See R. II, 554. Because the value of a public works program lies largely in the regenerative effect of a stimulation of the construction industry, it is evident that projects whose

construction requires a relatively large amount of labor away from the site, in related industries, have a peculiarly appropriate place in a comprehensive program of public works.

SUMMARY OF ARGUMENT

I

Petitioner has no standing to challenge the constitutional and statutory validity of the proposed loans and grants. That conclusion, reached by the court below, accords with the decisions of every other appellate court which has passed upon the question. *Duke Power Co.* v. *Greenwood County,* 91 F. (2d) 665, pending on certiorari, No. 397; *Arkansas-Missouri Power Company* v. *Kennett,* 78 F. (2d) 911 (C. C. A. 8th); *City of Allegan* v. *Consumers Power Co.,* 71 F. (2d) 477 (C. C. A. 6th), certiorari denied, 293 U. S. 586; *Kansas Utilities Co.* v. *City of Burlington,* 141 Kans. 926, petition for certiorari dismissed on motion of petitioner, 296 U. S. 658. A contrary result would establish either a new doctrine of private law, enlarging the rights of franchise holders against lawful competition, or a new doctrine of public law with respect to the action of Government officers.

The loss with which petitioners are threatened is attributable to the competition of the cities, and that competition is voluntary and is admittedly lawful under the law of Alabama and under the Fourteenth Amendment. The standing of petitioner, as the holder of non-exclusive franchises, is

limited to complaints against unauthorized or illegal competition, as in *Frost* v. *Corporation Commission,* 278 U. S. 515. Cases in which a city is acting in violation of its own charter powers, such as *City of Campbell* v. *Arkansas-Missouri Power Co.,* 55 F. (2d) 560 (C. C. A. 8th), have no application, as was recognized by the same court in the later *Arkansas-Missouri Power Co.* case, *supra.*

The fact that the competition will be made possible by advances of funds alleged to be beyond the lawful authority of the lender cannot serve to confer additional protection upon the petitioner. Cf. *Railroad Company* v. *Ellerman,* 105 U. S. 166; *Sprunt & Son* v. *United States,* 281 U. S. 249; *Chicago Junction Case,* 264 U. S. 258. And the fact that the lender is the United States is likewise not material. Since no legally protected interest of petitioner will be infringed, there is no occasion for the defendant to justify the proposed loans and grants by showing the authority of a valid statute. That the suit is brought against Government officers, so far from enlarging the standing of the petitioner, discloses the deficiency in its claim; for in such suits the officer is required to show valid authority only if his acts, viewed as those of a private individual, would constitute an invasion of an interest which the law would otherwise protect or which has been especially conferred by statute. *In re Ayers,* 123 U. S. 443; *Ex parte Young,* 209 U. S. 123; *Ex parte La Prade,* 289 U. S. 444. Cases holding that a defendant is answerable

where he has induced another, by fraud or intimidation or with a solely malicious motive, to cause damage to a plaintiff, have no application to the cases at bar.

II

The proposed loans and grants are authorized by the statutes. That Congress intended electric power projects, whether competitive or not, to be eligible for loans and grants, is made plain by the terms of the statutes, by their legislative history, and by their administrative construction, which has met with uniform judicial approval and has been confirmed by four congressional enactments. An amendment which would have excluded competitive projects was rejected in connection with the Emergency Relief Appropriation Act of 1935. Congress itself determined that electric projects of the type here in question are an appropriate part of a comprehensive program of public works for the relief of unemployment.

III

The statutes do not unlawfully delegate legislative power to the Administrator. They require a comprehensive program of public works to be undertaken and enumerate various classes of eligible projects. They set a limit on the relative amount of the grant and require loans to be reasonably secured; this in turn requires that the project be sound from a legal and engineering standpoint and, in the case of public borrowers, that the project be

duly authorized by sovereign action. A major element of discretion resides not in the Administrator but in the local applicant. The discretion reserved to the Administrator is essentially that of segregating a lump sum appropriation for various classes of eligible projects. The validity of legislation conferring such authority is attested by historic practice and by the decisions. *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308; *United States* v. *Hunson,* 167 Fed. 881 (C. C. A. 9th). The argument of the petitioner is one of legislative policy, not of constitutional law.

In comparable fields of action similar grants of authority to the executive have repeatedly been sustained; in the administration of public lands (*Butte City Water Co.* v. *Baker,* 196 U. S. 119; *United States* v. *Grimaud,* 220 U. S. 506, 516; *United States* v. *Hanson,* 167 Fed. 881 (C. C. A. 9th)); the establishment of fiscal agencies (*McCulloch* v. *Maryland,* 4 Wheat. 316); the disposal of government property (*United States* v. *Chemical Foundation,* 272 U. S. 1; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288); and the borrowing of money on the credit of the United States.

IV

The statutory provisions are a legitimate exercise of the power to appropriate money to promote the general welfare. In *Steward Machine Co.* v. *Davis,* 57 S. C. 883, this Court upheld the Federal tax and credit as a means of mitigating the finan-

cial burdens which the Federal Government necessarily assumes in the relief of unemployment, and this Court adverted in particular to the expenditures made in connection with public works. In choosing a public works program as a means of increasing employment, Congress recognized the fact that the construction industry is a key industry in relation to employment and had suffered the most drastic decline. A program of public works as a remedy for unemployment had been widely advocated by business leaders and economists and had been previously adopted both in this country and abroad. The results confirmed the appropriateness of the means chosen. See *Monthly Labor Review,* (U. S. Department of Labor), Oct., 1936, for a summary of the employment created by the public works program. The fact that electric distribution systems require relatively less labor at the site than in the fabrication and transportation of the materials used, does not support an argument that Congress should have excluded such projects from the comprehensive program. On the contrary, this type of project is of particular value in contributing to the regenerative effect of a stimulation of the construction industry.

V

There is no invasion of the reserved powers of the states. There is no coercion of the states and their subdivisions to build public works projects, much less to build power plants in particular.

The inducement is even less strong than that to be found in the provisions of the Federal Social Security Act sustained in *Steward Machine Co.* v. *Davis*, *supra*. Nor is there any regulation of local utilities. The only interest of the United States is that of a holder of the bonds of the cities, possessing only the limited rights of bondholders conferred under the laws of the state.

The system of Federal grants-in-aid is an established form of cooperation between Federal and state governments, each exercising its delegated powers and each seeking to accomplish purposes within its legitimate sphere. Such grants have been made regularly for education, public health, highways, forest fire prevention, and other purposes.

The states and their subdivisions are merely aided, if they so choose, to exercise reserved powers which they have consistently exercised under the Constitution without successful challenge in the past.

VI

The alleged improper purpose, motive or standard of the Administrator is irrelevant. Apart from the fact that the findings of the District Court negative the petitioner's charge in this respect, such an improper purpose would in any event be irrelevant as a matter of fact, since, as petitioner properly acknowledges, the financial loss to it as the result of the proposed loans and grants will be the same whatever the purpose or motive of the

Administrator. In the second place, the alleged improper purpose of the Administrator is legally irrelevant. If, as we have shown, the statutes are valid and the loans and grants are authorized by the statutes and conform therewith, neither the statutes nor the action taken can be rendered invalid by the Administrator's purpose or motives. *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 162; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 145.

ARGUMENT

I

PETITIONERS HAVE NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE FEDERAL STATUTES OR ASSERT A VIOLATION THEREOF

INTRODUCTORY

The Court of Appeals has held that petitioner is without standing to attack the constitutional validity of Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, or the validity of the acts of the Administrator pursuant thereto. In so holding, the court adopted the view taken by every appellate court which has passed upon the question.* We submit that this view is clearly correct.

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*Duke Power Co. v. Greenwood County, 91 F. (2d) 665, pending on certiorari, No. 397; *Arkansas-Missouri Power Company* v. *Kennett*, 78 F. (2d) 911 (C. C. A. 8th); *City of Allegan* v. *Consumers Power Co.*, 71 F. (2d) 477 (C. C. A.

Petitioner does not rely upon its status as a Federal or local taxpayer to support its right to maintain this suit. It relies solely upon its status as a holder of non-exclusive franchises to operate electric generating and distribution systems, with which the proposed municipal electric projects will compete. It is conceded that the competition of the municipalities is lawful under the law of Alabama. *Oppenheim* v. *City of Florence,* 229 Ala. 50. The attack now made is necessarily confined to the claim that injury will result from the asserted unconstitutional or unauthorized activity of the Administrator in making the loans and grants to the municipalities.

The only financial loss which petitioner will suffer will be the immediate consequence of voluntary and lawful competition by the cities. Such financial loss involves no invasion of any legally protected interests of the petitioner, no invasion of any of its private legal or equitable rights. It is therefore *damnum absque injuria.*

The contention of petitioner that it is entitled to be protected against such competition if it is made possible by invalid acts of a Federal officer, and that, therefore, it may challenge the validity of the action of the Administrator, would, if ac-

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6th), certiorari denied, 293 U. S. 586; *Kansas Utilities Co.* v. *City of Burlington,* 141 Kans. 926, petition for certiorari dismissed on motion of petitioner, 296 U. S. 658. In *Kansas Gas & Elec. Co.* v. *City of Independence,* 79 F. (2d) 32 (C. C. A. 10th) the question was expressly passed by.

cepted, establish a new doctrine of public or of private law.

(a) The principle for which petitioner specifically contends would establish a new doctrine of public law; namely, that when a Government officer is sued it is necessary merely to show that the officer was acting in excess of lawful authority and his acts made possible substantial financial loss to the plaintiff; and that it is not necessary to show that the officer's action has invaded any interest of the plaintiff which the law would otherwise protect or has violated any right of the plaintiff which the law has specially conferred. Acceptance of such a doctrine would mark a departure from principles to which this Court has long adhered. See pp. 89–98, *infra*.

(b) If no such new doctrine of public law is to be established, the petitioner's contention would require the establishment of a new doctrine of private law, namely, that a suit may be maintained against a private person who by financial aid has made possible lawful and voluntary competition between a third party and the plaintiff, on the ground that in extending such aid the defendant acted in violation of law, i. e., was using funds of some other person (not the plaintiff) which he had no lawful right thus to employ. Such a doctrine of private law would open the courts to a new class of complaints in the field of business competition, and would impose hitherto unrecognized restraints on competition which is lawful and voluntary.

The fallacy in this second contention was succinctly exposed in the opinion by Judge Parker in *Duke Power Co.* v. *Greenwood County,* 91 F. (2d) 665, 676, now before this Court (No. 397, present Term):

> It is true that grounds for relief may exist against action innocent in itself if taken to enable another to violate rights of complainant; but we know of no principle upon which action which violates no right may be enjoined because in aid of another action which violates no right. * * * and we cannot see that the source of the funds can affect the question of invasion of rights, where plaintiff has no such interest in the funds as it could protect by injunction.

A complete answer to petitioner's contention should, however, be made, in view of the importance of the question, by showing the following: (1) the competition of the cities is voluntary and lawful, and the threatened damage to petitioners is attributable to that competition; (2) there is no standing to challenge the validity of a loan and grant which will make possible such competition; (3) the fact that the suit is against a Government officer does not enlarge the standing to complain; on the contrary, the nature of such a suit discloses the deficiency of the claim; and (4) the authorities cited by petitioner, not involving intervening lawful competition but dealing with coercion or fraud or malice, have no application here.

It will be seen that in the view we take of the question it is not of controlling importance that the suits are against the Administrator rather than against the United States. It is not and has not been our position that the suits must fail because they are, in essence, suits against the United States. Our position is that the petitioner has no cause of action against either the United States or the Administrator, because no legal interest of petitioner is threatened, and it therefore cannot require the United States or the Administrator to justify the proposed action by showing that it will be taken under the authority of a valid statute.

1. *The municipal competition is lawful and the threatened damage is attributable to that competition*

Under the statutes and decisions of Alabama, the proposed municipal undertaking is concededly lawful. And as it is not forbidden by the terms of petitioner's franchises it is likewise lawful under the Fourteenth Amendment.

The rights of a franchise holder are strictly construed, and the courts have been careful to avoid an extension of those rights into an unintended monopoly. When holders of non-exclusive franchises have endeavored to prevent competition by a state or municipality, this Court has held again and again that such franchises "are confined to the letter of their expressed grant" (*Madera Water Works* v. *Madera*, 228 U. S. 454,

456), and that the possibility of such competition is a risk "which the [plaintiff] took when it entered the field" (*Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 626.)[7]

A city may build its own system without the necessity of purchasing existing systems owned by a private company, *Helena Waterworks Co.* v. *Helena,* 195 U. S. 383. A city may build a competing system even though it has granted to a utility company an exclusive franchise as against "any other person or corporation," *Knoxville*

[7] In *Hamilton Gas Light Co.* v. *Hamilton City,* 146 U. S. 258, this Court said (p. 268, 269): "It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas-works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. * * * What was said in *Turnpike Company* v. *The State,* 3 Wall. 210, 213, is quite applicable to the present case: * * *. This court said: 'The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defence, is, that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms, or by necessary implication; and hence whatever may have been the general injurious effects and consequences to the company, from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress.'"

Water Co. v. *Knoxville,* 200 U. S. 22. A city may operate its own system without becoming subject to regulation imposed on a competing private system, *Springfield Gas Co.* v. *Springfield,* 257 U. S. 66. A city may exempt its own system from a tax which it levies on a competing system, *Puget Sound Power & Light Co.* v. *City of Seattle, supra.*

The interest which petitioner may assert as a holder of non-exclusive franchises, is a right to be free of competition by one not having a valid franchise to compete. This was the principle applied in *Frost* v. *Corporation Commission,* 278 U. S. 515, relied on by petitioner (Brief, p. 27). In the *Frost* case the plaintiff had secured a license to operate a cotton gin, pursuant to a statute which, this Court held, made the permit the equivalent of a non-exclusive franchise. That franchise, it was held, entitled the holder to challenge the threatened competition of the defendant cooperative corporation on the ground that its purported franchise was void because it could be issued only under a statutory provision which was itself void as in violation of the equal protection clause of the Fourteenth Amendment. This Court thus defined the plaintiff's interest (278 U. S. at 521):

> While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who

> attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights.

That the *Frost* decision was based upon the right to complain of competition threatened by one not having a valid franchise is made clear by the subsequent decisions of this Court. In *Corporation Commission* v. *Lowe,* 281 U. S. 431, 435, it was said:

> In *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, the Court concluded that one who had complied with the statutes of Oklahoma and had obtained a permit to operate a cotton gin, held a franchise which constituted a property right, and that while this right did not preclude the State from making similar valid grants to others, it was an exclusive right as against *attempts to operate a competing gin without a permit or under a void permit.* [Italics supplied.]

And in *New State Ice Company* v. *Liebmann,* 285 U. S. 262, 273, a similar statement of the *Frost* case is found.

Gallardo v. *Porto Rico Ry. L. & P. Co.,* 18 Fed. (2d) 918 (C. C. A. 1st), was like the *Frost* case, for there the defendant, the Government of Puerto Rico, was itself proposing to engage in direct competition with plaintiff utility company, and the court held that the defendant, in doing so, was pro-

posing to act in violation of the Organic Act of Puerto Rico.* *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1, is also inapposite, for there the City had granted the plaintiff water company an *exclusive franchise* and the proposed competition was therefore unlawful. Of course, the loss of customers in such circumstances is actionable, even if plaintiff had no binding contracts with them.

The *Frost* case would be applicable to the cases at bar only if the proposed undertaking by the cities were beyond *their* lawful authority. The contrary, as we have shown, is clearly established.

The other cases cited by petitioner in this connection (Brief, pp. 27–28) are inapposite for the same reason. The courts have not failed to perceive the controlling distinction. In *Campbell* v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560 (C. C. A. 8th), it was held, on the authority of the *Frost* case, that a utility company was entitled to an injunction against a city to prevent the construction of the city's competing plant, because the issuance of bonds by the city to finance such construction was in excess of *its* charter powers. The court held that in those circumstances the city was in the same position as a rival company threatening to compete without having obtained a valid franchise. That ruling was reaffirmed in two de-

* Moreover, the plaintiff alleged that it was a taxpayer and would be injured as such by the increase in local taxes levied upon it for the operation of the competing plant.

cisions of the same court, *Iowa Southern Utilities Company* v. *Cassill,* 69 F. (2d) 703 (C. C. A. 8th); *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F. (2d) 911 (C. C. A. 8th). When, however, the very utility company which had been successful in the *Campbell* case sought to extend the doctrine of that case in the precise way in which petitioner here is seeking to extend it—i. e., to justify an injunction against the Administrator—the Court of Appeals for the Eighth Circuit rejected that contention, pointed out that its decision in the *Campbell* case was inapplicable, and held that the plaintiff had no standing to attack the validity of the Administrator's act in making proposed loan and grant. *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F. (2d) 911. The other cases cited are like the *Campbell* case, in that they involved attacks upon the validity of the action of the city itself under state law.[9] Petitioner (like Judge Soper in his dissenting opinion in *Duke Power Co.* v. *Greenwood County,* 91 Fed. (2d) 665, 680) cites the *Campbell* case and ignores the *City of Kennett* case, *supra.*

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[9] *Colorado Central Power Co.* v. *Municipal Power Development Co.*, 1 F. Supp. 960 (D. Col.); *Oklahoma Utilities Co.* v. *City of Hominy*, 2 F. Supp. 849 (D. Okla.); and *Kansas G. & E. Co.* v. *City of Independence*, 79 F. (2d) 32 (C. C. A. 10th); *Mississippi Power Co.* v. *City of Starkville*, 4 Fed. Supp. 833 (D. N. D.), involved what the court held to be a breach by the defendant city of a covenant of quiet enjoyment made by the city in connection with the sale of property to the plaintiff utility company.

It is unnecessary to consider whether the above applications of the rule in the *Frost* case are sound. For in the cases at bar, the validity of the action of the cities under the law of Alabama is conceded, and it is the cities which will compete. The courts have taken proper care to avoid confusing this situation with that presented in petitioner's authorities.

The case of *Citizens Electric Illuminating Co.* v. *Lackawanna & Wyoming Valley Power Co.*, 255 Pa. 145, specially relied upon by petitioner (Brief, p. 28) is similarly beside the point. There the defendant, a utility company, with a franchise limited to a particular area, proposed to sell power, at wholesale, in a township in which it had no franchise to operate, and in direct unlawful competition therein with the plaintiff utility company which had a valid franchise covering that township. Plaintiff was granted an injunction. It happened that the proposed purchaser of the power from defendant was a third utility company which had a valid franchise to sell, at retail, in competition in that township with plaintiff. But the wrong complained of was the illegality of the *direct competition,* at wholesale, between plaintiff, having a valid franchise covering that territory and defendant, which had no such franchise.[10]

[10] The court also relied upon a Pennsylvania statute expressly giving a cause of action for damages resulting from an *ultra vires* act.

Here neither the United States nor the Administrator is proposing to compete with petitioner. As was said in *Arkansas-Missouri Power Company* v. *City of Kennett,* 78 Fed. (2d) 911 (C. C. A. 8), "The United States is not proposing to become a competitor of the power company. It will have no right, title, or interest in the plant when completed and nothing to do with operating it. The destruction of the power company's property will come about by reason of the city's operation of the plant when erected. The position of the United States is that of a lender of money, a buyer of bonds, and a giver of gifts. True, the money procured from the government will enable the city to build the plant, and, if the city builds the plant, it will no doubt operate it, and when it does operate the plant the city will take the customers of the power company, and the company's property in Kennett will become worthless or greatly impaired in value. We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it." See also *Kansas Gas & Electric Co.* v. *City of Independence,* 79 Fed. (2d) 638 (C. C. A. 10); *Missouri Utilities Co.* v. *City of California,* 8 Fed. Supp. 434.

It must be concluded, we submit, that the court below was right in stating (R. I, 515), "The thing which affects the plaintiffs is the competition, and that is lawful."

2. *Petitioner is not entitled to challenge the validity of loans and grants which will make possible the competition of the cities*

It is settled that where a defendant renders financial aid which makes the lawful competition of a third person possible, a competitor has no standing to complain that the action of the defendant is unlawful. No case has been cited, and we know of none, holding that the validity of advances or gifts by others may be drawn in question by a competitor of the borrower or grantee. A decision to the contrary would be novel and far-reaching. Its result would be that the validity of bank loans could be attacked by competitors of a borrower, and that the validity of bond purchases could be challenged by competitors of the issuer. If petitioner's contention were correct, a utility company could inquire into the validity of a bank loan made to a competing utility company which had a valid franchise, and a shoe company could challenge in court the validity of a bank loan made to a rival shoe company engaged in fair and lawful competition. The decisions of this Court, of the lower Federal Courts, and of the state courts show that no such restraints on competition will be imposed.

In *Railroad Company* v. *Ellerman*, 105 U. S. 166, the City of New Orleans, which owned certain public wharves from which it received dues, made a contract with Ellerman granting to him the right to collect the revenues derived therefrom. The

defendant railroad company had been authorized by the legislature to maintain a wharf solely for railroad purposes. Nevertheless the railroad company proposed unlawfully to lease its wharf to third persons, who planned to make it available to the public, thus competing with Ellerman and threatening loss of patronage and financial damage. Ellerman brought suit to enjoin the execution of the lease. He contended that he was entitled to prevent such competition on the ground that the railroad could neither lawfully operate a public wharf nor enable others to do so. This Court held that the unlawfulness of the railroad company's lease gave Ellerman no standing to complain of the resulting competition and that therefore he was not entitled to an injunction. Mr. Justice Matthews said (pp. 173–174):

> The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely

that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting ultra vires? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. * * * In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights.

National Banks are prohibited by Federal statutes from making certain kinds of loans. This Court has repeatedly held that no one but the United States can object to the making of such loans. *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Fortier* v. *Bank*, 112 U. S. 439–451; *Reynolds* v. *Bank*, 112 U. S. 405, 413; *Thompson* v. *Bank*, 146 U. S. 240, 251; *Schuyler Natl. Bank* v. *Gadsden*, 191 U. S. 451. National banks have often been held to be agencies of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Farmers' & M. National Bank* v. *Dearing*, 91 U. S. 29, 33. But no one would suppose that a business man could enjoin an invalid loan by a national bank enabling a new rival to compete.

Petitioner contends, however, that the principle of the *Ellerman* case has no application to acts of a government officer challenged as invalid.[11] But the principle has been given striking application in precisely that class of cases, by this and other courts, Federal and state.

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[11] That an officer acting outside of the authority conferred upon him by a statute is acting "ultra vires," see *Garfield* v. *Goldsby*, 211 U. S. 249, 261; *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165, 174.

There is, of course, no distinction between a suit based upon an alleged violation of a valid statute and one based upon action pursuant to an alleged unconstitutional statute. *Goltra* v. *Weeks*, 271 U. S. 536, 543. If petitioner were to assert that the rule for which it contends applies only to the latter kind of case, it would be obliged to abandon its contentions based upon the alleged violation of the statute.

Specifically it has been held that acts of Government officers which are in excess of their powers give no cause of action to a plaintiff where those acts threaten to cause financial loss by bringing about more effective competition. Thus in *Edward Hines Trustees* v. *United States,* 263 U. S. 143, the plaintiffs, manufacturers and shippers of lumber, brought suit to annul an order of the Interstate Commerce Commission which abolished a penalty charge on lumber held by carriers at reconsignment points. The penalty charge had been of substantial benefit to the plaintiffs because of the burden which it placed upon their competitors, and its removal threatened loss of business. The order was attacked on the ground that it exceeded the power of the Commission. This Court held that the plaintiffs were without standing to raise the issue of the validity of the order notwithstanding the fact that, as they alleged, it would result in increased competition, causing damage to them. The order, this Court said, would merely subject the plaintiffs "to such losses as are incident to more effective competition." (263 U. S. at 148.)

The *Chicago Junction Case,* 264 U. S. 258, because its rationale is most significant, deserves particular attention. There a railroad company brought suit to set aside an order of the Interstate Commerce Commission which authorized a competing railroad to acquire important terminal properties. The acquisition of those terminal properties by the competing railroad would have

resulted directly in damage to the extent of millions of dollars to the complaining railroads. The majority of the Court stated that the *Ellerman* case would have been applicable, and that the plaintiffs would have had no cause of action, despite the invalidity of the Commission's order, except for the fact that the Transportation Act, 1920, contained a special provision giving railroads the right to equality of treatment (264 U. S. at 269, note 12). On that statutory basis solely, the majority of the court held that the plaintiffs had a cause of action.

Mr. Justice Sutherland, speaking for the minority, construed the Transportation Act differently, as giving no such special statutory right to the plaintiffs, and, therefore, stated that the *Ellerman* case was applicable and that the plaintiffs had no cause of action. Since the majority and minority were agreed except as to the effect of the special provision of the Transportation Act, the minority opinion by Mr. Justice Sutherland may be taken as expressing the view of the entire Court in the absence of such a special statutory provision.

Mr. Justice Sutherland said (pp. 271, 272, 273):

> The complainants have no standing to vindicate the rights of the public, but only to protect and enforce their own rights. Redress for public grievances must be sought by public agents, not by private intervention. *Home Telephone Co.* v. *Railroad Commission,* 174 Mich. 219. The right of the complainants to sue, therefore, cannot rest upon the alleged violation of a pub-

> lic interest, but must rest upon some distinct grievance of their own. Loss of business, or of opportunities to get business, attributable to the activity or increase of facilities on the part of a competitor is not enough [citing and quoting from the *Ellerman* case]. * * * Their complaint must stand or fall upon the nature of their own grievance. A private injury for which the law affords no remedy, cannot be converted into a remediable injury merely because it results from an act of which the public might complain. In other words, the law will afford redress to a litigant only for injuries which invade his own legal rights; and since the injuries here complained of are not of that character and do not res[illegible] from the violation of any obligation owing to the complainants, it follows that they are without legal standing to sue.

In the case at bar, as in the *Chicago Junction Case*, the rights of the petitioner cannot rest upon the alleged violation of a public interest, but must rest upon some "distinct grievance of their own." The public grievance, consisting of the expenditure of federal funds pursuant to an invalid statute or in violation of a valid statute, cannot be vindicated in court by a citizen, *Frothingham* v. *Mellon*, 262 U. S. 447. And the loss resulting from the lawful competition, made possible by the Administrator's expenditures, does not constitute a distinct private grievance of the petitioner, even if

those expenditures were not authorized by a valid statute.[12]

In *Sprunt & Son* v. *United States,* 281 U. S. 249, shippers brought suit to set aside as void an order of the Commission establishing a new rate structure which deprived the plaintiffs of a special business advantage which they had previously enjoyed over their competitors, with resulting serious financial loss to the plaintiffs. The Court pointed out that "the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs * * * were not subjected to or threatened with any legal wrong." (281 U. S. at 256–257, citing *Edward Lines Trustees* v. *United States,* 263 U. S. 143.)

In the *Sprunt* case the *Chicago Junction Case* was expressly distinguished on the ground that there "an independent legal right of the plaintiff was affected by the order which it was sought to set aside," because "the order violated the plain-

[12] Petitioner (pages 32–33) asserts that it, like the plaintiffs in the *Chicago Junction Case*, has "a special interest," but fails to note that the special interest of plaintiffs in the *Chicago Junction Case* was expressly ascribed in the majority opinion to the statutory rights under the Transportation Act.

Petitioner strives to make it appear that, in the cases cited in the text relating to the Interstate Commerce Commission, there was a lack of casual relation between the Commission's order and the injury to the plaintiffs. By no possibility can that be said to be true in the *Chicago Junction Case.*

tiff's right under paragraph 2 of Section 5 to equal treatment." (281 U. S. at 257, and 257 note.)

Even more recently the same principles have been announced. In *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, a ferry company was held entitled to maintain suit to annul an order of the Interstate Commerce Commission granting permission to a competing railway company to extend its line by operation of a ferry service. Concerning the right to maintain the suit, the Court said, "The right of appellant Ferry Company to institute and maintain this proceeding *rests wholly upon the permission granted by paragraph 20, Sec. 1.* 'Any party in interest' may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commisison" (page 391). [Italics supplied.]

In *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, a barge line sued to enjoin as invalid an order of the Interstate Commerce Commission permitting lower rates by rail on sugar, which it was alleged would result in destructive competition against the plaintiff. Section 500 of Transportation Act, 1920, provided:

> * * * it is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and pre-

> serve in full vigor both rail and water transportation.

This Court, after holding that the order of the Commission was not in violation of that provision of the statute, added, with a significant citation of the *Sprunt* case (pages 289–290):

> For the purposes of this appeal we have assumed, as it was assumed in the court below, that the appellant has a standing sufficient to maintain the suit. See, however, *Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249. * * * These objections to the suit coalesce to such an extent with the merits of the appellant's grievance under Sec. 500 of the statute (Transportation Act, 1920) as to make it unnecessary to separate them.

This statement in the opinion serves to reaffirm the principle, discussed above, that the right to maintain such a suit must depend upon the conferring of a specially protected interest.

The lower Federal courts and the State courts have likewise recognized that there is no general right to complain of lawful, fair, and voluntary competition on the ground that it is made possible by an allegedly invalid act of a Government officer. In *United States ex rel. New York Warehouse Assn.* v. *Dern*, 68 F. (2d) 773 (App. D. C.), certiorari denied, 292 U. S. 642, several warehouse companies brought an action against the Secretary of War asking that a lease, for private use of more than 2,000,000 square feet of government warehouse

space, entered into between that official and a corporation, known as the Mercur Company, be cancelled. It was alleged that the plaintiffs were terminal warehouse companies owning millions of square feet of storage space; that the purported lease was in violation of the statutory authority of the Secretary of War, and that the Comptroller General had so ruled; that the lessee (a corporation, with a nominal capital, leasing two millions of dollars of Government property at a fixed rental of but $1.00 a year plus a percentage of the income from the operation of the warehouse) was "in open and direct competition" with plaintiffs, with a marked competitive advantage, and had obtained some of their business and would obtain more "to the substantial detriment of plaintiffs."[12] The court held that the prospective loss to the plaintiffs as a result of the lease gave them no standing to question the legality of the action of the Secretary of War.

Petitioner (Br. p. 33) surprisingly asserts that the interest of the plaintiffs in the *Dern* case "was

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[12] The plaintiffs alleged that:

"*Ships, freights, cargoes, storage business of all kinds, and industrial tenants, are solicited by both your petitioners and by Mercur Corporation*, and especially in the storage of commodities, raw Cuban sugar, for instance, the same consignments are solicited by your petitioners and by the Mercur Corporation. Mercur Corporation in competition and in the *exercise of competitive practices has obtained business, and particularly goods for storage, away from and to the substantial detriment of your petitioners.*" [Italics added.]

negligible," and that the case is distinguishable because "the plaintiffs did not contend * * * that the lease contemplated or required any interference with their business." But the facts alleged in plaintiffs' pleadings (as shown in the Record in this Court on petition for certiorari), and admitted on demurrer, demonstrate the contrary. There was nothing "negligible" about the effects of the competition. And the plaintiffs in that case were no more and no less entitled to be free of interference with their business through the lawful competition of the Mercur Company than is petitioner entitled to be free of loss occasioned by lawful competition from the cities.[14]

In *Milwaukee Horse & Cow Commission Co.* v. *Hill,* 207 Wis. 420, state officers constituting a State Fair Commission were about to lease a portion of the State Fair grounds to plaintiff's direct competitor. Plaintiff was refused a lease of a portion of the Fair Grounds and would thus be at a serious competitive disadvantage, with resulting substan-

[14] Petitioner also refers to the fact that the Court of Appeals for the District of Columbia in that case stated that the interest of the plaintiffs was not "direct, but indirect and remote." But that is the locution employed (to describe the fact that the plaintiff's loss was *damnum absque injuria*) by the Court of Appeals for the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *Kennett*, *supra*, which is quoted with approval by the Court of Appeals for the District of Columbia in the case at bar. And the concurring opinion of Judge Groner in the case at bar concludes with the statement "that in the circumstances the threatened damage to the plaintiff's property is consequential and indirect."

tial direct damage. Plaintiff sued to enjoin the Commission from making the lease on the ground that it was in violation of statute. The court denied the injunction, citing and quoting from the *Ellerman* case, and saying (p. 432):

> The only right of the Commission Company which it is alleged has been infringed is the right to be immune from competition. It has no such right in the law. The law does not recognize any injury resulting from competition to any one engaged in trade or commerce. True, there are such things recognized in the law as unfair competition, which the law will suppress, but it goes without saying that this is not within any of the classes of competition recognized as unjust.

A similar conclusion was reached in *Keen* v. *Mayor and Council of Waycross,* 101 Ga. 588, 29 S. E. 42, opinion by Lumpkin, J., where the threatened competition was by the city.

Reference has already been made to the uniform decisions which have applied these principles in the cases involving loans and grants like those in issue in the cases at bar. See page 62, note 5, *supra.*

The cases above cited make it plain that a utility company, with a non-exclusive franchise, has no greater right to be free from the competition of another utility company, holding a valid franchise, or of a municipality, which is not violating its charter or any contract, than has the owner of a drug store

or warehouse to be free from the lawful competition of a rival drug store or a rival warehouse. As petitioner's right to be immune from the competition of the cities will not be infringed, since that competition is in no respect unlawful, the right of the cities to compete with petitioner is precisely the same as that of a competitor in any ordinary business with a person or company having no franchise. If, therefore, petitioner's contention were sound, a shoe company (or a school or warehouse company) could assert the invalidity of a bank loan made to another shoe company (or school or warehouse company) engaged in fair and lawful competition.

It is because the common law cherishes competition that it will not take the risk of impeding lawful competition by allowing an inquiry into the lawfulness of the conduct of third persons (lenders or donors) but for whose acts such competition would not occur.

The basis in policy for the principles discussed above was thus stated by Mr. Justice Holmes (Privilege, Malice, and Intent, 8 Harvard Law Review 1, 3, cited by petitioner, Brief, p. 26):

> For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already.

The privilege, Mr. Justice Holmes explained, "rests on the economic postulate that free com-

petition is worth more to society than it costs."

In sum, a plaintiff's loss directly resulting from voluntary and lawful competition of a third person constitutes no invasion of his legally protected interests, even though that competition is caused or made possible by the unlawful conduct of the defendant. Such lawful competition acts as a non-conductor or insulator against alleged liability in such cases. As the Court of Appeals for the Fourth Circuit said in its recent opinion in the *Duke* case, 91 F. (2d) 665, 677, "it is well settled that an act which is unauthorized, but which infringes no right of another, may not be enjoined merely because it will enable a third person to enter into competition with that other."

The courts have been careful to avoid, in the form of an extension of procedural rights, the enlargement of rights of property. "Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights." *Reichelderfer* v. *Quinn*, 287 U. S. 315, 319. This has been notably true in respect of attacks upon voluntary, fair, and lawful competition. Holders of franchises like petitioner's have for decades unsuccessfully endeavored to have this Court widen by implication the limited freedom from competition conferred by their franchises. This suit is one more effort to extend such limited rights; to prevent the sovereign States, acting through their municipalities, from exercising the

powers reserved to them by the Constitution; and, by indirection, to convert a temporary and fortuitous *de facto* monopoly into a legal monopoly, "to create and protect a monopoly which the law does not give." *Railroad Co.* v. *Ellerman, supra,* at p. 174.

3. *The nature of suits against Government officers discloses the deficiency in petitioner's claim*

The petitioners insist that because they will suffer loss as a consequence of the acts of public officers they have an interest which they may vindicate in court by challenging the authority under which those acts are taken. We have discussed above the decisions dealing with acts of public officers, challenged as illegal, which made possible lawful competition causing damage to the complainant (pages 77–86, *supra*). Those decisions make it clear that, unless, by statute or contract, a special right has been conferred on the complainant to be protected from such competition, the courts will not require the defendant to justify his action by showing valid statutory authority and that the validity of the statute is not a relevant or material part of a case or controversy. Those decisions thus furnish a complete refutation of the argument of petitioner.

As the cases at bar would fail, for want of a cause of action, if brought against the United States, petitioner can surely have no greater rights because they are in form suits against officers of

the United States. Since, however, the argument of petitioner appears to rest upon a fundamentally erroneous view of the nature of such suits, and because a consideration of the basis upon which such suits are entertained serves to confirm the answer to petitioner's argument, it may be appropriate to review briefly the basis upon which such suits must rest:

A Government officer may be sued, despite the immunity of the sovereign, where his acts are asserted to be without authority of law. In such a case he is regarded as stripped of his official capacity and, like a private individual, must defend. *Poindexter* v. *Greenhow,* 114 U. S. 270;[15] *In re Ayers,* 123 U. S. 443; *Goltra* v. *Weeks,* 271 U. S. 536; *Ex parte La Prade,* 289 U. S. 444. The officer may defend, like a private individual, on the ground that his acts are in fact justified by authority of a valid statute. In that event, the Court is

[15] "In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." *Poindexter* v. *Greenhow*, 114 U. S. at 287, quoting from *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446. The Court added, "He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defence. * * * That which, therefore, is unlawful because made so by the Supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name." (114 U. S. at 288, 290.)

called upon to determine the constitutional validity of the statute. If the statute is invalid, the justification fails and the officer may be held liable. In that event, the Court will exercise "the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." *Frothingham* v. *Mellon,* 262 U. S. 447, 488.

The defense of the officer may, however, like that of a private individual, be properly of a different sort. He may show that the damage to the plaintiff is too conjectural to require justification for the threatened acts. In that event it is unnecessary for the Court to consider the validity of the statute. *Frothingham* v. *Mellon, supra.*

Or the officer may show that if there has been any violation of a legal duty owed to the plaintiff, the duty is not that of the officer but of the sovereign, as, for example, the duty of a trustee imposed by statute. In that event it is likewise unnecessary to consider the validity of the defendant's acts, for the suit will be dismissed as one in essence against the United States. *Morrison* v. *Work,* 266 U. S. 481.

Or the officer may show, as in the cases at bar, that neither he nor the sovereign has invaded any legal interest of the plaintiff; that is, any right which the courts would otherwise protect or which has been specially conferred by statute or contract. And in that event also it is unnecessary to consider the validity of the statute under which the officer

proposes to act or whether the statute has been violated.

The cases in which suits against Government officers have been maintained fall into well recognized categories of legal injury. Thus such suits have been maintained to restrain acts of the following kinds:

(1) A trespass or similar tort against the property of the plaintiff, as by the seizure or distraint or stoppage of goods.[16]

(2) Acts defaming plaintiff's products or constituting a cloud on the title of plaintiff.[17]

(3) Threatened coercion, as by threats of unlawful prosecution of plaintiff's customers or employer, which, if not restrained, will inflict a legal injury upon the plaintiff.[18]

(4) Vexatious and oppressive litigation.[19]

(5) Violation of a right conferred specially by statute, as a right to use of the mails.[20]

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[16] E. g., *In re Ayers*, 123 U. S. 443; *Pondexter* v. *Greenhow*, 114 U. S. 270; *Lipke* v. *Lederer*, 259 U. S. 557; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251.

[17] E. g., *Scully* v. *Bird*, 209 U. S. 481, 488–490; *Lane* v. *Watts*, 234 U. S. 525; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165.

[18] E. g., *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Truax* v. *Raich*, 239 U. S. 33; *Hammer* v. *Dagenhart*, 247 U. S. 251.

[19] E. g., *Ex parte Young*, 209 U. S. 123; *Ex parte La Prade*, 289 U. S. 444.

[20] E. g., *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110; *Baldwin Co.* v. *Robertson*, 265 U. S. 168; *American Steel Foundries* v. *Robertson*, 262 U. S. 209.

Special reliance is placed by petitioner upon *Ex parte Young,* 209 U. S. 123, and *Philadelphia Company* v. *Stimson,* 223 U. S. 605. Those cases did not, of course, overrule or modify the previously announced basis upon which suits against Government officers were entertained, as explained in the *Poindexter* and *Ayers* cases, *supra.* See *Old Colony Trust Co.* v. *Seattle,* 271 U. S. 426, 431–432 (where this Court cited and relied upon both the *Poindexter* and *Stimson* cases); *Ex parte La Prade,* 289 U. S. 444, 455. The argument of petitioner is based on the fact that in the *Young* case the defendant officer was threatening to prosecute the plaintiff and in the *Stimson* case to create a cloud on the plaintiff's title; that the only person in a position to make such a threat was a public officer; that thus it is unnecessary, in suits against officers, to show that the defendant is threatening an action which, if he were a private person, would render him answerable to the plaintiff; and that accordingly in such suits it is not necessary to show that the plaintiff's loss results from *"the more familiar wrongs"* which "courts are accustomed to recognize and redress." (Pet. Br. 20–23.) That argument, however, ignores the elaborate reasoning which the Court in the *Young* case found necessary to reach the conclusion that the defendant was answerable. The Court there began its discussion by referring to its earlier decisions, such as the *Ayers* and *Poindexter* cases, *supra,* in which it had been held that a suit could be maintained against a

Government officer only if it were first shown that, regarded as a private person, he was committing a trespass. The Court then discussed at length (209 U. S. at 153) the question "whether the commencement of a suit could ever be regarded as actionable injury to another, *equivalent* in some cases *to a trespass* such as is set forth in some of the foregoing cases." [Italics supplied.] The Court concluded (p. 158) that the threat to commence suits under the circumstances shown was "equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer." Specifically, the Court observed (p. 160) that "it would be an injury to complainant to *harass it with a multiplicity of suits or litigation* generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity." [21] In short, the defendant was in fact threatening "a familiar wrong", i. e., wrongful, oppressive, and vex-

[21] Suits to restrain officers from prosecuting a plaintiff under an invalid statute cannot be maintained unless there is a real threat of *vexatious* litigation, a threat that the defendant officer will bring more than one suit. See *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 96; *Boise Artesian, etc., Water Co.* v. *Boise*, 213 U. S. 276.

In the *Boise* case the Court cited *Insurance Co.* v. *Bailey*, 13 Wall. 616, 621, where it was said that equity will intervene "to suppress oppressive and interminable litigation, or to prevent a multiplicity of suits."

atious litigation against the plaintiff, and that action was an invasion of a legally protected interest of the plaintiff.[22]

Similarly, in the *Stimson* case, the action of the defendant constituted a well-recognized form of legal injury, the creation of a cloud on the plaintiff's title. See *Lane* v. *Watts*, 234 U. S. 525, 540, where the Court said, citing the *Stimson* case, "The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of appellees."

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[22] Petitioner asserts that the dissenting opinion of Mr. Justice Harlan in *Ex parte Young* employs the argument which we are making (Br., pp. 21–22). The very opposite is true. Mr. Justice Harlan insisted that the cause of action must rest upon the fact that the defendant is sued as a Government officer. Upon that premise, which is the premise advanced here by petitioner, Mr. Justice Harlan reached the conclusion that the suit could not be maintained.

The majority of the Court, on the other hand (209 U. S. at 159), rejected the suggestion that the suit was founded upon the fact that the defendant "was complained of as an officer" and rested its conclusion on the fact that he was sued as an individual and was unable to justify by a valid statute his acts which constituted an invasion of plaintiff's legally protected interests.

Petitioner (Brief p. 21) asserts that "the point driven home" in the *Young* case "is the substantial nature of the consequences." That is, indeed, an indispensable but a different factor in such a case; since an injunction is sought, the court requires a showing that "the danger of irreparable loss is both great and immediate." *Fenner* v. *Boykins*, 271 U. S. 240, 243–244; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500–503.

The burden of petitioner's argument is that in cases like the *Young* and *Stimson* cases no private individual was able to threaten the wrong to the plaintiff. It is true that in those cases the officers, being the only persons named in the statute, were the only persons who happened to be in a position to threaten the challenged acts. But nothing turns upon that fact. The standing of the plaintiff would have been the same had the statute authorized a private individual to bring vexatious litigation or to create a cloud upon title. In such a situation the defendant would be obliged to justify his conduct, precisely as in the case of the officers in the *Young* and *Stimson* cases, by showing that the statute was constitutional. Cf. *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334. And the same would be true in a suit against the sovereign where it was acting and had consented to be sued.

Petitioner states (Br. p. 23): "The rule is no different when the injury flows from an unauthorized use of the spending power." We do not take issue with that contention. We do not assert that there is anything unique or sacrosanct about the acts of officers when spending pursuant to an appropriation statute, or that such acts or such statutes are immune from judicial review. We do not assert that a citizen may not attack an exercise of the spending power as invalid if it involves, in petitioner's phrase, a "familiar wrong" to the citi-

zen; or that a decision in favor of the respondent in these cases will establish any contrary precedent, or what the petitioner in the *Duke* case refers to as an "entering wedge." (Brief in No. 397, p. 48). Petitioner would have standing to assert the invalidity of appropriation statutes if, pursuant thereto, a defendant officer were threatening, for instance, to spend federal funds to employ men to trespass upon its property, or to organize a boycott against it, or to defame its business or to place a cloud upon its title to property. No such situation is presented in the cases at bar.

Petitioner contended also in the court below that if it is without standing to complain, Congress will be able, without the possibility of judicial scrutiny, to make appropriations to foster competition between favored private citizens and other private citizens. That question is likewise not before the Court. It may be suggested, however, that in such circumstances it is not impossible that a State might be in a position to maintain a suit, not because of financial loss to the competitor, but on the ground that if the statute were invalid the quasi-sovereign functions of the state would be infringed. Cf. *Colorado* v. *Toll,* 268 U. S. 228, 230.

Petitioner insists that the United States and its officers owe every citizen a duty not to violate any provision of the Constitution and to see to it that officers do not act in violation of statutory authority. That there is such a duty cannot be questioned.

But, absent an invasion of a citizen's legally protected interests, the breach of that duty does not give rise to a justiciable controversy. Where such a justiciable controversy does not exist, the redress for the violation of that duty does not lie in the courts. Cf. *Pacific Telephone Co.* v. *Oregon,* 223 U. S. 118; *Luther* v. *Borden,* 7 How. 1, 44; *Georgia* v. *Stanton,* 6 Wall. 50; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273.

Petitioner cites in support of its position (Br. p. 23) *Frothingham* v. *Mellon,* 262 U. S. 447, and, quoting therefrom, argues that a complainant need show only that the statute is invalid and "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." For present purposes the critical words in this passage are "direct injury." The error of petitioner is in applying those words as if they were "direct damage." Only if the complainant can show legal injury, and not merely loss or damage, will the court consider whether the justification can rest upon the authority of a valid statute. Only in such a case is the court called upon to exercise "the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." 262 U. S. at 488. This is not such a case.

4. *The authorities relied on by petitioner, not involving lawful competition, but dealing with coercion or fraud or malice, have no application*

It is not our position (cf. Pet. Br. 24–26) that a complainant can never hold a defendant liable where any lawful act of a third person intervenes between the action of the defendant and the resulting loss to the complainant. Our position is that where the intervening act consists of voluntary and lawful competition which is the immediate cause of the complainant's loss there is no standing to complain that the defendant has made possible the loss by acts which are in excess of his lawful authority. This principle rests, not upon a lack of a causal relation in fact between the defendant's act and the complainant's loss, but upon grounds of legal policy or legal liability frequently stated in terms of legal cause. The authorities cited by petitioner, which in various circumstances have held a defendant liable despite the intervening lawful act of a third party (pp. 24–26), are thus in no sense an answer to our position. The decisions cited by petitioner do not involve loss occasioned by voluntary and lawful competition, and indeed most of them involve the special element of coercion or fraud or malice. It is plain that they can have no application here.

In the cases at bar the action of the cities is in no way coerced. The District Court expressly so found (Findings 35, R. 1, 462–463). Each city acted

voluntarily in electing to seek Federal financial aid for the construction of a competitive power system rather than for the construction of other types of eligible projects. See pages 29–32, *supra*. And, of course, the mere offering of loans and grants to the cities did not operate to coerce them. *Steward Machine Co.* v. *Davis*, decided May 24, 1937, No. 837. See also the discussion, *infra*, pp. 157–171, in relation to the Tenth Amendment. It is clear from the cases already discussed (pp. 77–85, *supra*), in which without exception relief has been denied against an officer whose act made possible competition, that the making possible of lawful competition cannot be regarded as the equivalent of coercion.

Since there is here no coercion by the Administrator of the petitioner or its customers or the cities, cases like *Pierce* v. *Society of Sisters*, 268 U. S. 510, and *Truax* v. *Raich*, 239 U. S. 33 (Pet. Br. p. 22) are not in point. In the *Pierce* case the defendant officers were threatening, by criminal prosecutions under a statute, to coerce patrons of the plaintiff to cease patronizing the plaintiff's school; such coercion was unlawful unless the statute, which authorized and therefore justified those prosecutions, was constitutional; the validity of the statute was therefore a relevant issue. *Truax* v. *Raich* involved similar coercive threats against plaintiff's employer to prosecute him criminally unless he discharged the plaintiff. *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Terrace* v. *Thompson*, 263 U. S. 197, were similar. Absent a valid

statute justifying such threats, the plaintiff in those cases had a cause of action for a familiar wrong, like that of the plaintiff in *Duplex Printing Press* v. *Deering*, 254 U. S. 443, cited in the *Pierce case*, 268 U. S. at 536.[23]

Similarly, the cases dealing with fraudulent or malicious inducement are beside the point. The argument of petitioner based upon the asserted improper purpose of the Administrator is untenable, since, regardless of the Administrator's purpose, the effect of the loans and grants in causing loss to the petitioner will be the same; therefore an argument based upon the Administrator's alleged motive or purpose is reduced to an argument based simply upon the consequences of the Administrator's action. Furthermore, it is clear from the authorities that even a malicious or malevolent purpose or motive will not make conduct actionable which would otherwise be non-actionable unless that is the sole purpose or motive, or unless it is coupled with fraud. See *Beardsley* v. *Kilmer*, 236 N. Y. 80, 90; *Holbrook* v. *Morrison*, 214 Mass. 209.[24] This Court has used the phrase "disinterested malevolence" to describe an exclusively mali-

[23] *United States Fidelity & C. Co.* v. *Millonas*, 206 Ala. 147, and *Gibson* v. *Fidelity & Casualty Co.*, 232 Ill, 49 were cases in each of which the defendant insurance company was held liable because it used coercion (the threat of cancelling an insurance policy) to force plaintiff's employer to discharge plaintiff in order to compel him to settle his claim against the defendant.

[24] *Walker* v. *Cronin*, 107 Mass. 555, involving a labor dispute, is cited in *Holbrook* v. *Morrison*, *supra*, and, in the light of that case must be deemed to be limited in scope.

cious motive or purpose, and has defined the term as meaning "doing a harm malevolently, for the sake of the harm as an end in itself." *Aikens* v. *Wisconsin,* 195 U. S. 194, 203, 206; cf. *American Bank and Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350. Since at most the petitioner's contention is that the Administrator desired to benefit consumers through the reduction of power rates, and that the necessary consequence of such reduction would be harmful to the petitioners, there being no contention that the Administrator was acting out of a desire to harm petitioner for the sake of the harm as an end in itself, it is clear that on no possible assumption can the cases at bar be brought within those cited by petitioner. And especially is that true since, as shown above (p. 14), petitioner itself concedes that the alleged policy (or plan or intention or motive) of the Administrator is irrelevant because the harm to petitioner would neither be augmented by its presence nor diminished by its absence.

The other cases cited are, if anything, even more remote. In *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229 (as explained in *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 211, 212) there was involved both fraud and intimidation.[25] *Angle* v. *Chicago, St. Paul, etc. Ry. Co.,* 151

[25] Insofar as *Thacker Coal Co.* v. *Burke,* 59 W. Va. 253, is at variance with the rule of *American Steel Foundries* v. *Tri-City Council, supra,* it must be deemed to be inapplicable in this court.

U. S. 1; *Rice* v. *Manley,* 66 N. Y. 82; and *Benton* v. *Pratt,* 2 Wend. 385, clearly turn on the factor of fraud. In *Tasker* v. *Stanley,* 153 Mass. 148, the court denied recovery for persuading a wife to leave her husband, in the absence of a showing of fraud or malevolence. Holmes, J. said (p. 150):

> But, in order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think that it ought to appear that the advice was *not honestly given,* that *it did not represent his real opinions,* or that it *was given from malevolent motives;* and so are all the cases. [Italics supplied.]

And in *Deon* v. *Kirby Lumber Co.,* 162 La. 671, the court made a significant distinction. There the plaintiff alleged two causes of action; first, that the defendant lumber company had threatened to discharge its employees if they had merely social or personal relations with the plaintiff or his family; and second, that the ~~plaintiff~~ DEFENDANT threatened to discharge its employees if they patronized plaintiff's competing store. The court held the first cause of action good, but not the second, because there competition justified the defendant's conduct.

In sum, nothing in the authorities cited by petitioner negatives the conclusion that no legally protected interest of petitioner will be invaded by the proposed loans and grants, and that to require the Administrator to justify his action by showing

valid statutory authority would be to establish a new doctrine of private or of public law.

II

The Proposed Loans and Grants Are Authorized by the Statutes

The petitioner maintains that the loans and grants are unauthorized by the statutes. The precise basis for this contention is not clear. It is not clear whether petitioner's argument is that the construction of a municipal electric system is not within the scope of the public works provisions enacted by Congress; or whether competitive projects are to be excluded; or whether, although Congress has determined that such projects may be included with other types in the comprehensive program of public works for the increase of employment, and although the projects in the cases at bar meet all the tests of eligibility, including financial and engineering soundness, and although the four municipalities remaining of the original ten in the cases at bar have so strongly formed their preference for these projects that for four years they have persisted in their applications, and although the loan and grant agreements are in nowise a departure from the statutes, authority is nevertheless lacking for the loans and grants.

Because of the ambiguity of the petitioner's contention, and because in our view the essential question of statutory authority is whether Congress has

authorized the inclusion of competitive power projects among the types of municipal public works projects eligible for loans and grants, it appears appropriate to turn to a consideration of that question.

First. The 1933 Act provides (c. 90, 48 Stat. 201):

> SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy * * *; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public * * *.

The projects are "publicly owned * * * facilities" within clause (a) of Section 202. They are projects for the "transmission of electrical energy" within clause (b). They are projects "of the character heretofore constructed or carried on * * * by public authority * * * to serve the interests of the general public," within

clause (c), inasmuch as between the years 1882 and 1927 a total of 3,814 municipally owned electric light and power projects were established. (H. B. Dorau, Changing Character and Extent of Municipal Ownership in the Electric Light and Power Industry (1929), p. 13.)[26]

Second. But the intention of Congress need not be gathered from the foregoing alone. The statute received a consistent administrative interpretation to the effect that power plants and competitive plants were authorized by the Act. This interpretation was brought to the attention of Congress. Senate Resolution No. 190, 73d Congress, approved February 15, 1934, requested the Administrator of Public Works to furnish the Senate the following information:

(1) A general survey of the Public Works program.

(2) An account of the organization of the Public Works Administration.

(3) A statement of the policies of the Public Works Administration.

(4) A statement of allotments under the Public Works Act and the number of men employed.

(5) A list of Federal and non-Federal projects approved.

(6) A list of Federal and non-Federal projects pending in the Public Works Administration at Washington and in the offices in the several States.

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[26] Not all continued to exist in 1927, the latest year cited. At that time 2,320 were in operation. *Dorau, supra*, p. 12.

In response to that resolution the Administrator submitted a letter to the Senate transmitting a report of the business of the Public Works Administration for the period ending February 15, 1934. The report was submitted on March 26, 1934, and printed as Senate Document 167, 73d Congress, 2d Session (Def. Ex. 10, separately certified). The document, 300 pages in length, contains a statement of the organization, functions, procedure and policies of the Public Works Administration, together with detailed statistical tables and lists of approved and pending projects. The tables and lists are classified basically into Federal and non-Federal projects—that is, those where the construction is undertaken by agencies of the Federal Government and those where construction is undertaken by a non-Federal agency. Appendix C of that report, pp. 124–147, contains a list of approved non-Federal projects, stating the location, type, and amount of allotment for each. In that list there are no less than 37 power projects. It is thus clear that the inclusion of power projects was made known to Congress.

A construction of the Act requiring competitive projects to be rejected would have been virtually impossible of administration and would have defeated the purpose of the statute to promote widespread employment quickly. Cf. *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 421. For almost every kind of State or municipal public works project would be competitive in greater or less degree; this

is true, for example, of schools and auditoriums and bridges as well as of power plants. The decision as to the types of projects to be constructed was left to the States and municipalities, and an eligible project was not rejected because it happened to be a power plant or a competitive undertaking.

Third. The administrative construction of the statute has in effect been confirmed by no less than four subsequent Acts of Congress.

(1) Three months after the report described above, Congress enacted the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (c. 648, 48 Stat. 1021). In Title II of that Act a revolving fund was created out of which additional loans could be made by the Public Works Administration under the provisions of Title II of the National Industrial Recovery Act. 48 Stat. 1056. The making available of these additional amounts after receiving the Administrator's report constituted Congressional approval of the administrative interpretation of the statute. Cf. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 480–481; *United States* v. *Arizona*, 295 U. S. 174, 186. In the *Midwest Oil Co.* case, the Court, discussing a report of the Secretary of War in response to a Senate Resolution, said (p. 481):

> Congress with notice of this practice and of this claim of authority, received the Report. Neither at that session nor afterwards did it ever repudiate the action taken

> or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.

(2) The following year Congress enacted the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (c. 48, 49 Stat. 115), which continued the existence of the Public Works Administration and authorized continuance of its functions. While the bill was under consideration in the Senate an amendment was introduced to limit the projects undertaken to those which would not compete with existing private enterprise. 79 Cong. Rec. 3972. The proposed amendment read as follows:

> SECTION ——. Public projects, Federal, State, or municipal, undertaken pursuant to this joint resolution, shall be selected and planned so that when completed they shall not compete with existing private enterprises.

The amendment was rejected. 79 Cong. Rec. 3973. The debates on that amendment show that competitive power projects were among those to which it would have applied. See Appendix, pp. 78–85. The argument of petitioner is therefore an attempt to write into the Act a limitation which Congress specifically declined to impose. *Cf. United States* v. *Elgin, J. & E. Ry. Co.*, 298 U. S. 492, 500.

(3) The next Act of Congress bearing upon the construction of the provisions in question is Title II of the First Deficiency Appropriation Act, fiscal year 1936, approved June 22, 1936, c. 689, 49 Stat. 1597, 1608. While the bill was under consideration, the Administrator testified at length before a subcommittee of the Senate Committee on Appropriations and pointed out that loans and grants had been made for projects like that in the case at bar and that revenue bonds had often been accepted. (Hearings before Subcommittee of Committee on Appropriations, U. S. Senate, May 18, 1936, on First Deficiency Appropriation Bill, 1936, at pp. 11, 19, 15.) In the debates on the floor the proponent of a provision, which was adopted, removing any time limit on projects enjoined by court order, directed attention to a typical case of an injunction obtained by a power company against a proposed municipal electric project. (See Appendix to this brief, pp. 91–92.) Moreover, prior to that time, on January 16, 1936, a Senate Resolution had been adopted directing the Administrator to report to the Senate "a list of all projects involving the generation, transmission, or distribution of electric power * * * and to include in such report which projects * * * have been delayed because of injunction or other litigation." On March 6, 1936 (while the 1936 Act was being debated and prior to the adoption of the proviso), such a list was transmitted (74th

Cong., 2d Sess., Sen. Doc. No. 184). It stated, *inter alia* (p. 2): "Almost all the suits have been brought by private power companies who fear the competition which such publicly owned facilities will provide either directly or as a comparative standard * * *. One case, in which the Public Works Administrator is included as a party, has been tried on the evidence and argued before the upper court (*Duke Power Co. et al.* v. *Greenwood County et al., and Harold L. Ickes.*)" [27]

The Act provides (c. 689, 49 Stat. 1609):

> In order to increase employment by providing for useful public-works projects *of the kind and character for which the Federal Emergency Administrator of Public Works* (hereinafter called the Administrator) *has heretofore made loans or grants* pursuant to title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the Presi-

[27] Less than a month after the enactment of the Emergency Relief Appropriation Act of 1935, the Senate had passed a resolution approved May 1, 1935, Sen. Res. 123, 74th Cong., 1st Sess., directing the Federal Power Commission to furnish to the Senate a list of all the publicly owned electric plants, Federal, State, county, or municipal, in which the installation, organization, or operation of such plants has been interfered with by restraining orders or injunctions in Federal or State courts. The response to this resolution, Sen. Doc. 182, 74th Cong., 2d Sess., March 5, 1936, points out that 25 cases were pending in the District of Columbia and 37 elsewhere involving plants proposed to be financed by the Public Works Administration (p. 25).

dent, use not to exceed $300,000,000 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects: *Provided,* That no part of the sum made available by this paragraph shall be granted for any project unless, in the determination of the Administrator, the completion thereof can be substantially accomplished prior to July 1, 1938, and adequate provision has been made or is assured for financing such part of the entire cost thereof as is not to be supplied through the Federal Emergency Administration of Public Works: *Provided further,* That this limitation upon time shall not apply to *any project enjoined in any Federal or State court: Provided further,* That in no case shall the amount of the grant exceed forty-five per centum of the cost of the project. * * * [Italics supplied.]

The express provision concerning projects enjoined in Federal or State courts not only discloses a recognition of the fact that competitive projects had been undertaken but also constitutes Congressional approval of such action.

That Congress approved the interpretation placed upon the Act by the Administrator is made clear also by the above-quoted words of the 1936 Act, which speak of "useful public-works projects of the kind and character for which the * * * Administrator * * * has heretofore made loans or grants pursuant to title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935." The Chairman of

the House Committee on Appropriations explained that the purpose of this provision "is to enable the Public Works Administration to follow a well-beaten path by providing aid in financing a non-Federal Public Works program." (See Appendix, p. 94.)

(4) The final Act of Congress in this series is the recent Public Works Administration Extension Act of 1937 (Title II, Public Res. No. 47, 75th Cong.). Section 201 provides:

> * * * All provisions of law existing on June 29, 1937, and relating to the availability of funds for carrying out any of the functions of such Administration are hereby continued until July 1, 1939, * * *.

The legislative background of this Act, like that of the prior Acts, demonstrates that competitive power projects were sharply brought to the attention of Congress and that the action of the Administrator in making loans and grants for such projects was approved by Congress.[28]

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[28] Senate Resolution 82, 75th Cong., 1st Sess., requested certain agencies, including the Public Works Administration, to submit a statement of all cases in which injunctions, restraining orders, or other judgments have been issued, rendered, or denied by the Supreme Court or inferior Federal courts since March 4, 1933. In response to this resolution, the Assistant Administrator of the Public Works Administration submitted on March 1, 1937, a report (S. Doc. No 27, 75th Cong., 1st Sess.) on pages 5–6 of which is a summary of the litigation involving the Alabama projects.

Among the several bills which were introduced in the 75th Congress to continue the Public Works Administration was

It is to be noted that Congress did not require that public works projects should be competitive; it provided that federal aid for such projects should not be denied merely because when completed and operated they would be competitive with existing private enterprise. And it should further be noted that this was precisely the interpretation which the Administrator put upon the statute—and not only with respect to projects in general, but with respect to power projects in particular, for the record shows that at least two-thirds of the power projects for which allotments had been made are non-competitive (Fdg. 40, R. I, 464–465).[29]

III

The Statutes Are Not Invalid as a Delegation of Legislative Power

The Circuit Court of Appeals for the Tenth Circuit, in *Kansas Gas & Electric Co.* v. *City of Independence,* 79 F. (2d) 638, and the Circuit Court of Appeals for the Fourth Circuit, in *Greenwood County* v. *Duke Power Co.,* 81 F. (2d) 986, 91 F.

H. R. 5943. In testifying on this bill before the Subcommittee of the House Committee on Appropriations, on May 3, 1937, the Federal Emergency Administrator of Public Works referred to 63 power and gas projects involved in litigation. The Alabama projects are specifically mentioned. (p 11).

[29] In July 1933, it was announced that preference for grants would be given to regenerative projects such as waterworks, sewer and sewage-disposal systems, highways, bridges, tunnels, and "projects for the transmission of electric energy into territories not now served." (Pl. Ex. 119, R. II, 362, 374).

(2d) 665, pending on certiorari, have held that the statutes involved satisfy the requirements concerning delegation of legislative power to the executive. On that issue there was no dissent. Those decisions were reached after full consideration of this Court's decisions in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 and *Schechter Corp.* v. *United States*, 295 U. S. 495.

Before turning, however, to a discussion of the question of delegation of power as such, we wish to call attention to the effect of the series of Congressional enactments discussed above (pp. 104 to 113) as constituting Congressional confirmation and approval of the action of the Administrator here in issue. Since this view, if sound, makes it unnecessary to decide the constitutional question concerning delegation of power, we present it at the outset.

1. Congress has confirmed and approved the action taken by the Administrator and challenged in these cases

What has been shown above (pp. 106 to 113) in demonstrating that the projects in question are authorized by Congress indicates that there has been full, repeated and continued disclosure to Congress of the action taken by the Administrator and that Congress has legislated in the light thereof. We have shown that on four separate occasions after the passage of the 1933 Act, Congress, with full knowledge of allotments for projects such as these, continued the functions of the

Public Works Administration and three times made additional appropriations therefor. We wish to call special attention to the latest steps in that series of enactments. On January 16, 1936, Senate Resolution 235 was passed, which directed the Administrator to report to the Senate "a list of all projects involving the generation, transmission, or distribution of electric power, and all projects for the production and distribution of gas, for which allotments have been made by the Public Works Administration, and to include in such report which projects are under construction, and those which have been delayed because of injunction or other litigation." In response to that Resolution a report was submitted by the Administrator on March 6, 1936, and is printed as Senate Document 184, 74th Congress, 2d Session. That report contains a list of all approved non-Federal electric power projects as of February 15, 1936, including the amount of the allotment for each and its status in litigation. *Each of the projects involved in the present cases appears in that list, at page 3.*

After the receipt of this report, Congress enacted the First Deficiency Act, fiscal year 1936, approved June 22, 1936. Title II of that Act (49 Stat. 1608, 1609) authorizes additional expenditures by the Public Works Administration and provides that the limitation upon time with respect to projects financed thereunder shall not apply in the case of projects enjoined in any State or Fed-

eral court. And on June 29, 1937, the Public Works Administration Extension Act of 1937 was approved (Appendix, p. 39). The enactment of these statutes in these circumstances constituted Congressional approval and ratification of the proposed loans and grants enumerated in the Administrator's report. In a comparable situation this Court recently said: "Congress has made appropriations for the benefit of the project of which it is a part and so recognized and approved the building of the dam. *Wisconsin* v. *Duluth,* 96 U. S. 379, 386." *United States* v. *Arizona,* 295 U. S. 174, 186. See also *United States* v. *Midwest Oil Company,* 236 U. S. 459, 480–481, as to the effect of a report to the Senate and subsequent acquiescence by Congress.

The effect of Congressional enactments as confirmation and approval of executive action and as setting at rest any question of delegation of power, was recently considered by this Court in two cases. *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, and *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297. In those cases it was held that any question of delegation of power by Congress to the President to transfer certain powers to the Secretary of Commerce had been rendered moot by the subsequent recognition by Congress of the action of the President in making such a transfer. This Court held that such Congressional recognition constituted ratification of the action of the Presi-

dent. The Court went further in the *Swayne & Hoyt* case, *supra,* stating (p. 302):

> And we think that Congress, irrespective of any doctrine of ratification, has, by the enactment of the statutes mentioned, in effect confirmed and approved the exercise by the Secretary of the powers originally conferred on the Shipping Board.

We submit that the approval here was much more deliberate and specific than that found in the two cases just discussed.

It should be emphasized that the ratification here is not retroactive. That is, it does not divest any previously existing rights, nor does it confirm an illegal act which has been completely executed. Compare *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338. This is not a case of a "rubber stamp" approval of a *fait accompli.* These proposed loans and grants have not yet been made, and Congress was as free to have disapproved as to have approved them. In the language of the *Isbrandtsen-Moller* case, *supra,* the administrative action when ratified was still *"in fieri."* Indeed it has remained so up to the present time.

2. Congress has provided adequate standards for the expenditure of the money appropriated

"That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain." *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 321–322. This Court thus took occasion, at the

last Term, to place beyond dispute the constitutional validity of lump-sum appropriations. The opinion continued:

> Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* v. *Hanson,* 167 Fed. 881, 884–885. * * *

In the *Cincinnati Soap* case, "the uses to which the money is to be put [were] not specified" (301 U. S. at 323). In the cases at bar it is unnecessary to rest on the broad doctrine there declared, for here the statutes set forth a definite policy and impose specific limitations on the allotment and expenditure of the funds. It is unnecessary to consider, for example, whether an appropriation stating that the funds were to be used for the general welfare would be valid. An analysis of the back-

ground and terms of the statute, and of their administration, will demonstrate that, like the provisions of the Reclamation Act sustained in *United States* v. *Hanson*, 167 Fed. 881, and approved in the *Cincinnati Soap* case, they are not open to serious question on the score of delegation of legislative power.

Title II of the 1933 Act did not inaugurate the policy of the Federal Government to extend financial aid for the construction of public works projects by States and subdivisions. That policy was embodied in the Emergency Relief and Construction Act of 1932, c. 520, 47 Stat. 709. The power to make loans for such purposes was vested in the Reconstruction Finance Corporation, an administrative agency of the Federal Government. Section 201 (a) of the 1932 Act (47 Stat. 711) authorized that Corporation—

> to make loans to, or contracts with, States, municipalities, and political subdivisions of States, public agencies of States, of municipalities, and of political subdivisions of States, public corporations, boards, and commissions, and public municipal instrumentalities of one or more States, to aid in financing projects authorized under Federal, State, or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise, and for such purpose the Reconstruction Finance Corporation is authorized to bid for such securities: * * *

The same subsection contained requirements regarding convict labor, a thirty-hour week, and veterans' preferences.

It will be observed that the 1932 Act furnished a background of policy for the 1933 Act. As indicating that the latter was in essence a continuation of the former, the latter provided in Section 301 that the Administrator of Public Works should have access to the applications, files, and records of the Reconstruction Finance Corporation with respect to loans and contracts and the administration of funds under the prior Act. And in fact the Public Works Administration examined 526 projects turned over to it by the Reconstruction Finance Corporation. See *Report of the Administrator,* Sen. Doc. 167, 73d Cong., 2d Sess., March 26, 1934, p. 1.

The 1933 Act authorized the making of grants in addition to loans but limited the amount of the grant in any case to 30 per cent of the cost of the labor and materials employed upon the project. The 1933 Act contained more detailed requirements than did its predecessor. The Administrator of Public Works was required, under the direction of the President, to prepare a comprehensive program of public works which should include various enumerated types of projects. This requirement, contained in Section 202, includes the following pertinent provisions:

> (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instru-

> mentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, * * * (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; * * * (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, * * *.

Section 203, which authorizes the making of loans and grants, contains important limitations on the Administrator. The section opens with the clause "With a view to increasing employment quickly (while reasonably securing any loans made by the United States)." It is thus required that loans and grants shall be made as part of the program of increasing employment and that loans shall be reasonably secured. The limitation on the amount of the grant has already been noted. It thus appears that both the subject matter of the action to be taken, namely, financial aid in the construction of recognized types of public works, and the nature of the action to be taken, namely, the making of a reasonably-secured loan or a grant in a limited amount, were definitely prescribed by Congress. And the policy of Congress that unem-

ployment be relieved and that a comprehensive program of public works be undertaken is left in no doubt whatever.

The express limitations which have been outlined necessarily include others which it is important not to overlook. Chief among these is the fact that since either a loan or a grant is a consensual transaction, the State or subdivision must apply therefor. In short, the choice of projects among those authorized by the Act is vested in the first instance not in the Administrator but in the local applicant. Since the applicant is a sovereign, there is required appropriate public action on its part. This outstanding limitation on the power of the Administrator cannot be too strongly emphasized. Not only must the applicant seek the project by appropriate action, but it must appear that its obligation to repay a loan is legally sound under local law. Furthermore, the project must also be sound from an engineering or technical standpoint, in order that a loan may be secure.[20] These constitute additional and essential limitations on the power of

[20] The requirement that loans be reasonably secure is not affected by Section 203 (d) of the 1933 Act, which empowers the President to extend any of the benefits of the statute to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on its right or power to borrow money or incur indebtedness. To interpret this subsection as permitting waiver of the requirement of reasonable security would render that requirement nugatory, and such a construction is therefore not to be assumed. In fact, no such construction has been given to this subsection. In Circular No. 1, of the PWA, issued July 31, 1933, it was explained that this provision is related to the leasing pro-

the Administrator. Section 206, moreover, requires that all loans and grants pursuant to the Act shall contain specified provisions designed to insure the maintenance of carefully designated labor standards in connection with the work of construction.

In view of the policy and standards and limitations thus laid down by Congress, it is difficult to escape the conclusion of the Circuit Court of Appeals for the Tenth Circuit in the *Kansas Gas Co.* case, *supra,* which was quoted and adopted in the *Duke* case, *supra,* by the Circuit Court of Appeals for the Fourth Circuit (81 F. (2d) at 995):

> Sections 203 and 206 (40 U. S. C. A., Secs. 403, 406) lay down standards as to what projects may be financed or aided by loans or grants. They must be public works projects; they must be projects included in the program; they must come within the limitations specified in section 206; a loan or grant must be made with a view to increasing employment quickly, and a loan must be reasonably secured.

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vision of the Act, which authorizes the Administrator to purchase property or securities and to lease such property to a municipality. See Pl. Ex. 119, R. II, 366–367. In fact, Section 203 (d) has never been put into effect (Fdg. 50, R. I, 468; R. II, 514). In these circumstances the Court will not consider what the effect would be if this provision were construed to waive the requirements as to reasonable security for loans. See *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, 253; *Pacific Tel. & Tel. Co.* v. *Seattle*, 291 U. S. 300, 304; *Stephenson* v. *Binford*, 287 U. S. 251, 276–277.

One of the loans and grants here involved (to Decatur) will be made with funds whose expenditure is authorized by the 1933 Act. Three (to Hartselle, Russellville, and Guntersville) are authorized by the Emergency Relief Appropriation Act of 1935. (Conclusion of Law No. 11, R. I. 470.) The 1935 Act provided in Section 12 that the Public Works Administration should continue until June 30, 1937, and authorized that Administration to perform such of its functions under the 1933 Act as might be authorized by the President. By Executive Order No. 7064, June 7, 1935, the President authorized the Administrator to continue to perform all the functions which he was authorized to perform under the 1933 Act. The 1935 Act made an additional appropriation, including the following:

> (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000;

The amount thus authorized could be increased by the President by an amount not to exceed 20 per cent of the total appropriation in the 1935 Act.

The above-quoted provisions of the 1935 Act must be read in the light of the Congressional

policy and administrative practice under the 1932 and 1933 Acts. While the amount of grants was increased by the Public Works Administration from 30 per cent to 45 per cent of the cost of labor and materials on a project, the same standards under which the Public Works Administration had been operating continued to be followed. That this was the intention of Congress is made clear by the subsequent First Deficiency Appropriation Act, fiscal year 1936, June 22, 1936 (c. 689, 49 Stat. 1597, 1608). That Act authorized the use of a revolving fund for grants in an amount not exceeding 45 per cent of the cost of a project, "in order to increase employment by providing for useful public work projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935." It should be noted that the 1935 Act imposed an additional requirement that at least 25 percent of the amount of the loan or grant must be used for work under each project; and that the President must so determine.

In the light of these statutory requirements, the discretion left to the Administrator in making loans and grants is seen to be no broader than that which is customarily vested in administrative agencies. The discretion consists largely of the segregation of a lump sum appropriation for particular

types of projects, subject to the requirements of a comprehensive program of public works; the determination of the amounts of a particular loan and grant, respectively, subject to the requirement of adequate security for the loan and a maximum proportion for the grant; and the details of the contract to be executed between the United States and the applicant, subject to the requirements concerning conditions of labor in the construction work. To those familiar with the functions of such administrative agencies as the Interstate Commerce Commission, the Federal Tariff Commission, and the like, this area of discretion will appear to be relatively limited.

Only by ignoring these limitations could the petitioner reach the startling conclusion that "In sum the legislation says bluntly that whenever a public body wants to do a 'thing' the President in his discretion may finance that 'thing'" (Pet. Brief, p. 45).

This challenging assertion of petitioner calls for a concrete test. Suppose that the Administrator were especially desirous of promoting municipal operation of gasoline stations (cf. Pet. Br., p. 46). Obviously he would be powerless to act in that direction until financial aid was sought by an applicant for such a project. But suppose, for example, that the City of Decatur, instead of applying for a loan and grant for a power plant, wished to enter upon the business of operating gasoline stations. Suppose that the city proposed to purchase an ex-

isting privately owned station and accordingly requested a loan and grant from the Administrator for that purpose. That, in the words of petitioner, is the "thing" which the city "wants to do." May the Administrator in his uncontrolled discretion make the loan and grant? Obviously not. The short reason is that there is no authority conferred on the Administrator to finance the purchase of an existing enterprise but only to aid in financing construction. Suppose, then, that the city changes its plans to provide for the construction of a gasoline station. May the Administrator finance it? On those facts, no. Such an undertaking may not be a public purpose under the law of Alabama, and hence the obligation of the borrower would be legally unsound. But suppose that such an undertaking were a legitimate public purpose in Alabama for which taxes might be levied. If the city has reached its debt limit, its obligation to repay the loan would still be legally and financially unsound. But suppose that the city changed its plan and proposed to issue revenue bonds payable solely from the earnings of the project. The city would have to show legal authority to issue revenue bonds for

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[31] The Alabama statute under which the cities propose to issue bonds for the present projects is limited to electric systems. Ala. Laws, Extra session 1933, No. 107. A separate statute authorized the issuance of revenue bonds for waterworks, sewer, and gas systems, but provided that the construction of gas and water systems could not be undertaken where a privately owned system was in operation. *Id.*, No. 102.

that type of project under Alabama law.[31] But suppose Alabama enacted a statute authorizing revenue bonds to be issued for that type of project. Still the Administrator would have to be satisfied that the bonds were reasonably secure on the basis of prospective earnings. And under the 1935 Act it would have to be determined that at least 25 per cent of the loan would be expended for work under the project.[32]

It should be apparent that the petitioner has given a highly unreal picture of the discretion left to the Executive in connection with loans and grants for non-Federal projects. In support of that unreal picture petitioner quotes certain language used by the Administrator in describing the problems which faced the Public Works Administration at the outset (Pet. Br., pp. 37–38). Those statements were obviously meant to stress the difficulty and complexity of the problem of preparing a comprehensive program of public works as required by the statute. The head of any administrative agency would be likely to make similar statements in recalling the magnitude of its tasks and its accomplishments. In fact, the First

[32] This limitation does not mean that 25 per cent of the loan must be expended for work at the site. Neither does it mean that this amount may be expended so that ultimately at least 25 per cent will go to labor, no matter how remotely connected with the project. The meaning is that at least 25 per cent must be expended for work at the site and for work in the extraction, fabrication, and transportation of the materials which go into the project. See Appendix pp. 85–88.

Annual Report of the Federal Radio Commission contains very similar statements." But the present cases are not to be decided by rhetorical or metaphorical discussions of that sort. What is required in this connection is an analysis of the standards laid down by Congress (an analysis such as has been outlined above), together with an examination of the actual administration of the statute.

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[11] The Report, for the year 1927, states:

"The passage of the radio act of 1927 presented a situation without parallel in the history of American executive departments" (p. 1).

The Report quotes (p. 6) from an address by Commissioner Bellows as follows, under the heading "An Appalling Responsibility":

"* * * Nor do I know of any other law which, like the radio act of 1927, sets up as the sole guide for the body charged with its administration the interest, convenience, or necessity of the public. That, in just four words, is what Congress has told us to do. We are to determine who shall and who shall not broadcast and how such broadcasting shall be carried on, simply in accordance with our conception of public interest, convenience, or necessity.

"It is a rather appalling responsibility.

* * * * * * *

"* * * We can not evade this responsibility, for it is the thing which Congress has told us we must do, and it is the thing which the people of America rightly demand shall be done. The variety of broadcasting service has become infinite; how shall we measure the conflicting claims of grand opera and religious services, of market reports and direct advertising, of jazz orchestras and lectures on the diseases of hogs!"

Compare the decision sustaining the grant of power. *Federal Radio Comm'n v. Nelson Bros. & Co.*, 289 U. S. 266.

Petitioner proposes to make an examination of subsequent experience under the statutes (Pet. Br., pp. 42–44). On pages 42–43 of the brief is listed a number of projects for which allotments were made, as listed in the Administrator's report in March 1934 (Def. Ex. 10, separately certified). In the first place, most of the examples cited are examples of Federal projects, which are subject to different tests, and which are not in issue here. In the report itself these projects are segregated from the non-Federal projects. The Federal projects are listed in the report at pp. 18–123, according to the Federal Departments involved. The appropriation to the Civil Works Administration, referred to in petitioner's brief at p. 43, was likewise a federal project from the standpoint of the Public Works Administration. Whether any particular activities undertaken by the Civil Works Administration with the funds thus allocated to it were outside the proper scope of the statute is a question which does not concern us here.[44] Of the *non-fed-*

[44] We cannot, however, let pass unchallenged the petitioner's reference (Br., p. 44) to the Civil Works Administration. The brief refers to a report of the Federal Emergency Relief Administration (not to be confused with P. W. A.) for examples of projects which in the opinion of petitioner could not properly be regarded as public works projects in any limited sense. In the interest of accuracy, it must be pointed out that petitioner's selection (Br., p. 44) of a few projects listed, without indicating their relationship to the major classifications of civil works projects, is highly misleading. The report itself classifies the projects in ten groups, viz (p. 18): streets, roads, and highways; schools and univer-

eral projects listed in the report, over 1,800 in number (pp. 124–127 of the report), petitioner has selected ten which appear to it to be novel and per-

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sities; parks and playgrounds; public buildings and equipment; improvement to public lands; pest control; sanitation; waterways and water supply; utilities; administrative, professional, and clerical. Thus what petitioner designates as "painting guard rails and fences" is in fact described in the report as "constructing and painting guard rails and fences," and is one of 15 types of work confined to the classification "Streets, Roads, and Highways." The other examples are likewise given in a misleading manner.

Also, petitioner fails to quote from the report the following important explanation (Monthly Report of the Federal Emergency Relief Administration, Dec. 1–31, 1933, p. 17):

"A large number of employable persons on relief were not qualified for work that fell within the scope of the Civil Works program proper and which could be paid for from the Public Works funds made available for this administration. To meet this situation a Civil Works service program was set up for persons employed on projects relating to relief offices or for the benefit of relief clients.

"The Civil Works service program is being carried forward with a maintenance of maximum identity with the Civil Works program. The funds for it are all drawn from relief sources and all persons employed on Civil Works service projects are persons eligible for relief."

The foregoing explanation indicates that the Civil Works Administration was definitely aware of the limitation upon use of funds allotted by P. W. A. It was, therefore, necessary to draw upon relief funds from other sources to finance the so-called service projects as distinguished from public works projects. The report suggests (p. 18) that the requirements as to civil works projects be relaxed by Congress so as to permit the inclusion of service projects. This, however, Congress did not do. Whether, in the administration of the civil works program, the tests of public works projects were properly applied in every case is a question outside the scope of the present litigation.

haps amusing. We suggest that the court scan for itself the list of approved non-federal projects and determine whether these ten are in fact fair examples. Such an examination will show that those ten projects are virtually unique, though we do not mean to suggest that they are improper. If in an occasional instance a public dry dock or a public fire alarm or a public silo can meet the requirements imposed by the statutes there is no reason why they should be excluded from the comprehensive program. But the various limitations discussed above would make it almost certain that they would occupy, as in fact they do, a trivial position in the comprehensive program of public works.

A fair and accurate picture of that program can be obtained, as we have said, by examining the report itself from which the petitioner has selected these illustrations. A fair and accurate picture can also be obtained by reference to the more recent testimony of the Administrator during the hearings on the First Deficiency Appropriation Bill, 1936, H. R. 12624, 74th Cong., 2d Sess., before a Sub-Committee of the Senate Committee on Appropriations. In that testimony the Administrator submitted a schedule of non-federal projects theretofore approved, classified according to type. We have already set out (pp. 12–13, *supra*) the table there given, and it will not be reprinted here.

Upon examining the list the Court will, we submit, be impressed, not with the novelty or strange-

ness of the types of projects, but rather with their familiar and well-recognized character as public works in the traditional and well-established sense.

The fact that academic writers or foreign countries have suggested or found that the concept of public works may be expanded and strained to include virtually all sorts of work and services can not alter the fact that the statutes here involved as administered and interpreted by the Public Works Administration conform to a well-established pattern of public works as States and subdivisions have long recognized them. The States and their subdivisions had traditionally undertaken public works projects such as bridges, highways, public buildings, parkways, water-works, gas plants, electric plants, and the like. What was left to the Administrator was simply to coordinate into a comprehensive program such of these projects submitted by States and subdivisions as were eligible for financial aid under the requirements and limitations imposed by Congress.

The fact is that, so far as delegation is concerned, a major element of discretion was reposed, not in the Administrator, but in the States and subdivisions themselves. The petitioner does not suggest that there has been an improper delegation of power by Congress to the States. Such a contention would of course be untenable. *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, 326. The function of the Administrator

was to apply the tests of eligibility laid down by Congress and to coordinate eligible projects into a nation-wide and diversified program. It is this element of discretion which the plaintiffs must show violates the limits permitted by the Constitution.

An answer more than adequate has been given by this Court in the *Cincinnati Soap* case, *supra*.

Essentially, the argument of petitioner is an argument of legislative policy, not of constitutional law. The degree of particularity with which appropriations are made is a matter as to which both power and responsibility have been left to Congress. The question has been debated as one of policy since the first administration under the Constitution, with Hamilton, Jefferson, and Gallatin taking leading parts in the celebrated controversy.[35] More recently, in connection with the movement for an executive budget, the question of policy again came to the fore, and in 1912 President Taft approved and submitted to the House a report of the Commission on Economy and Efficiency on the need for a national budget (House Doc. 854, 62d Cong., 2d Sess.), which suggested that the practice of enacting detailed appropriation measures was unwise and at variance with the fiscal practice contemplated by the Constitution (*id.* at 72). A recurring argument in favor of greater executive control

[35] See Gallatin, *Writings* (Adams ed.) III, 73, 117; Hamilton, *Works* (Ham. ed.) VII, 532, 533, 788; Richardson, *Messages and Papers of the Presidents*, I, 329; American State Papers (Finance), 7th Cong., 1st Sess., pp. 755–757.

over expenditures, particularly pertinent in the field of public works, is the charge that a legislature is more subject to sectional influences in determining upon particular expenditures, and the conviction that the placing of greater responsibility in the executive in that regard will bring about a broader and more expert view in the financing of internal improvements. Whatever may be the merits of such considerations, the important fact remains that the question is one of policy for the legislature. There lie the "power and responsibility." Cf. *Cincinnati Soap Co.* v. *United States, supra,* at 324.

3. *There are numerous precedents in related fields*

a. Reference has already been made briefly to the provisions of the Reclamation Act of 1902, 32 Stat. 388, which set up a revolving fund for reclamation works and provided in Section 4 that "upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same."

It will be noted that the statute contains no direction to the Secretary of the Interior to spend any amount of money whatever. He is authorized to spend as much or as little as he deems wise, provided that the amount of expenditures does not exceed the maximum sum in the reclamation fund.

There is no test or rule laid down for the guidance of the Secretary in selecting projects, except that he must find that the project is practicable in order to make it eligible. The word "practicable" is not defined.

The constitutionality of this statute was challenged in *United States* v. *Hanson,* 167 Fed. 881 (C. C. A. 9th), on the ground that it "delegates legislative authority to the Secretary of the Interior, and authorizes him to determine what and where irrigation systems shall be built and maintained and what shall be expended thereon." Judge Gilbert, writing for the Circuit Court of Appeals for the Ninth Circuit, rejected this contention and held the statute valid. He made the following observations relative to the point under discussion (pp. 884–885):

> It is said that the appropriation is indefinite. This is true, but it is not more indefinite than other appropriations which have been made by Congress from the beginning of the government, the constitutionality of which has never been questioned.
>
> But it is urged that the act delegates legislative authority to the Secretary, in that it authorizes him to determine what irrigation system shall be built and maintained, and what amount shall be expended thereon. A similar contention was advanced in *Union Bridge Company* v. *United States,* 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, concern-

> ing the river and harbor act of 1899 (Act March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3540]), which gave to the Secretary of War power to determine whether bridges on navigable waters of the United States are unreasonable obstructions to navigation, and providing for the removal of such bridges when so condemned by the Secretary. But the court held that the act was not unconstitutional as a delegation of legislative power to an executive officer.

This decision was cited and relied upon in the *Cincinnati Soap* case, *supra.*

The power of expenditure is closely analogous to other powers which are not essentially legislative, or law-making, in character. In such fields powers at least as broad as those here conferred have been commonly granted and never invalidated on the ground of delegation of power.

b. In the administration of the public lands it is well established that Congress has a broad power of delegation. Congress may, for example, subject the location of mine claims to state and territorial laws and to local mining customs. *Butte City Water Co.* v. *Baker,* 196 U. S. 119.

In *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 474, this Court reaffirmed the doctrine of the *Butte City* case, stating that "land laws are not of a legislative character in the highest sense of the term (Art. 4, § 3) 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.'" See also *United States* v. *Wilbur,* 283

U. S. 414, 419; *United States* v. *Chemical Foundation*, 272 U. S. 1, 12. In *United States* v. *Grimaud*, 220 U. S. 506, 516, the Court likened administrative regulation of the Federal forest reserves to ordinances that—

> do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor.

c. In disposing of property of the United States, Congress may likewise entrust administrative officers with wide discretion. Cf. *United States* v. *Chemical Foundation*, 272 U. S. 1, 11–12; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288.

d. In the establishment of fiscal agencies, Congress may vest a large measure of discretion in the administrative officers charged with carrying out the law. The Acts establishing the United States banks left to the directors of those institutions wide latitude such as is ordinarily reposed in officers of similar private institutions. Perhaps no power so vested in them was of greater practical importance than that of establishing branches, for thereby the impact of the bank was felt directly by competing private institutions, whose functions were in part supplanted. An extremely forceful argument was made in *McCulloch* v. *Maryland*, 4 Wheat. 316, by Mr. Hopkinson, for Maryland, to the effect that if the power to establish branches existed in the Fed-

eral Government, its exercise must rest with Congress alone (pp. 335–337):

> 2d. But if these branches are to be supported on the ground of the constitutional necessity, and they can have no other foundation, the question occurs, who should be the judge of the existence of the necessity, in any proposed case; of the when and the where the power shall be exercised, which the necessity requires? * * * The establishment of a bank in a state, without its assent; without regard to its interests, its policy or institutions, is a higher exercise of authority than the creation of the parent bank, which, if confined to the seat of the government, and to the purposes of the government, will interfere less with the rights and policy of the states, than those widespreading branches, planted everywhere, and influencing all the business of the community. Such an exercise of sovereign power should, at least, have the sanction of the sovereign legislature, to vouch that the good of the whole requires it, that the necessity exists which justifies it. But will it be tolerated, that twenty directors of a trading corporation, having no object but profit, shall, in the pursuit of it, tread upon the sovereignty of the state; enter it, without condescending to ask its leave; disregard, perhaps, the whole system of its policy; overthrow its institutions, and sacrifice its interests?

Though the argument was vigorous and extended, the Chief Justice was able to deal with it in a summary way (p. 424–425):

> The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

Compare also the discretion vested in the Secretary of the Treasury under the Farm Loan Act, sustained in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180.

e. Perhaps the most striking example of the discretion traditionally left with the Executive in carrying out laws which are not of a regulatory or coercive nature is the issuance of obligations of the United States. The power to borrow money on the credit of the United States is, of course, a power vested in Congress by the Constitution. Yet in authorizing the Secretary of the Treasury to borrow money, Congress has conferred upon him ex-

tremely broad powers. The legislation is collected in Title 31 of U. S. C., Sections 752–757. The amounts which the Secretary is authorized to borrow and for which he may issue obligations extend into the tens of billions of dollars. Yet he is left wholly free to determine whether and when to issue any or all of the types of obligations authorized by the statutes. No limit is placed upon the time during which these obligations may be issued. In the case of United States notes (Section 753), certificates of indebtedness (Section 754), Treasury bills (Section 754), and war-savings certificates (Section 757), the rate of interest is left entirely at the discretion of the Secretary. In the case of bonds only a maximum rate of interest is designated. In the case of United States notes (Section 753), the Secretary is given his choice of four quite different schemes of complete or partial tax exemption. The importance of the powers thus conferred, and their effect upon the national credit, upon competitive investments in state, municipal, and private obligations, upon interest rates generally and upon the saving and investment of capital, need not be elaborated.

In these instances the powers conferred, despite their important direct and collateral consequences, were not law-making powers in the appropriate sense, such as were those involved in the *Panama* and *Schechter* cases. The same is true of the power to segregate lump-sum appropriations in the cases at bar.

In the cases at bar there is, finally, the important fact that only by vesting in administrative officers the discretion conferred could the power of Congress be effectively exercised. As was said by Judge Parker in the *Duke Power Co.* case, 81 F. (2d) 994:

> It was out of the question for Congress to prescribe the details of an extended program of public works. It appropriated the money for the purpose, laid down the principles which were to guide the President and the Administrator of Public Works in its expenditure, and left to them the working out of the details. The making of loans and grants in carrying out the policy thus laid down by Congress is the exercise of administrative, not legislative, discretion.

This Court has repeatedly recognized that

> Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421).

The language of the *Panama* case is particularly applicable here. To attack the right of Congress to delegate the functions which it has conferred upon the Public Works Administration is to attack in all practical sense the power of Congress to make appropriations in aid of a comprehensive program of public works for the relief of unemployment.

IV

The Statutes are Constitutional as an Exercise of the Power of Congress to Spend Public Funds to Promote the General Welfare

The conclusion that the statutes are a valid exercise of the spending power of Congress is no longer open to question, in view of the recent decisions of this Court sustaining the provisions of the Federal Social Security Act. *Steward Machine Co.* v. *Davis,* decided May 24, 1937, No. 837; and *Helvering* v. *Davis,* decided May 24, 1937, No. 910. In the *Steward* case the Court sustained the tax and credit as a means of mitigating the financial burdens assumed by the Federal Government in periods of depression; and the Court referred specifically to the sums expended by the National Government "for public works and unemployment relief":

> It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler,* 297 U. S. 1, 65, 66; *Helvering* v. *Davis,* decided herewith. The nation responded to the call of the distressed. Between January 1, 1933, and July 1, 1936, the states (according to statis-

> tics submitted by the Government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended *for public works and unemployment relief* for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,681,000,000. The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train. [Italics supplied.]

These recent decisions reiterated the principle expressed in *United States* v. *Butler,* 297 U. S. 1, that the choice of means in exercising the spending power rests with Congress, and that to overturn its choice the courts will require a showing that by no reasonable possibility can the challenged measure be regarded as an appropriate means to the end sought.

Petitioner must contend that, despite the judgment of Congress and expert opinion, financial aid to States and their subdivisions for a nation-wide program of public works is an inadmissible means of relieving unemployment; or that in undertaking such a program the construction of power plants

must be excluded, even though a municipal applicant chooses that type of public works project rather than some other eligible type. Such contentions are clearly untenable.

1. In 1933, when Title II of the National Industrial Recovery Act was passed, the United States was in the midst of an economic depression of unprecedented character. This Court has taken judicial notice of the depth and severity of the depression. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, 260; *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, 149; *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 422. The Federal Reserve Board index of industrial production showed a drop from 119 for 1929 to 64 for 1932.[36] The consequent unemployment was widespread and was severely undermining the economic well-being of the nation. Factory employment had shrunk from 104.8 per cent in 1929 to 62.6 per cent in May 1933, based upon the 1923–1925 volume.[37] It has been estimated that between 1929 and 1933 the number of unemployed increased from 1,864,000 to 15,653,000.[38] The re-

[36] *Federal Reserve Bulletin*, October 1936. The figures are based upon the years 1923 to 1925, as 100.

[37] *Monthly Labor Review*, May 1935, page 1339.

[38] *The American Federationist*, January 1936, p. 85. This estimate of unemployment in 1933 would appear to be conservative. The Alexander Hamilton Institute estimated that 17,000,000 were unemployed in March 1933. *Business Conditions Weekly*, September 5, 1936.

sources of private charity were unable to cope with the distress and suffering resulting from this widespread unemployment. The absolute necessity of providing public funds for the relief of the unemployed and the destitute created a financial problem of grave magnitude. By July 1933, 13 per cent of the population of this country was receiving relief from public funds.[39] The unemployment problem had become nation-wide in scope, and the states and local communities were unable to provide the necessary relief. Every section of the country was affected. Tax collections were decreasing, local revenues were dwindling, and the credit resources of states, counties, and municipalities were rapidly being exhausted.[40]

Not only was unemployment in itself a matter of the gravest importance, but it had profound effects upon the economy of the nation. The decrease of expenditures for consumption goods resulting from the unemployment of millions who theretofore had incomes, affected not only the numerous industries engaged in producing such goods, but also inevit-

[39] See Report of the Federal Emergency Relief Administrator to the Chairman of the Senate Committee on Appropriations, Sen. Doc. No. 56, 74th Cong., 1st Sess.

[40] See Report of Federal Emergency Relief Administrator (December 1933), where it is stated that on May 22, 1933, approximately 4,250,000 families (i. e., 19,000,000 persons) were receiving relief from public funds.

See also Report of Federal Emergency Relief Administrator (May 1935), Sen. Doc. No. 56, 74th Cong., 1st Sess. Ex. W., 657–719, where the status of each State in regard to need and ability to bear financial burdens for relief is given.

ably affected the purchase of the capital goods used for the production and manufacture of consumption goods. A downward spiral was in progress which had to be arrested if the nation was not to find itself in a state of utter collapse. The gravity of the situation is graphically depicted by the fact that the national income produced had shrunk from 81 billions in 1929, to 40 billions in 1932.[41] In March 1937 this Court said: "We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved." *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 399.

In these circumstances it cannot be doubted that Congress had the power to appropriate funds to relieve the distress of the unemployed. In so doing, two courses were open: (1) Funds could be donated to the unemployed. This was done through the Federal Emergency Relief Act of 1933 (c. 30, 48 Stat. 55) providing for Federal aid to the States for direct relief of unemployment. (2) A comprehensive program of useful public works could be inaugurated and the unemployed paid for work performed in connection with projects included in that program. Such a program would not only

[41] Estimates of the Department of Commerce, presented in *The National Income Produced, 1929–34,* by Robert K. Nathan, Chief, Income Section, Division of Economic Research, Bureau of Foreign and Domestic Commerce. (*Survey of Current Business,* November 1935.)

relieve the distress of the unemployed, but would also serve another purpose promotive of the national general welfare; namely, the increase of employment both in the actual construction of public works projects and in industries engaged in producing, manufacturing, and transporting the materials used on those projects. The second course of action was the one adopted by Congress in the enactment of Title II of the National Industrial Recovery Act.

2. In determining to engage in a comprehensive program of public works, Congress was influenced by an obvious consideration of the utmost importance. The construction industry had suffered a far greater decline than that sustained by other industries. The importance of the construction industry as an indicator of business activity has long been recognized. The immense number of workers, the amount of pay rolls, and the value of the output of this industry indicate its importance in any analysis of the economic condition of the nation.

It has been estimated that the total amount annually expended on construction in the United States, public and private, sank from a sum of considerably in excess of $12,000,000,000 in 1929, to the sum of approximately $4,000,000,000 in 1932.[42]

[42] Gayer, Arthur D., *Public Works in Prosperity and Depression* (National Bureau of Economic Research, 1935) prepared for the National Planning Board of the Federal Emergency Administration of Public Works.

Building construction in 257 cities having a total population of 44,850,000 declined from $2,933,117,531 in 1929 to $481,490,267 in 1932, a decrease of 83.6 per cent.[43] Throughout the United States employment in the construction industry, direct and indirect, decreased between August 1929 and March 1933 by more than 63 per cent. In August 1929 a total of 2,325,689 persons were employed in this industry, and in March 1933 the number had dwindled to 850,414.[44] Activity in the construction industry stimulates employment in allied industries, which put men to work in producing cement, lumber, electrical machinery, supplies, and other materials. The construction of public works is the most practical method of stimulating the construction industry.

3. The idea of a comprehensive program of public works as a means of relieving unemployment has long been recognized by practical business men and students of the problem as well as by legislative bodies both in this country and abroad. Perhaps no method of relieving unemployment has been so universally approved as this.[45]

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[43] *Building Construction*, January 1936, p. 50 (United States Department of Labor).

[44] *American Federationist* (Jan. 1936), pp. 72–73, American Federation of Labor. These figures include those employed directly and indirectly by building contractors, by builders on their own account, and by road construction companies. See also Fdg. 45, R. I, 466, and II, 542–549, for statistics on the relative decline in employment in the durable and non-durable goods industries.

[45] *Economic Reconstruction*, Report of the Columbia University Commission (1931), pp. 35–37, 150–169; J. M. Clark,

During the business recession of 1921 a Conference on Unemployment was called by President Harding. It was convened by Secretary of Commerce Herbert Hoover and was attended by business men and economists from all parts of the country. Among other things, the conference ap-

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The Economics of Planned Public Works (National Bureau of Economic Research, 1935); Arthur D. Gayer, *Public Works in Prosperity and Depression* (National Bureau of Economic Research, 1935); O. M. W. Sprague, *Recovery and Common Sense* (1935), pp. 15–33; Sumner H. Slichter, "The Economics of Public Works," *American Economic Review*, supp. (1934), pp. 174–185; F. G. Dickinson, "Public Construction and Cyclical Unemployment," *Annals of the American Academy of Political and Social Science* (1928), Vol. CXXXIX, pp. 175–209; Vernon A. Mund, "Prosperity Reserve and Public Works," *Annals of the American Academy of Political and Social Science*, supp. (May 1930); Round Table Discussions on Public Works and Unemployment, *American Economic Review*, Supp. (March 1930), pp. 15–29; J. M. Keynes, *The Means to Prosperity* (1933); Gerhard Colm and Fritz Lehmann, "Public Spending and Recovery in the United States," *Social Research* (May 1936), Vol. III, p. 129.

The construction of public works as a means of combating economic depressions has been known since antiquity. It has been said that the construction of buildings on the Acropolis under Pericles was undertaken to create work for the unemployed masses. The Romans devoted their idle resources to construct not only public buildings but also water supply systems and roads, some of which still endure. More recently, the policy of retarding public works during periods of prosperity and extending them during periods of depression has been adopted by Great Britain, Canada, France, the Netherlands, and Norway. J. M. Clark, *Economics of Planning Public Works* (U. S. Government Printing Office, 1935); League of Nations, *Enquiry on National Public Works*, c. 482 M. 209, 1934 VIII.

pointed a committee, headed by Owen D. Young, to undertake an investigation into the problems arising from the conditions of unemployment then prevailing. The report of the Committee is contained in a volume entitled *Business Cycles and Unemployment*. One of its recommendations was the adoption of a policy of retarding public works during periods of business activity and accelerating them during periods of depression.

In 1931 the Employment Stabilization Act of 1931 was enacted into law. C. 117, 46 Stat. 1084. This Act provided for the preparation of a six-year schedule of Federal public works with the view of using it as a business stimulus during slack periods. On May 31, 1932, in his message to Congress urging the enactment of a bill authorizing the Reconstruction Finance Corporation to buy bonds from political subdivisions or public bodies to aid in the construction of self-liquidating public works, President Hoover said:

> I have for many years advocated speeding up of public works as relief to unemployment in times of depression. Since the beginning of this depression, in consonance with this view, the Federal Government will have expended in excess of $1,500,000,000 in construction and maintenance of one kind or another, as against a normal program of perhaps $650,000,000 for a similar period. (75 Cong. Rec., pp. 11597–11598.)

Shortly thereafter the Emergency Relief and Construction Act of 1932 was enacted, authorizing

the Reconstruction Finance Corporation, among other things, "to make loans to, or contracts with, states, municipalities, and political subdivisions of States, public agencies of States, of municipalities, and of political Subdivisions of States, public corporations, boards, and commissions, and public municipal instrumentalities of one or more States to aid in financing projects authorized under Federal, State, or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise." 47 Stat. 711.

The following year Title II of the National Industrial Recovery Act became law. Section 301 of this Act provided that within ten days after the date upon which the Administrator has qualified and taken office no application should be received by the Reconstruction Finance Corporation under the provisions of the Emergency Relief and Construction Act of 1932, hereinabove referred to, and that the Administrator should have access to all applications, files, and records of the Reconstruction Finance Corporation relating to such loans and contracts. It is evident that Congress considered that it was continuing, under a new administrative set-up and with supplementations, work previously authorized.

4. The results of the Public Works progra have vindicated the judgment of the Congress as to the appropriateness of the means adopted. Cf. *Legal Tender Cases,* 12 Wall. 457, 543. Every

Public Works Administration contract includes a clause making it mandatory for the contractor to report to the Bureau of Labor Statistics the number of people on his pay roll and amount of pay roll, the man-hours of work at the site of the construction project, and the expenditures for construction materials. (Fdg. 46, R. I, 467; 133; II, 550.) Since the inception of the Public Works Administration more than 14,000 projects, federal and non-federal, have been completed or are under construction, at a total cost of more than $3,000,000,000. From the inception of the program to August 1936, $755,262,389 was expended for wages and $1,371,329,589 for materials.[46] The latter expenditure will provide employment for persons away from the site of the projects in the mines, mills, factories, and shops, and on the railroads, in every corner of the nation. Studies made by the Bureau of Labor Statistics show that in three years the construction of the projects included in the comprehensive program of public works provided approximately 6,475,000 man-months of labor.[47] It is conservatively estimated that for each person put to work at the site of a project, two and one-half additional persons

[46] *Employment and Pay Rolls*, August 1936 (U. S. Department of Labor).

[47] Herman B. Byer, "Employment Created by P. W. A. Construction," *Monthly Labor Review*, October 1936, p. 838. This figure is based on a 170-hour month. On P. W. A. projects, 130 hours constitute a fulltime month of employment. Figured on the latter basis the number of man-months of work provided at the site comes to approximately

are given employment away from the site, so that it may safely be said that the Public Works Administration during the first three years of its existence has provided a total of approximately 23,000,000 man-months of employment.

5. The argument of petitioner that power plants should not have been included in the eligible types of public works is an argument addressed, not to constitutional power, but to legislative policy both of the Federal Government and of the States. Whether a power plant, or a competitive power plant, should be constructed as part of a public works program is left in the first instance to the States. On this question of policy Alabama was free to act and has done so through her legislature. Alabama has provided that municipalities may issue revenue bonds for gas and water systems only when they are non-competitive, but has imposed no such restriction on electric projects. (Ala. Acts 1933, extra session, Nos. 102, 107.

Congress, on its part, was unwilling to exclude arbitrarily this type of project from the comprehensive program. To have done so might have opened the way for similar irrational exceptions and so might have jeopardized the success of the public works program as a whole.

8,500,000. The author is Chief of the Division of Construction and Public Employment, Bureau of Labor Statistics (R. II, 542).

See also Hearings before Subcommittee of Senate Committee on Appropriations on H. R. 12624, 74th Cong., 1st Sess., May 18, 1936 (testimony of Administrator).

Congress recognized that the purchase of materials for use in the construction of public works projects would stimulate the employment of more labor than would be employed in the actual construction, and for that reason amended a proposed limitation in the 1935 statute which might conceivably have been interpreted to restrict the amount of funds available for purchase of materials. (See legislative history, Appendix, p. 78.) Petitioner's assertion that power projects involve the employment of fewer men at the site and more expenditures for purchase of materials and their transportation is therefore irrelevant. Indeed, it is to be observed that so-called indirect labor, resulting from the purchase of materials—since it involves men employed in the extraction, fabrication, and transportation of materials throughout the country—has a more pronounced effect on the national general welfare than the employment of men locally in the construction of such projects. In these circumstances the courts cannot be asked to hold that the refusal of Congress to exclude power projects was arbitrary and unconstitutional.

V

There Is No Violation of the Tenth Amendment

The decisions holding that the statutory provisions here in question, and the loan and grant agreements pursuant thereto, do not invade the reserved powers of the State, have been amply

vindicated by the recent decision of this Court sustaining the Federal unemployment compensation tax and credit. *Steward Machine Co.* v. *Davis*, decided May 24, 1937, No. 837.

The charge that the States were coerced by the unemployment tax and credit, as the farmers were held to be by the Agricultural Adjustment Act in the *Butler* case, 297 U. S. 1, was strongly pressed in the *Steward* case, and was as strongly rejected:

> Who then is coerced through the operation of this statute? * * * * Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by the duress. * * * For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. * * * There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. * * *

What was there said with respect to Alabama is precisely true here. Her legislature has specifically authorized the incurring of obligations to the United States for loans with which to construct public works. Alabama Acts, Extra Session, 1933, No. 107, Appendix, p. 52. And the Supreme Court of Alabama has expressly sustained such authorization. *Oppenheim* v. *City of Florence*, 229 Ala. 50.

The argument of coercion is even less tenable in the present case than in the *Steward* case. Here

the States and subdivisions are left entirely free to apply or not to apply for financial aid for public works. There is no element of competitive self-interest which makes it imperative for one State to match another in this respect, particularly since the receipt of a loan will entail a serious financial undertaking on the part of the borrower. But even if the availability of Federal funds for public works does constitute a strong incentive for the States to seek such funds, the important factor is that the choice of projects is left with the local applicant. Any inducement by reason of the Federal act is simply an encouragement to construct public works at the present time; it is not an inducement to construct a power plant rather than a schoolhouse or a city hall.

The unemployment tax and credit sustained in the *Steward* case operates, on the other hand, as a much more impelling inducement than the grant-in-aid provisions involved in the case at bar. Under the former plan the employers in a state must pay either a tax to the Federal Government or a contribution to a state fund for the relief and prevention of unemployment, and the economic self-interest of the state will naturally impel it to establish an approved unemployment compensation system in order that the inescapable burden imposed on its employers by the Federal Act may be applied to the advantage of the state itself. In fact, as the opinion of Mr. Justice Butler pointed out,

within a short time after the enactment of the Federal law 43 States passed appropriate unemployment compensation measures. Under the public works provisions of the 1933 Act, no involuntary burden whatever is imposed by the Federal Government. There is simply afforded to the state the choice of preserving the *status quo* or seeking the benefit of financial aid on terms which are meant to be attractive but which nevertheless entail the voluntary assumption of a financial obligation."

"This freedom of local choice is reflected in the results of local elections held in connection with proposed construction of Public Works projects. Out of 2,613 elections held on the question of borrowing funds as a condition of receiving a grant, 2,166, or about 83 percent, were carried, and 447, or about 17 percent, were defeated. In terms of votes cast, 5,837,456, or 58 percent, were in favor of the proposals, and 4,169,736, or 42 percent, opposed. In terms of the estimated cost of the projects, those in an amount of $364,011,878 were approved, and those in an amount of $98,448,257 were disapproved. Proposed Federal grants in the amount of $150,390,286 were approvad in these elections, while such grants in the amount of $44,090,570 were rejected. Hearing before Subcommittee of Committee on Appropriations, U. S. Senate, on H. R. 12624, May 18, 1936, p. 12 (testimony of Administrator).

Also significant in this connection is the fact that Iowa City, Iowa, after approval of its application for a grant, voluntarily withdrew its application as a result of subsequent local determination not to enter upon a municipal power undertaking. See the Resolution of the City Council of Iowa City filed in this Court with the stipulation of counsel that the cause had become moot.

It is unnecessary to labor the point, for the distinction was expressly recognized in the separate opinion of Mr. Justice Sutherland. Speaking for himself and Mr. Justice Van Devanter, he said (57 S. Ct., 901–902):

> An illustration of what I regard as permissible cooperation is to be found in Title I of the act now under consideration. By that title, federal appropriations for old-age assistance are authorized to be made to any state which shall have adopted a plan for old-age assistance, conforming to designated requirements. * * * so that we have simply the familiar case of federal aid upon conditions which the state, without surrendering any of its powers, may accept or not as it chooses. *Massachusetts* v. *Mellon,* 262 U. S. 447, 480, 482, 483.

What was said by Mr. Justice Sutherland in *Massachusetts* v. *Mellon,* cited in the foregoing quotation, is particularly applicable here (262 U. S. at 482, 483):

> Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.
>
> In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the

> mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; * * *.

The system of Federal grants in aid is one which has been recognized for over a century as a salutary and appropriate method, within the framework of our constitutional division of powers, for the exercise of Federal functions in cooperation with those of the states. This practice has persuasive force. As was said by the Chief Justice in *McCulloch* v. *Maryland,* 4 Wheat. 316, 401:

> this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

The very first Congress in 1790 enacted the well-known Assumption Act (1 Stat. 138, 142) under which the Federal Government assumed the debts of the States incurred during the Revolution. The Act was sponsored by Alexander Hamilton (American State Papers, Finance, Vol. I, pp. 15–25). In 1836 Congress provided (5 Stat. 52, 55) that the surplus in the Treasury in excess of $5,000,000 should be deposited with the States, subject to their individual assent, under an agreement to repay

upon stated notice by the Secretary of the Treasury. In 1841 Congress provided (5 Stat. 453, 455) that the net proceeds of the sales of public lands should be divided among certain States; and further that 500,000 acres of public land should be donated to each of the nine States and a similar amount to each new State admitted to the Union. Section 9 of the Act provided that the lands so received by the States should not be disposed of at a price less than $1.25 per acre, and that the proceeds should be faithfully applied to objects of internal improvements, "namely, roads, railways, bridges, canals and improvement of watercourses, and drainage of swamps."

Beginning in 1803 (2 Stat. 225) lands were regularly granted to the States upon admission to the Union for the use of schools in the State. Every State, except the 13 original members of the Union and 5 others, has received such Federal grants for common schools.[49] A total of 77,510,737 acres were thus granted by the Federal Government.[50] Similarly, extensive grants of land were made by the Federal Government to the States for universities, seminaries of learning, and normal schools. The grants for these purposes aggregated 3,987,954 acres.[51]

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[49] *Digest of Legislation Providing Federal Subsidies for Education*, U. S. Department of Interior, Office of Education, Bulletin No. 8, 1930, pp. 3–4.

[50] *Idem*, p. 15. This figure does not include the grant to the Territory of Alaska.

[51] *Idem*, p. 23.

In 1862 the first Morrill Act (12 Stat. 503) granted 30,000 acres to each State for each Senator and Representative, according to the apportionment of 1860. Each State was required to select the land within its own limits, but in case of a deficiency the Secretary of the Interior was to issue land scrip for the balance, such scrip to be sold by the state and the proceeds applied to the purpose of the Act. Numerous restrictions were placed upon the uses and maintenance of the fund. The interest was to be devoted to the "endowment support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts * * *." Ninety per cent of the money derived from the sale of land scrip was to be invested in stocks of the United States or of the states or in other safe stocks, bearing interest at not less than 5 per cent. The remaining 10 per cent of the funds might be used for the purchase of experimental farms and sites for buildings. Annual reports to Congress were required. In 1866 the benefits of the Act were made applicable generally to future states (14 Stat. 208). Every State has a land grant college. See *Hamilton* v. *Regents,* 293 U. S. 245, 259, note 3.

Congress has by no means confined its grants to land and land scrip. Grants of Federal funds have been made regularly to the states for purposes of education (including agricultural experimentation), public health, highway construction, forest protection, and other purposes.

Education. In 1887 the so-called Hatch Act (24 Stat. 440) authorized appropriations for agricultural experiment stations in connection with the colleges established pursuant to the Morrill Act of 1862. The subjects of research and experiment were carefully enumerated. For the first year authority was conferred to use 20 per cent of the amount of the grants for erecting buildings necessary for experimental work, and thereafter 5 per cent of the grants could be thus used. In 1906 the Adams Act (34 Stat. 63) provided for increased appropriations for the agricultural experiment stations. The fund was to be applied only to paying necessary expenses of conducting research or experiments bearing upon the agricultural industry of the United States. Annual reports to the Secretary of Agriculture and the Secretary of the Treasury were required. In 1925 (43 Stat. 970) additional amounts were authorized to be appropriated annually. Under these acts the agricultural and experiment stations have received, from 1888 to 1929, a total of $52,770,914.65.[52]

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[52] *Idem*, pp. 32–33.

In addition to the appropriations for agricultural experiment stations, the colleges established pursuant to the Morrill Act of 1862 have anually received substantial amounts from the Federal Government. The second Morrill Act in 1890 (26 Stat. 417) provided an additional annual appropriation. The Act prohibited payment of any appropriation to any college where distinction of race or color is made in the admission of students, but allowed funds for the establishment and maintenance of separate colleges for white and colored students. Further appropriations were authorized in 1907 (34 Stat. 1256). These appropriations under the second Morrill Act and the Act of 1907 have aggregated, for a period, 1890 to 1930, $74,202,000. Cf. *Hamilton* v. *Regents,* 293 U. S. 245, 259.

Still further appropriations have been regularly made to provide for cooperative agricultural extension work in the land grant colleges. The Smith-Lever Act of 1914 (38 Stat. 372) appropriated funds for such work to be carried on in a manner mutually agreed upon by the Secretary of Agriculture and the agricultural college. This Act required the States to contribute equally with the Federal Government in order to secure the benefits of the Act. Among the requirements imposed was a provision that not more than 5 per cent of each annual grant shall be applied to the printing and

distribution of publications. Supplementary appropriations were authorized in 1928 (45 Stat. 711) with the provision that 90 per cent thereof should be utilized for payment of salaries of county extension agents. Under these acts the appropriations for cooperative agricultural and home economic extension work have aggregated, for the period 1914 to 1930, $73,145,872.[53]

For the year 1930 alone the total appropriation for land grant colleges, agricultural experiment stations, and cooperative extension work was $14,712,936.[54]

Federal grants in large amounts have also been made to the States for the purpose of vocational education. The Smith-Hughes Act of 1917 (39 Stat. 929) authorized grants to the states subject to the acceptance by their legislatures of the prescribed terms which included, among other things, the creation of a state board, the submission of plans to the Federal board for vocational education, the establishment of teaching qualifications approved by the Federal board, the provision of suitable buildings and equipment, and the expenditure by the state or local community, or both, of an equal amount for the maintenance of training of teachers. The appropriations under this Act, from 1918 to 1934, aggregated $104,000,000.[55]

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[53] *Idem*, p. 340.
[54] *Ibid.*
[55] *Idem*, p. 39.

Forest-fire prevention.—In 1911 Congress appropriated $200,000 to be expended by the Secretary of Agriculture in cooperation with any state or states in protection from fire of the forested watersheds of navigable streams. Act of March 1, 1911 (c. 186, 36 Stat. 961). The state was eligible to receive this Federal aid after it had established a system of fire protection and had appropriated a sum as large as the Federal grant. The money was to be spent by the state officials, subject to Federal approval. The original grant was soon expended and yearly appropriations of $100,000 were made by Congress until 1920, when the annual subsidy was raised to $125,000, and in 1921 to $400,000.[56] Up to 1924 Congress had limited the use of such funds to the protection of the forested watersheds of navigable streams, but in 1924 the Clarke-McNary law authorized an appropriation to be used in cooperation with States for the protection from fire of all forest lands, private or government owned, within or without watersheds, with the provision that the amount expended should not exceed the expenditure of the State. Act of June 7, 1924, c. 348, 43 Stat. 653. Thirty-three States have accepted Federal benefits under the Clarke-McNary law.[57]

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[56]Act of March 4, 1917, c. 179, 39 Stat. 1134, 1166; Act of October 1, 1918, c. 178, 40 Stat. 973, 1005; Act of July 24, 1919, c. 26, 41 Stat. 234, 268; Act of May 31, 1920, c. 217, 41 Stat. 694, 728; Act of March 3, 1921, c. 127, 41 Stat. 1315, 1344.

[57]A. F. Macdonald, *Federal Aid* (1928), p. 43.

Highways.—Federal grants to States for the construction of highways are a familiar type of Federal aid. Since the Act of July 11, 1916, c. 241, 39 Stat. 355, constantly increasing appropriations have been made.[58] Under these Acts the expenditure of the Federal Government was limited to 50 per cent of the estimated cost of the approved projects, and the construction work was to be done under the supervision of the states but subject to the inspection and approval of the Secretary of Agriculture.

Discussing the Federal-aid highway legislation in *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 417, 418–419, this Court said:

> The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed.
>
> To achieve its purposes, the Federal Government has made large contributions to the cost of the Federal-aid highway system. * * * *It has, since the depression, given to the several States emergency grants to be*

[58] See e. g., Act of July 11, 1916, c. 241, 39 Stat. 355; Act of February 28, 1919, c. 69, 40 Stat. 1189, 1200–1201; Act of November 9, 1921, c. 119, 42 Stat. 212; Act of June 19, 1922, c. 227, 42 Stat. 652, 660; Act of January 22, 1923, c. 29, 42 Stat. 1154, 1157; Act of February 26, 1923, c. 119, 42 Stat. 1289, 1321; Act of February 12, 1925, c. 219, 43 Stat. 889, Sec. 1.

expended in highway ...ruction for the relief of unemployment. [Italics supplied.]

Vocational rehabilitation.—Beginning with the Act of June 2, 1920, Congress has made an annual appropriation, of $1,000,000 since 1924, to the States for the promotion of vocational rehabilitation of persons disabled in industry or in any other legitimate occupation, on the condition that the States expend at least equal sums and meet certain Federal requirements, including a requirement that none of the funds be used for buildings."

Health and hygiene.—The Sheppard-Towner Act of November 23, 1921, c. 135, 42 Stat. 224, Sec. 2, provided for a state subsidy of $1,240,000 annually "for the promotion of the welfare and hygiene of maternity and infancy." This was to be apportioned among such of the several states as should accept and comply with its provisions, including the condition that the payments to any state should not be made until the state had appropriated an equal amount. This was the Act involved in *Massachusets* v. *Mellon,* 262 U. S. 447.

In view of this background of Federal grants-in-aid, and the decision in the *Steward* case, *supra,* we submit that the validity of the statutory provisions for loans and grants, as against the charge

"Act of June 2, 1920, c. 219, 41 Stat. 135, 136, Secs. 1–4, as amended by the Act of June 5, 1924, c. 265, 43 Stat. 430, 431, and Act of June 30, 1932, c. 324, 47 Stat. 448, 449. For other examples of Federal-State cooperation, see U. S. Daily, August 14, 1928, p. 4.

of violation of the Tenth Amendment, has been put beyond the realm of debate.

The fact that the result of the loan and grant will be competition raises no constitutional question. The resulting competition will be that of the cities and not of the Federal Government. And in any event, such collateral consequences do not affect the validity of the Federal action even though they might not alone justify it. *Sonzinsky* v. *United States,* 300 U. S. 506.

There is nothing in the loan and grant agreements themselves which constitutes an invasion of the powers of the State. Apparently petitioner so concedes. The agreements provide in Section 13 that there are no other agreements or undertakings between the cities and the Federal Government save those therein contained. The position of the Federal Government under the agreements may be succinctly described as that of a bondholder possessing only the rights conferred by the laws of the state upon any holder of such bonds. Specific provision to that effect is found in Section 13 of the agreements.[60] The state remains free to pursue its own policy respecting the regulation of utility

[60] The fact that the bonds are payable solely out of the revenues of the project does not affect the status of the Federal Government in relation to the project. Revenue bonds are a well-recognized form of security issued by public bodies and held by institutional and other investors. *Cf. Puget Sound Co.* v. *Seattle*, 291 U. S. 619, 631 (Opinion of Van Devanter, J., concurring); see Public Works Administration, *Revenue Bond Financing* (1936).

rates and service.[61] The only restriction on the State's power is that the limited rights of bondholders granted by existing state law must not be destroyed; and this restriction is founded not upon any requirement imposed by Congress or the Administrator but upon Section 10 of Article 1 of the Federal Constitution itself.

If there is any interference with the reserved powers of the states, or with local self-government, it is properly attributable, we submit, not to Congress or to the Administrator, but to the petitioner, which seeks to prevent the state and its municipalities from carrying out an undertaking which they have freely determined upon and in which they have an admitted constitutional right to engage.

VI

The Alleged Improper Policy or Nonstatutory Standard or Criterion Ascribed to the Administrator Cannot Invalidate His Acts

As noted *supra,* pages 14 to 54, it is not open to petitioner to assert that the Administrator had

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[61] It is thus unnecessary to consider in the present cases the question whether the inclusion of a provision in the agreements with respect to resale rates would be valid. It may be noted that such a provision would not constitute an invalid delegation of the legislative powers of the cities, under the decisions of state courts. *Clarke* v. *South Carolina Public Service Authority*, 177 S. C. 427; *Thomas* v. *McHugh*, 256 N. W. 763, 767–769 (N. D. 1934); *Marin Water & Power Co.* v. *Sausalito*, 168 Calif. 587, 143 Pac. 767; *Bell* v. *City of Fayette*, 28 S. W. (2d) 356, 359, 362.

any improper policy or applied any improper or nonstatutory standard or criterion in making the loan and grant agreements, because the trial court has made express findings to the contrary, and petitioner has assigned no error in this court as to the correctness of those findings; and, moreover, petitioner cannot show that those findings are not amply supported by the evidence.

Petitioner has endeavored to maintain that in carrying out the statute the Administrator has made loans and grants for local electric projects for the purpose solely of reducing rates to consumers and "regulating" the rates of private companies; that if the statute had so provided it would be unconstitutional; and that therefore the Administrator's action is itself unconstitutional. The conclusive answer is that the District Court found, and the record shows, that such has not been the Administrator's interpretation of the statute. The administration of the statute, as already shown, has been in accordance with the intention of Congress that neither a municipal power project nor any other municipal project should be rejected merely because it is competitive with an existing private enterprise. The fact that in carrying out the statute the Administrator was necessarily aware of its consequences cannot affect the validity of his action.

Even if we were to assume, however, that the findings of the District Court are in error, and that

petitioner has not waived its right to assail the findings, we submit that the alleged application by the Administrator of an improper or non-statutory standard or criterion would in any event be irrelevant.

In the first place, as pointed out above (pp. 14 to 15) petitioner, by its own arguments, discloses that irrelevance, for in its brief and throughout this litigation it has insisted that the threatened financial loss to it is the inevitable (but incidental) consequence of the making of any loan and grant, pursuant to the statute, to these cities for the construction of competing power projects. In short, petitioner asserts—and it is a fact—that if the Administrator has complied with the statute and has not applied the alleged additional improper policy or standard, the consequences to petitioner will be exactly the same.

Aside from the failure of proof as to the improper purposes of the Administrator and the findings of the District Court in that regard, and aside from the irrelevance of that element as a matter of fact, it is also irrelevant as a matter of law. If, as we have shown, the loans and grants in the cases at bar are authorized by the statutes and the statutes themselves are constitutional, the alleged improper purpose or standard of the Administrator cannot serve to render invalid either the statute or the action taken thereunder. This Court has repeatedly held that where an officer is

acting in the exercise of executive powers conferred upon him by a valid statute, and where his action, viewed objectively, is in conformity with the statute, the reasons for his action cannot be made the subject of judicial inquiry.

Thus in *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, where the President had taken possession of telephone companies under a statute enacted pursuant to the war power, it was argued that his action was unlawful and unconstitutional, as the war had virtually ended, and as therefore the action was not taken for the purpose of prosecuting the war but for the unlawful and non-statutory purpose of regulating intrastate telephone rates. (See argument, 250 U. S. at 177.) In disposing of that contention, the Court, speaking through Chief Justice White, said (p. 184):

> The proposition that the President in exercising the power exceeded the authority given him is based upon two considerations. First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and *assails the motives which it is asserted induced the exercise of the power.* But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the

> legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion. [Italics supplied.]

In *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, the appellant charged that an order of the Secretary of Commerce, acting as successor to the Shipping Board, requiring the disclosure of information as to rates and charges, "was issued pursuant to a concerted plan" of the defendant officers to compel the appellant to become part of a shipping monopoly, and that therefore any provision of law purporting to authorize the order was in violation of the Fourth and Fifth Amendments to the Constitution.[62] This contention, which is

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[62] The pertinent allegation of the bill of complaint in that case is so strikingly similar in form to the charges made in the present case that we reprint the allegation here (Record in U. S. Supreme Court, p. 14).

"On information and belief, said order of November 18, 1935, was issued pursuant to a concerted plan of the defendants to compel complainant and any other independent or non-conference carriers to become part of steamship conferences or the shipping monopoly or a contemplated unified system of transportation by all common carriers by water in the foreign commerce of the United States, and was issued at the request of certain of complainant's competitors to compel the complainant, which is an independent, unsubsidized, non-conference line, either to join a conference or shipping monopoly, which it could not lawfully be compelled to join, or else to suffer serious damage to, if not complete destruction of, its business from the disclosure to its competitors, members of conferences, or shipping monopoly, of its private business records and rates charged and commodities moved by it. The complainant is informed and verily believes, and therefore alleges, that *any provision of law purporting to*

similar in all respects to that argued in the case at bar, was rejected by a unanimous Court, speaking through Mr. Justice Roberts, on "the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it" (p. 145). The Court cited *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163, 184; *Philadelphia & Trenton Railroad Co.* v. *Stimpson,* 14 Pet. 448, 458, 459; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14, 15.

The precise argument made by petitioner was rejected by this Court when it was advanced by its stockholders in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288. There it was argued, *inter alia,* that, even if the statute in itself was constitutional, the conduct of the directors of the Authority, in making the contract there involved, was invalid because it was based upon the very "national power policy" which petitioner in the case at bar ascribed to the Administrator (R. I, 489, 171), and that that policy made the acts of the Authority violative of the statute, and also unconstitutional. That argument, which was rejected by eight members of this Court, will be found set forth, almost *in haec verba,* in the brief filed in this Court by the unsuccessful plaintiffs in the *Ashwander* case, and in the dissenting opinion in

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authorize the issuance of said order for said purposes would be a nullity, being violative of the provisions of the Fourth and Fifth Amendments to the Constitution of the United States." [Italics supplied.]

that case. The opinion of the majority of the court emphasized the principle that, when a statute itself is valid, the constitutionality of official action must be tested by looking to the action itself—to see whether it complies with the provisions of the valid statute—and not by judging the policies or motives or pronouncements on the part of the administrative officers.

See also *Anicker* v. *Gunsburg,* 246 U. S. 110, 120; *DeCambra* v. *Rogers,* 189 U. S. 119, 122; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *West* v. *Hitchcock,* 205 U. S. 80, 85–86.

The authorities cited by petitioner deal with fundamentally different situations. In all the cases cited by petitioner (Brief, pp. 65–66) the defendant officers had *refused* to act in the manner required by the statute, in the mistaken belief that they had no power to act, or that the statute gave them discretion not to act. And accordingly the court required the officers to take action in accordance with the statute properly interpreted—and not, as petitioner's argument implies, to prevent action by the officer which is authorized by the statute. Typical is *Herkness* v. *Irion,* 278 U. S. 92, where a State officer refused to issue a license to plaintiff, on the basis of a nonstatutory rule. To like effect are the several Interstate Commerce Commission cases cited by petitioner, such as *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship*

Co., 224 U. S. 474, where the Commission, through a misinterpretation of the statute, refused to take jurisdiction and this Court ordered it to assume jurisdiction and to exercise its discretion.

Arguing the same point, petitioner in the *Duke Power Co.* case cites *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, in support of its position and as if that case were contrary to the *Dakota Telephone* and *Isbrandtsen-Moller* cases, *supra*. If there were any inconsistency between the *Southern Pacific* case and these cases, the former must be deemed to have been overruled. But there is no such discrepancy, for the latter cases related to "executive conduct." (See *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454, 465, note 9, and cases there cited; *Morgan* v. *United States*, 298 U. S. 468, 479). The *Southern Pacific* case, on the other hand, related to the regulatory powers of the Interstate Commerce Commission acting pursuant to a statute which requires the Commission to act upon the basis of record evidence and upon findings. More important, in the *Southern Pacific* case this Court found, from the face of the order of the Commission, the Commission's opinion, and the official syllabus of that opinion, that the Commission was not complying with the statutory requirements (as is the Administrator in the case at bar) but was ignoring the statutory bases for action by it and was acting solely upon the basis of a criterion not authorized by or found in the statute.

Atchison, T. & S. F. Ry. Co. v. *Interstate Commerce Commission,* 190 Fed. 591 (decided by the Commerce Court), involved merely an application of the rule of the *Southern Pacific* case where conduct of the Commission was involved. *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462, S. D. W. Va., was of like character. Subsequently the Circuit Court of Appeals for the Fourth Circuit, in *Appalachian Electric Power Co.* v. *Smith,* 67 F. (2d) 451, 454, said, "The allegations and prayers of the bill which relate to the abuse of authority by the Commission need not be considered; for it is clear that it is only on the allegations of want of statutory or constitutional authority that the suit against the Commissioners as individuals could under any theory be sustained." And in its most recent opinion in the *Duke* case, 91 Fed. (2d) 665, at 675, 676 (C. C. A. 4), the same court said that

> even if the Administrator have the motive attributed to him by plaintiff, and even if this be an improper motive, the validity of his action is not affected thereby. Equity will restrain where there is lack of power on the part of a public officer, not where there is mere abuse of power in doing from a wrong motive or to accomplish an ulterior purpose that which the law authorizes. To grant injunction in the latter case would be for the courts to control the executive in the exercise of executive discretion, a thing which under our tripartate form of government they have no power to do. * * *

> The fact that the competition which will result from the project may have some effect upon plaintiff's rates cannot affect the validity of the action of the Administrator any more than his motives. It is true, of course, that neither Congress nor the Administrator may do something which they are forbidden to do by calling it something else; but the exercise of a granted power is not rendered unlawful by reason of its incidental effects. (Citing *Sonzinsky* v. *United States,* and *Magnano Co.* v. *Hamilton, supra.*)

There is, to be sure, a limited class of cases in which the action of an officer, though taken pursuant to a valid statute and in conformity therewith, may nevertheless be held invalid. In those cases the gravamen of the complaint is that the officer, in administering the statute, has systematically discriminated against one person or group in favor of others similarly situated, and his action therefore denies to the complainant the equal protection of the laws or due process of law. In such a case the officer's action itself is unconstitutional because, though authorized with respect to the complainant, it was deliberately not so taken with respect to others. *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23, 28–30; Cf. *Norris* v. *Alabama,* 294 U. S. 587. Even in such cases it is the action of the officer, objectively viewed, which is the subject of inquiry. It is enough to say that no such complaint of unlawful discrimination is made in the cases at bar.

CONCLUSION

For the foregoing reasons, the decree of the Court of Appeals, affirming that of the District Court, should be affirmed.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

	Page
A. Acts of Congress:	
1. Title II of National Industrial Recovery Act (c. 90, 48 Stat. 200)	1
2. Emergency Appropriation Act, Fiscal year 1935 (c. 648, 48 Stat. 1021, 1055)	24
3. Emergency Relief Appropriation Act of 1935 (c. 48, 49 Stat. 115, 119)	26
4. First Deficiency Appropriation Act, Fiscal year 1936 (c. 689, 49 Stat. 1597, 1608, 1609)	37
5. Public Works Administration Extension Act of 1937 (Public Res. No. 47, 75th Cong.)	39
B. Executive Orders:	
1. No. 6174, June 16, 1933	42
2. No. 6198, July 8, 1933	43
3. No. 6252, August 19, 1933	44
4. No. 6929, December 26, 1934	47
5. No. 7064, June 7, 1935	48
C. State Legislation:	
1. Alabama Acts, Extra Session, 1933, No. 107	52
2. South Carolina Acts, 1933, No. 299	56
3. South Carolina Acts, 1934, No. 1095	75
D. Legislative History:	
1. Intent of Congress with respect to competitive projects, as shown by legislative history of Emergency Relief Appropriation Act, 1935	78
2. Interpretation of the words "work under each particular project" in the 1935 Act	85
3. The provision relating to the Public Works Administration contained in the First Deficiency Appropriation Act, Fiscal year 1936; Debates thereon; and Statement by the Chairman of the House Committee on Appropriations in explanation of the provision	89
4. Inclusion of generating plants and distribution systems within the meaning of Title II of the National Industrial Recovery Act	96

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APPENDIX A

ACTS OF CONGRESS

1

TITLE II OF NATIONAL INDUSTRIAL RECOVERY ACT (C. 90, 48 STAT. 200)

AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

TITLE II—PUBLIC WORKS AND CONSTRUCTION PROJECTS

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

SECTION 201. (a) To effectuate the purposes of this title, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the "Administrator"), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to

prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint.

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing, and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

(d) After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended, the President shall not make any further loans or grants or enter upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate: *Provided,* That he may issue funds to a borrower under this title prior to January 23, 1939, under the terms of any agreement, or any commitment to bid upon or

purchase bonds, entered into with such borrower prior to the date of termination, under this section, of the power of the President to make loans.

SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvement and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed: *Provided,* That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than

those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and/or limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft and technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or motorization of such Army tactical units as he may designate: *Provided, however,* That in the event of an international agreement for the further limitation of armament, to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part, any such naval or military construction or mechanization and motorization of Army units: *Provided further,* That this title shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such Architect is the contracting and/or executive officer.

SEC. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is au-

thorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 percentum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase: *Provided,* That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; (4) to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; and (5) to advance, upon request of the Commission having jurisdiction of the project, the unappropriated balance of the sum authorized for carrying out the provisions of the Act entitled "An Act to provide for the construction and equipment of an annex to the Library of Congress," approved June 13, 1930 (46 Stat. 583); such advance to be expended under the direction of such Commission

and in accordance with such Act: *Provided,* That in deciding to extend any aid or grant hereunder to any State, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several States, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

(b) All expenditures for authorized travel by officers and employees, including subsistence, required on account of any Federal public-works projects, shall be charged to the amounts allocated to such projects, notwithstanding any other provisions of law; and there is authorized to be employed such personal services in the District of Columbia and elsewhere as may be required to be engaged upon such work and to be in addition to employees otherwise provided for, the compensation of such additional personal services to be a charge against the funds made available for such construction work.

(c) In the acquisition of any land or site for the purposes of Federal public buildings and in the construction of such buildings provided for in this title, the provisions contained in sections 305 and 306 of the Emergency Relief and Construction Act of 1932, as amended, shall apply.

(d) The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality, notwithstanding any constitutional or legal restriction or limitation on the right or power

of such State, county, or municipality to borrow money or incur indebtedness.

SEC. 204. (a) For the purpose of providing for emergency construction of public highways and related projects, the President is authorized to make grants to the highway departments of the several States in an amount not less than $400,000,000, to be expended by such departments in accordance with the provisions of the Federal Highway Act, approved November 9, 1921, as amended and supplemented, except as provided in this title, as follows:

(1) For expenditure in emergency construction on the Federal aid highway system and extensions thereof into and through municipalities. The amount apportioned to any State under this paragraph may be used to pay all or any part of the cost of surveys, plans, and of highway and bridge construction, including the elimination of hazards to highway traffic, such as the separation of grades at crossing, the reconstruction of existing railroad grade crossing structures, the relocation of highways to eliminate railroad crossings, the widening of narrow bridges and roadways, the building of footpaths, the replacement of unsafe bridges, the construction of routes to avoid congested areas, the construction of facilities to improve accessibility and the free flow of traffic, and the cost of any other construction that will provide safer traffic facilities or definitely eliminate existing hazards to pedestrian or vehicular traffic. No funds made available by this title shall be used for the acquisition of any land, right of way, or easement in connection with any railroad grade elimination project.

(2) For expenditure in emergency construction on secondary or feeder roads to be agreed upon by the State highway departments and the Secretary of Agriculture: *Provided,* That the State or responsible political subdivision shall provide for the proper maintenance of said roads. Such grants shall be available for payment of the full cost of surveys, plans, improvement, and construction of secondary or feeder roads, on which projects shall be submitted by the State highway department and approved by the Secretary of Agriculture.

(b) Any amounts allocated by the President for grants under subsection (a) of this section shall be apportioned among the several States seven-eighths in accordance with the provisions of section 21 of the Federal Highway Act, approved November 9, 1921, as amended and supplemented (which Act is hereby further amended for the purposes of this title to include the District of Columbia), and one-eighth in the ratio which the population of each State bears to the total population of the United States, according to the latest decennial census and shall be available on July 1, 1933, and shall remain available until expended; but no part of the funds apportioned to any State need be matched by the State, and such funds may also be used in lieu of State funds to match unobligated balances of previous apportionments of regular Federal-aid appropriations.

(c) All contracts involving the expenditure of such grants shall contain provisions establishing minimum rates of wages, to be predetermined by the State highway department, which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for

bids and shall be included in proposals for bids for the work.

(d) In the expenditure of such amounts, the limitations in the Federal Highway Act, approved November 9, 1921, as amended and supplemented, upon highway construction, reconstruction, and bridges within municipalities and upon payments per mile which may be made from Federal funds, shall not apply.

(e) As used in this section the term "State" includes the Territory of Hawaii and the District of Columbia. The term "highway" as defined in the Federal Highway Act approved November 9, 1921, as amended and supplemented, for the purposes of this section, shall be deemed to include such main parkways as may be designated by the State and approved by the Secretary of Agriculture as part of the Federal-aid highway system.

(f) Whenever, in connection with the construction of any highway project under this section or section 202 of this Act, it is necessary to acquire rights of way over or through any property or tracts of land owned and controlled by the Government of the United States, it shall be the duty of the proper official of the Government of the United States having control of such property or tracts of land with the approval of the President and the Attorney General of the United States, and without any expense whatsoever to the United States, to perform any acts and to execute any agreements necessary to grant the rights of way so required, but if at any time the land or the property the subject of the agreement shall cease to be used for the purposes of the highway, the title in and the jurisdiction over the land or property

shall automatically revert to the Government of the United States and the agreement shall so provide.

(g) Hereafter in the administration of the Federal Highway Act, and Acts amendatory thereof or supplementary thereto, the first paragraph of section 9 of said Act shall not apply to publicly owned toll bridges or approaches thereto, operated by the highway department of any State, subject, however, to the condition that all tolls received from the operation of any such bridge, less the actual cost of operation and maintenance, shall be applied to the repayment of the cost of its construction or acquisition, and when the cost of its construction or acquisition shall have been repaid in full, such bridge thereafter shall be maintained and operated as a free bridge.

SEC. 205. (a) Not less than $50,000,000 of the amount made available by this Act shall be allotted for (A) national forest highways, (B) national forest roads, trails, bridges, and related projects, (C) national park roads and trails in national parks owned or authorized, (D) roads on Indian reservations, and (E) roads through public lands, to be expended in the same manner as provided in paragraph (2) of section 301 of the Emergency Relief and Construction Act of 1932, in the case of appropriations allocated for such purposes, respectively, in such section 301, to remain available until expended.

(b) The President may also allot funds made available by this Act for the construction, repair, and improvement of public highways in Alaska, the Canal Zone, Puerto Rico, and the Virgin Islands.

SEC. 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

SEC. 207. (a) For the purpose of expediting the actual construction of public works contemplated by this title and to provide a means of financial

assistance to persons under contract with the United States to perform such construction, the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, to approve any assignment executed by any such contractor, with the written consent of the surety or sureties upon the penal bond executed in connection with his contract, to any national or State bank, or his claim against the United States, or any part of such claim, under such contract; and any assignment so approved shall be valid for all purposes, notwithstanding the provisions of sections 3737 and 3477 of the Revised Statutes, as amended.

(b) The funds received by a contractor under any advances made in consideration of any such assignment are hereby declared to be trust funds in the hands of such contractor to be first applied to the payment of claims of subcontractors, architects, engineers, surveyors, laborers, and material men in connection with the project, to the payment of premiums on the penal bond or bonds, and premiums accruing during the construction of such project on insurance policies taken in connection therewith. Any contractor and any officer, director, or agent of any such contractor, who applies, or consents to the application of, such funds for any other purpose and fails to pay any claim or premium hereinbefore mentioned, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

(c) Nothing in this section shall be considered as imposing upon the assignee any obligation to

see to the proper application of the funds advanced by the assignee in consideration of such assignment.

SUBSISTENCE HOMESTEADS

SEC. 208. To provide for aiding the redistribution of the overbalance of population in industrial centers $25,000,000 is hereby made available to the President, to be used by him through such agencies as he may establish and under such regulations as he may make, for making loans for and otherwise aiding in the purchase of subsistence homesteads. The moneys collected as repayment of said loans shall constitute a revolving fund to be administered as directed by the President for the purposes of this section.

RULES AND REGULATIONS

SEC. 209. The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment not to exceed six months, or both.

ISSUE OF SECURITIES AND SINKING FUND

SEC. 210. (a) The Secretary of the Treasury is authorized to borrow, from time to time, under the Second Liberty Bond Act, as amended, such amounts as may be necessary to meet the expenditures authorized by this Act, or to refund any obligations previously issued under this section, and to issue therefor bonds, notes, certificates of indebtedness, or Treasury bills of the United States.

(b) For each fiscal year beginning with the fiscal year 1934 there is hereby appropriated, in addition

to and as part of, the cumulative sinking fund provided by section 6 of the Victory Liberty Loan Act, as amended, out of any money in the Treasury not otherwise appropriated, for the purpose of such fund, an amount equal to 2½ per centum of the aggregate amount of the expenditures made out of appropriations made or authorized under this Act as determined by the Secretary of the Treasury.

REEMPLOYMENT AND RELIEF TAXES

SEC. 211. (a) Effective as of the day following the date of the enactment of this Act, section 617 (a) of the Revenue Act of 1932 is amended by striking out "1 cent" and inserting in lieu thereof "1½ cents."

(b) Effective as of the day following the date of the enactment of this Act, section 617 (c) (2) of such Act is amended by adding at the end thereof a new sentence to read as follows: "As used in this paragraph the term 'benzol' does not include benzol sold for use otherwise than as a fuel for the propulsion of motor vehicles, motor boats, or airplanes, and otherwise than in the manufacture or production of such fuel."

SEC. 212. Titles IV and V of the Revenue Act of 1932 are amended by striking out "1934" wherever appearing therein and by inserting in lieu thereof "1935". Section 761 of the Revenue Act of 1932 is further amended by striking out "and on July 1, 1933" and inserting in lieu thereof "and on July 1, 1933, and on July 1, 1934,".

SEC. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in

the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act.

(b) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the collector of the district in which its principal place of business is located, or, if it has no principal place of business in the United States, to the collector at Baltimore, Maryland.

(c) Every such corporation is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payment made in accordance with the provisions of this section.

(d) The provisions of sections 115, 771 to 774, inclusive, and 1111 of the Revenue Act of 1932 shall be applicable with respect to the tax imposed by this section.

(e) The taxes imposed by this section shall not apply to the dividends of any corporation enumerated in section 103 of the Revenue Act of 1932.

SEC. 214. Section 104 of the Revenue Act of 1932 is amended by striking out the words "the surtax" wherever occurring in such section and inserting in lieu thereof "any internal-revenue tax." The heading of such section is amended by striking out "surtaxes" and inserting in lieu thereof "internal-

revenue taxes." Secton 13 (c) of such Act is amended by striking out "surtax" and inserting in lieu thereof "internal-revenue tax."

SEC. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

(b) For each year ending June 30 there is hereby imposed upon every foreign corporation with respect to carrying on or doing business in the United States for any part of such year an excise tax equivalent to $1 for each $1,000 of the adjusted declared value of capital employed in the transaction of its business in the United States.

(c) The taxes imposed by this section shall not apply—

(1) to any corporation enumerated in section 103 of the Revenue Act of 1932;

(2) to any insurance company subject to the tax imposed by section 201 or 204 of such Act;

(3) to any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or

(4) to any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.

(d) Every corporation liable for tax under this section shall make a return under oath within one

month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

(e) Returns required to be filed for the purpose of the tax imposed by this section shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under title II of the Revenue Act of 1926.

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be

the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

(g) The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

SEC. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

(b) The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law (including penalties) as the taxes imposed by title I of the Revenue Act of 1932.

SEC. 217. (a) The President shall proclaim the date of—

(1) the close of the first fiscal year ending June 30 of any year after the year 1933, during which the total receipts of the United States (excluding public-debt receipts) exceed its total expenditures (excluding public-debt expenditures other than those chargeable against such receipts), or

(2) the repeal of the eighteenth amendment to the Constitution,

whichever is the earlier.

(b) Effective as of the 1st day of the calendar year following the date so proclaimed section

617 (a) of the Revenue Act of 1932, as amended is amended by striking out "1½ cents" and inserting in lieu thereof "1 cent."

(c) The tax on dividends imposed by section 213 shall not apply to any dividends declared on or after the 1st day of the calendar year following the date so proclaimed.

(d) The capital-stock tax imposed by section 215 shall not apply to any taxpayer in respect of any year beginning on or after the 1st day of July following the date so proclaimed.

(e) The excess-profits tax imposed by section 216 shall not apply to any taxpayer in respect of any taxable year after its taxable year during which the date so proclaimed occurs.

SEC. 218. (a) Effective as of January 1, 1933, sections 117, 23 (i), 169, 187, and 205 of the Revenue Act of 1932 are repealed.

(b) Effective as of January 1, 1933, section 23 (r) (2) of the Revenue Act of 1932 is repealed.

(c) Effective as of January 1, 1933, section 23 (r) (3) of the Revenue Act of 1932 is amended by striking out all after the word "Territory" and inserting a period.

(d) Effective as of January 1, 1933, section 182 (a) of the Revenue Act of 1932 is amended by inserting at the end thereof a new sentence as follows: "No part of any loss disallowed to a partnership as a deduction by section 23 (r) shall be allowed as a deduction to a member of such partnership in computing net income."

(e) Effective as of January 1, 1933, section 141 (c) of the Revenue Act of 1932 is amended by striking out "except that for the taxable years 1932 and 1933 there shall be added to the rate of tax pre-

scribed by sections 13 (a), 201 (b), and 204 (a), a rate of three fourths of 1 per centum" and inserting in lieu thereof the following: "except that for the taxable years 1932 and 1933 there shall be added to the rate of tax prescribed by sections 13 (a), 201 (b), and 204 (a) a rate of three fourths of 1 per centum and except that for the taxable years 1934 and 1935 there shall be added to the rate of tax prescribed by sections 13 (a), 201 (b), and 204 (a) a rate of 1 per centum."

(f) No interest shall be assessed or collected for any period prior to September 15, 1933, upon such portion of any amount determined as a deficiency in income taxes as is attributable solely to the amendments made to the Revenue Act of 1932 by this section.

(g) In cases where the effect of this section is to require for a taxable year ending prior to June 30, 1933, the making of an income-tax return not otherwise required by law, the time for making the return and paying the tax shall be the same as if the return was for a fiscal year ending June 30, 1933.

(h) Section 55 of the Revenue Act of 1932 is amended by inserting before the period at the end thereof a semicolon and the following: "and all returns made under this Act after the date of enactment of the National Industrial Recovery Act shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President."

SEC. 219. Section 500 (a) (1) of the Revenue Act of 1926, as amended, is amended by striking out the period at the end of the second sentence thereof and inserting in lieu thereof a comma and

the following: "except that no tax shall be imposed in the case of persons admitted free to any spoken play (not a mechanical reproduction), whether or not set to music or with musical parts or accompaniments, which is a consecutive narrative interpreted by a single set of characters, all necessary to the development of the plot, in two or more acts, the performance consuming more than 1 hour and 45 minutes of time."

APPROPRIATION

SEC. 220. For the purposes of this Act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000. The President is authorized to allocate so much of said sum, not in excess of $100,000,000, as he may determine to be necessary for expenditures in carrying out the Agricultural Adjustment Act and the purposes, powers, and functions heretofore and hereafter conferred upon the Farm Credit Administration.

SEC. 221. Section 7 of the Agricultural Adjustment Act, approved May 12, 1933, is amended by striking out all of its present terms and provisions and substituting therefor the following:

"SEC. 7. The Secretary shall sell the cotton held by him at his discretion, but subject to the foregoing provisions: *Provided,* That he shall dispose of all cotton held by him by March 1, 1936: *Provided further,* That notwithstanding the provisions of section 6, the Secretary shall have authority to enter into option contracts with producers of cotton to sell to the producers such cotton held by him, in such amounts and at such prices and upon such terms and conditions as the Secretary may deem advisable, in combination with rental or

benefit payments provided for in part 2 of this title.

"Notwithstanding any provisions of existing law, the Secretary of Agriculture may in the administration of the Agricultural Adjustment Act make public such information as he deems necessary in order to effectuate the purposes of such Act."

TITLE III—AMENDMENTS TO EMERGENCY RELIEF AND CONSTRUCTION ACT AND MISCELLANEOUS PROVISIONS

SECTION 301. After the expiration of ten days after the date upon which the Administrator has qualified and taken office, (1) no application shall be approved by the Reconstruction Finance Corporation under the provisions of subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and (2) the Administrator shall have access to all applications, files, and records of the Reconstruction Finance Corporation; may issue funds to a borrower under such administration of funds over such subsection: *Provided,* That the Reconstruction Finance Corporation may issue funds to a borrower under such subsection (a) prior to January 23, 1939, under the terms of any agreement or any commitment to bid upon or purchase bonds entered into with such borrower pursuant to an application approved prior to the date of termination, under this section, of the power of the Reconstruction Finance Corporation to approve applications.

DECREASE OF BORROWING POWER OF RECONSTRUCTION FINANCE CORPORATION

SEC. 302. The amount of notes, debentures, bonds, or other such obligations which the Recon-

struction Finance Corporation is authorized and empowered under section 9 of the Reconstruction Finance Corporation Act, as amended, to have outstanding at any one time is decreased by $400,000,000.

SEPARABILITY CLAUSE

SEC. 303. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SHORT TITLE

SEC. 304. This Act may be cited as the "National Industrial Recovery Act."

Approved, June 16, 1933, 11:55 a. m.

2

EMERGENCY APPROPRIATION ACT, FISCAL YEAR 1935
(c. 648, 48 STAT. 1021, 1055)

AN ACT Making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1934, and prior fiscal years, to provide supplemental general and emergency appropriations for the fiscal years ending June 30, 1934, and June 30, 1935, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1934, and prior fiscal years, to provide supplemental general and emergency appropriations for the fiscal years ending June 30, 1934, and June 30, 1935, and for other purposes, namely:

* * * * *

TITLE II—EMERGENCY APPROPRIATIONS

EXECUTIVE

For an additional amount for carrying out the purposes of the Act entitled "An Act for the relief of unemployment through the performance of useful public work, and for other purposes," approved March 31, 1933 (48 Stat. 22); the Federal Emergency Relief Act of 1933, approved May 12, 1933 (48 Stat. 55); the Tennessee Valley Authority Act of 1933, approved May 18, 1933 (48 Stat. 58); and the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 195); and including $325,000 for an addition to the Executive Office Building and for the furnishings and equipment thereof; $899,675,000, to be allocated by the President for further carrying out the purposes of the aforesaid Acts and to remain available until June 30, 1935: *Provided,* That not exceeding $500,000,000 in the aggregate of any savings or unobligated balances in funds of the Reconstruction Finance Corporation may, in the discretion of the President, be transferred and applied to the purposes of the Federal Emergency Relief Act of 1933 and/or title II of the National Industrial Recovery Act, and any unobligated balances in appropriations (including allocations of appropriations) of the Federal Emergency Administration of Public Works may, in the discretion of the President, be transferred and applied to the purposes of such Federal Emergency Relief Act of 1933: *Provided further,* That the amounts to be made available under the authority of this paragraph for public works under the National Industrial Recovery Act shall not exceed in the aggregate $500,000,000.

EMERGENCY RELIEF

* * * * *

The Reconstruction Finance Corporation is hereby authorized to purchase marketable securities, satisfactory to said Corporation, acquired or to be acquired by the Federal Emergency Administration of Public Works, and any sums paid for such securities shall be available to said Federal Emergency Administration of Public Works for the making of additional loans (but not grants) under the provisions of title II of the National Industrial Recovery Act: *Provided,* That the amount that the Reconstruction Finance Corporation may have invested at any one time in such securities shall not exceed $250,000,000. The amount of notes, debentures, and bonds or other such obligations which the Reconstruction Finance Corporation is authorized and empowered to have outstanding at any one time pursuant to section 9 of the Reconstruction Finance Corporation Act, as amended, is hereby increased by the sums necessary for these purchases, not to exceed $250,000,000.

3

EMERGENCY RELIEF APPROPRIATION ACT OF 1935
(C. 48, 49 STAT. 115, 119)

JOINT RESOLUTION Making appropriations for relief purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be used in the discretion and

under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of $4,000,000,000, together with the separate funds established for particular areas by proclamation of the President pursuant to section 15 (f) of the Agricultural Adjustment Act (but any amounts thereof shall be available for use only for the area for which the fund was established); not exceeding $500,000,000 in the aggregate of any savings or unexpended balances in funds of the Reconstruction Finance Corporation; and not exceeding a total of $380,000,000 of such unexpended balances as the President may determine are not required for the purposes for which authorized, of the following appropriations, namely: The appropriation of $3,300,000,000 for national industrial recovery contained in the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (48 Stat. 274); the appropriation of $950,000,000 for emergency relief and civil works contained in the Act approved February 15, 1934 (48 Stat. 351); the appropriation of $899,675,000 for emergency relief and public works, and the appropriation of $525,000,000 to meet the emergency and necessity for relief in stricken agricultural areas, contained in the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (48 Stat. 1055); and any remainder of the unobligated moneys referred to in section 4 of the Act approved March 31, 1933 (48 Stat. 22): *Provided,* That except as to such part of the appropriation made herein as the President may deem necessary for continuing relief as authorized under the Federal Emergency Relief Act of 1933, as amended, or for restoring to the Federal Emergency Administra-

tion of Public Works any sums which after December 28, 1934, were, by order of the President impounded or transferred to the Federal Emergency Relief Administration from appropriations heretofore made available to such Federal Emergency Administration of Public Works (which restoration is hereby authorized), this appropriation shall be available for the following classes of projects, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: (a) Highways, roads, streets, and grade-crossing elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation, $500,000,000; (c) rural electrification, $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; *(g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000;* (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000: *Provided further,* That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or

more of the foregoing limitations if he finds it necessary to do so in order to effectuate the purpose of this joint resolution: *Provided further,* That no part of the appropriation made by this joint resolution shall be expended for munitions, warships, or military or naval matériel; but this proviso shall not be construed to prevent the use of such appropriation for new buildings, reconstruction of buildings and other improvements in military or naval reservations, posts, forts, camps, cemeteries, or fortified areas, or for projects for nonmilitary or nonnaval purposes in such places.

Except as hereinafter provided, all sums allocated from the appropriation made herein for the construction of public highways and other related projects (except within or adjacent to national forests, national parks, national parkways, or other Federal reservations) shall be apportioned by the Secretary of Agriculture in the manner provided by section 204 (b) of the National Industrial Recovery Act for expenditure by the State highway departments under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of the Act of June 18, 1934 (48 Stat. 993): *Provided,* That any amounts allocated from the appropriation made herein for the elimination of existing hazards to life at railroad grade crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, shall be apportioned by the Secretary of Agriculture to the several States (including the Territory of Hawaii and the District of Colum-

bia), one-half on population as shown by the latest decennial census, one-fourth on the mileage of the Federal-aid highway system as determined by the Secretary of Agriculture, and one-fourth on the railroad mileage as determined by the Interstate Commerce Commission, to be expended by the State highway departments under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of such Act of June 18, 1934 (48 Stat. 993); but no part of the funds apportioned to any State or Territory under this joint resolution for public highways and grade crossings need be matched by the State or Territory: *And provided further,* That the President may also allot funds made available by this joint resolution for the construction, repair, and improvement of public highways in Alaska, Puerto Rico, and the Virgin Islands, and money allocated under this joint resolution to relief agencies may be expended by such agencies for the construction and improvement of roads and streets: *Provided, however,* That the expenditure of funds from the appropriation made herein for the construction of public highways and other related projects shall be subject to such rules and regulations as the President may prescribe for carrying out this paragraph and preference in the employment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief, where they are qualified, and the President is hereby authorized to predetermine for each State the hours of work and the rates of wages to be paid to skilled, intermediate, and unskilled

labor engaged in such construction therein: *Provided further,* That rivers and harbors projects, reclamation projects (except the drilling of wells, development of springs and subsurface waters), and public buildings projects undertaken pursuant to the provisions of this joint resolution shall be carried out under the direction of the respective permanent Government departments or agencies now having jurisdiction of similar projects.

Funds made available by this joint resolution may be used, in the discretion of the President, for the purpose of making loans to finance, in whole or in part, the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers. Such loans shall be made on such terms as the President shall prescribe and shall be repaid in equal annual installments, or in such other manner as the President may determine.

Funds made available by this joint resolution may be used, in the discretion of the President for the administration of the Agricultural Adjustment Act, as amended, during the period of twelve months after the effective date of this joint resolution.

SEC. 2. The appropriation made herein shall be available for use only in the United States and its Territories and possessions. The provisions of the Act of February 15, 1934 (48 Stat. 351), relating to disability or death compensation and benefits shall apply to those persons receiving from the appropriation made herein, for services rendered as employees of the United States, security payments in accordance with schedules established by

the President: *Provided,* That so much of the sum herein appropriated as the United States Employees' Compensation Commission, with the approval of the President, estimates and certifies to the Secretary of the Treasury will be necessary for the payment of such compensation and administrative expenses shall be set aside in a special fund to be administered by the Commission for such purposes; and after June 30, 1936, such special fund shall be available for these purposes annually in such amounts as may be specified therefor in the annual appropriation Acts. The provisions of section 3709 of the Revised Statutes (U. S. C., title 41, sec. 5) shall not apply to any purchase made or service procured in carrying out the provisions of this joint resolution when the aggregate amount involved is less than $300.

SEC. 3. In carrying out the provisions of this joint resolution the President may (a) authorize expenditures for contract stenographic reporting services; supplies and equipment; purchase and exchange of law books, books of reference, directories, periodicals, newspapers and press clippings; travel expenses, including the expense of attendance at meetings when specifically authorized; rental at the seat of government and elsewhere; purchase, operation, and maintenance of motor-propelled passenger-carrying vehicles; printing and binding; and such other expenses as he may determine necessary to the accomplishment of the objectives of this joint resolution; and (b) accept and utilize such voluntary and uncompensated services, appoint, without regard to the provisions of the civil-service laws, such officers

and employees, and utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as may be necessary, prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, fix the compensation of any officers and employees so appointed.

Any Administrator or other officer, or the members of any central board, or other agency, named to have general supervision at the seat of Government over the program and work contemplated under the appropriation made in section 1 of this joint resolution and receiving a salary of $5,000 or more per annum from such appropriation, and any State or regional administrator receiving a salary of $5,000 or more per annum from such appropriation (except persons now serving as such under other law), shall be appointed by the President, by and with the advice and consent of the Senate: *Provided,* That the provisions of section 1761 of the Revised Statutes shall not apply to any such appointee and the salary of any person so appointed shall not be increased for a period of six months after confirmation.

SEC. 4. In carrying out the provisions of this joint resolution the President is authorized to establish and prescribe the duties and functions of necessary agencies within the Government.

SEC. 5. In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any in-

terest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

SEC. 6. The President is authorized to prescribe such rules and regulations as may be necessary to carry out this joint resolution, and any willful violation of any such rule or regulation shall be punishable by fine of not to exceed $1,000.

SEC. 7. The President shall require to be paid such rates of pay for all persons engaged upon any project financed in whole or in part, through loans or otherwise, by funds appropriated by this joint resolution, as will in the discretion of the President accomplish the purposes of this joint resolution, and not affect adversely or otherwise tend to decrease the going rates of wages paid for work of a similar nature.

The President may fix different rates of wages for various types of work on any project, which rates need not be uniform throughout the United States: *Provided, however,* That whenever permanent buildings for the use of any department of the Government of the United States, or the District of Columbia, are to be constructed by funds appropriated by this joint resolution, the provisions of the Act of March 3, 1931 (U. S. C., Supp. VII, title 40, sec. 276a), shall apply but the rates of wages shall be determined in advance of any bidding thereon.

SEC. 8. Whenever practicable in the carrying out of the provisions of this joint resolution, full ad-

vantage shall be taken of the facilities of private enterprise.

SEC. 9. Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

SEC. 10. Until June 30, 1936, or such earlier date as the President by proclamation may fix, the Federal Emergency Relief Act of 1933, as amended, is continued in full force and effect.

SEC. 11. No part of the funds herein appropriated shall be expended for the administrative expenses of any department, bureau, board, commission, or independent agency of the Government if such administrative expenses are ordinarily financed from annual appropriations, unless additional work is imposed thereupon by reason of this joint resolution.

Sec. 12. The Federal Emergency Administration of Public Works established under title II of the

National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purposes of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution, and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution, for the making of further loans under said Act or under this joint resolution.

SEC. 13. (a) The acquisition of articles, materials, and supplies for the public use, with funds appropriated by this joint resolution, shall be subject to the provisions of section 2 of title III of the Treasury and Post Office Appropriation Act, fiscal year 1934; and all contracts let pursuant to the provisions of this joint resolution shall be subject to the provisions of section 3 of title III of such Act.

(b) Any allocation, grant, or other distribution of funds for any project, Federal or non-Federal, from the appropriation made by this joint resolution, shall contain stipulations which will provide for the application of title III of such Act to the acquisition of articles, materials, and supplies for use in carrying out such project.

SEC. 14. The authority of the President under the provisions of the Act entitled "An Act for the relief of unemployment through the performance

of useful public work, and for other purposes", approved March 31, 1933, as amended, is hereby continued to and including March 31, 1937.

SEC. 15. A report of the operations under this joint resolution shall be submitted to Congress before the 10th day of January in each of the next three regular sessions of Congress, which report shall include a statement of the expenditures made and obligations incurred, by classes and amounts.

SEC. 16. This joint resolution may be cited as the "Emergency Relief Appropriation Act of 1935."

Approved, April 8, 1935, 4 p. m.

4

FIRST DEFICIENCY APPROPRIATION ACT, FISCAL YEAR 1936 (C. 689, 49 STAT. 1597, 1608, 1609)

AN ACT Making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years, to provide supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years, to provide supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes, namely:

* * * * *

TITLE II—RELIEF AND WORK RELIEF

* * * * *

In order to increase employment by providing for useful public works projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the President, use not to exceed $300,000,000 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects: *Provided,* That no part of the sum made available by this paragraph shall be granted for any project unless, in the determination of the Administrator, the completion thereof can be substantially accomplished prior to July 1, 1938, and adequate provision has been made or is assured for financing such part of the entire cost thereof as is not to be supplied through the Federal Emergency Administration of Public Works: *Provided further,* That this limitation upon time shall not apply to any project enjoined in any Federal or State court: *Provided further,* That in no case shall the amount of the grant exceed forty-five per centum of the cost of the project. Nothing herein shall be construed to increase the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered under existing law to issue and to have outstanding at any one time, and nothing herein shall be construed to limit or curtail in any way any powers

which the Federal Emergency Administration of Public Works or the Administrator is now authorized to exercise.

5

PUBLIC WORKS ADMINISTRATION EXTENSION ACT OF 1937 (PUBLIC RESOLUTION NO. 47, 75TH CONG.)

JOINT RESOLUTION Making appropriations for relief purposes

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

TITLE II

SEC. 201. The Federal Emergency Administration of Public Works (herein called the "Administration") is hereby continued until July 1, 1939, and until such date is hereby authorized to continue to perform all functions which it is authorized to perform on June 29, 1937. All provisions of law existing on June 29, 1937, and relating to the availability of funds for carrying out any of the functions of such Administration are hereby continued until July 1, 1939, except that the date specified in the Emergency Relief Appropriation Act of 1936, prior to which, in the determination of the Federal Emergency Administrator of Public Works (herein called the "Administrator"), a project can be substantially completed is hereby changed from "July 1, 1938" to "July 1, 1939."

SEC. 202. The amount which the Reconstruction Finance Corporation is authorized by existing law to have invested at any one time in securities purchased from the Administration is hereby increased from $250,000,000 to $400,000,000.

SEC. 203. The amount of funds which the Administrator, upon direction of the President, is authorized to use for grants from moneys realized from the sale of securities is hereby increased from $300,000,000 to $359,000,000; and after the date of the enactment of this joint resolution no allotment shall be made by the Administrator for any project the application for which has not been approved by the examining divisions of the Administration prior to such date.

SEC. 204. The paragraph in the Independent Offices Appropriation Act, 1938, under the caption "Federal Emergency Administration of Public Works" is hereby amended by (a) striking out the words "in connection with the liquidation" and (b) striking out the sum of "$10,000,000" and inserting in lieu thereof the sum of "$15,000,000."

SEC. 205. The funds available to the Administrator for the making of loans or grants or loans and grants may be used for projects (in addition to other purposes for which funds may be used) of the following classes, in amounts not to exceed the sums specified for each such class: (a) For school projects (other than those included in subdivisions (b) and (c) of this section) to replace, eliminate, or ameliorate existing school facilities or conditions which, in the determination of the Administrator, are hazardous to the life, safety, or health of school children, $60,000,000 for grants and $11,000,000 for loans; (b) for projects which have been authorized, or for the financing of which bonds or other obligations have been authorized, at elections held prior to the date of enactment of this joint resolution, or for projects for which an authority or board constituting an independent

corporation without taxing power has been specifically created by a State legislature prior to such date, $70,000,000 for grants and $22,000,000 for loans; (c) for projects for which appropriations have been made by the legislatures of the States, $15,000,000 for grants and $2,000,000 for loans; (d) for projects to be financed, except for the grant, by the issuance to contractors of tax or assessment securities at not less than their par value: *Provided,* That an allotment shall not be made for any such project unless the applicant has, in the determination of the Administrator, made or incurred substantial expenditures or obligations in contemplation of receiving an allotment, $5,000,000 for grants; (e) for projects for which funds have been tentatively earmarked by the Administrator but for which formal allotments have not been made, $54,000,000 for grants and $78,000,000 for loans: *Provided,* That the grant for any such project shall not exceed the amount tentatively earmarked as a grant for such project: *Provided further,* That the amount specified for any of the foregoing classes may be increased by not to exceed 15 per centum thereof by transferring an amount or amounts from any other class or classes in order to effectuate the purposes of the title.

SEC. 206. No new applications for loans or grants for non-Federal projects shall be received or considered by the Administration after the date of enactment of this joint resolution.

SEC. 207. Title II of this joint resolution may be cited as the "Public Works Administration Extension Act of 1937."

Approved, June 29, 1937, 11 p. m.

APPENDIX B

EXECUTIVE ORDERS

1

EXECUTIVE ORDER

ADMINISTRATION OF PUBLIC WORK

Pursuant to the authority of "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

1. I hereby appoint Colonel Donald H. Sawyer to exercise temporarily the office of Federal Emergency Administrator of Public Works.

2. I hereby appoint a Special Board for Public Works consisting of the following: The Secretary of the Interior, Chairman; the Secretary of War; the Attorney General; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Labor; the Director of the Budget; Colonel George R. Spalding and Assistant Secretary of the Treasury Robert.

During the ensuing 30 days the Federal Emergency Administrator of Public Works shall have authority to allot the sum of not to exceed $400,000,000 provided for in title II of said act for highway building for distribution among the States, Territories, and the District of Columbia,

and authority to allot the sum of not to exceed $238,000,000 to the Department of the Navy for the construction of certain vessels, the construction whereof conforms to the London Naval Treaty and has heretofore been approved by me.

The distribution of the money herein allocated for public roads shall be subject to the approval of the Board for Public Works.

The Federal Emergency Administrator of Public Works is hereby authorized to employ such necessary personnel on a temporary basis as may be approved by the Board.

During the next 20 days it shall be the duty of the Federal Emergency Administrator of Public Works and the Board herein constituted to study and report to me on all public-works projects which have heretofore been submitted or shall hereafter be submitted.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
June 16, 1933.

[No. 6174]

2

EXECUTIVE ORDER

ADMINISTRATION OF PUBLIC WORK

Pursuant to the authority of "An Act To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
July 8, 1933.

[No. 6198]

3

EXECUTIVE ORDER

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

A. Delegation of functions and powers

Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities, and tenure.

2. Under the conditions prescribed in section 203 of said Act, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act; upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent

domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

3. In deciding to extend any aid or grant to any State, county, or municipality, to consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof.

4. In his discretion, and under such terms as he may prescribe, to extend any of the benefits of Title II of said Act to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

B. Regulations

Pursuant to the authority vested in me by section 209 of the National Industrial Recovery Act I hereby prescribe the following rules and regulations as necessary to carry out the purposes of Title II of said Act:

1. No convict labor shall be employed on any project constructed in whole or in part under the provisions of Title II of said Act. No materials manufactured or produced by convict labor shall be used on any such project.

2. No contractor or subcontractor on any such project who is subject to a code adopted pursuant

to Title I of said Act shall permit any employee to work in excess of the hours of labor prescribed in said code. No other contractor or subcontractor shall permit any employee to work more than 30 hours in any one week, except by authority of the Administrator; provided that working time lost in any week because of inclement weather or unavoidable delay may be worked within the succeeding 20 days; provided further, that in localities where a sufficient amount of labor is unavailable in the immediate vicinity of the project a maximum of 130 hours of labor in any calendar month may be authorized by the Administrator; provided further, that in localities so remote and inaccessible that employees must be housed in camps the Administrator may authorize labor not to exceed 8 hours in any one day and 40 hours in any one week.

3. No employee on any such project shall be paid less than a just and reasonable wage which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. All such wages shall be paid in lawful money of the United States, in the full amount earned by each individual at the time of payment, not less often than once each week, and without deduction on account of goods purchased, rent, or other obligations, which obligations shall be subject to collection only by legal process.

4. Each contractor or subcontractor on any such project shall post in a prominent and easily accessible place at the site of the work a legible statement of all wage rates paid.

5. Should it appear that any individual employed on any such project has been or is being

paid less than hereinbefore prescribed, the Administrator shall notify the employer of such individual to pay him all wages due according to the prescribed rate. Upon 10 days' default on the part of such employer he shall be liable to the penalties provided in said Act for violation of these regulations.

6. Any violation of these rules and regulations may be notified by the Administator to the District Attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for such violation.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
August 19 1933.

[No. 6252]

4

EXECUTIVE ORDER

DELEGATIN 3 CERTAIN FUNCTIONS AND POWERS TO THE FEDERAI EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the "Act"), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. In his discretion, and upon such terms and conditions as he may prescribe, to sell, assign, transfer, and deliver all securities or any part thereof purchased under the authority of section

203 of the said Act and of Title II of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, 48 Stat. 1021, and to apply the proceeds as prescribed by section 203 of the said Act and said Emergency Appropriation Act, fiscal year 1935.

2. To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
December 26, 1934.

[No. 6929]

5

EXECUTIVE ORDER

AUTHORIZING THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO CONTINUE TO PERFORM FUNCTIONS UNDER TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND TO PERFORM FUNCTIONS UNDER THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935

Pursuant to the authority vested in me by the Emergency Relief Appropriation Act of 1935, ap-

proved April 8, 1935 (Public Resolution No. 11, 74th Congress), I hereby authorize the Federal Emergency Administration of Public Works, under the Federal Emergency Administrator of Public Works:

(a) to continue after June 16, 1935, to perform all of the functions which it was authorized to perform prior to June 16, 1935, under Title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200);

(b) subject to the rules and regulations heretofore and hereafter prescribed by the President to carry out the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, to perform the following functions under said Act:

(1) make loans or grants, or both, for projects of states, territories, possessions, including subdivisions and agencies thereof, municipalities and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project;

(2) carry out projects for slum clearance or low-cost housing, or both;

(c) to sell any securities acquired under Title II of the National Industrial Recovery Act, approved June 16, 1933, or under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and all moneys realized from such sales shall be available for the making of further loans under the said Title II of the National Industrial Recovery Act or the said Emergency Relief Appro-

priation Act of 1935, in the performance of the functions herein authorized.

To the extent necessary to carry out the provisions of this Executive Order, the Administrator is authorized to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

In the performance of the functions and duties herein prescribed, expenditures are hereby authorized for contract stenographic reporting services; supplies and equipment; purchase and exchange of law books, books of reference, directories, periodicals, newspapers, and press clippings; travel expenses, including the expense of attendance at meetings when specifically authorized by the Administrator; rental at the seat of Government and elsewhere; purchase, operation, and maintenance of passenger-carrying vehicles; printing and binding; and such other expenses as may be necesary to the performance of the functions herein authorized; and, subject to the rules and regulations heretofore and hereafter prescribed by the President, I hereby authorize the Administrator to accept and utilize such voluntary and uncompensated services and, with the consent of the State, such State and local officers and employees, and appoint, without regard to the provisions of the civil service laws, such officers and employees, as may be necessary, prescribe their duties and responsibilities and, without regard to the Classification Act of 1923, as amended, fix their compensation: Provided, That

insofar as practicable, the persons employed shall be selected from those receiving relief.

The unobligated balances on June 30, 1935, of allotments of funds made pursuant to Title II of the National Industrial Recovery Act, approved June 16, 1933, to departments and agencies of the Government which continue to exist after June 16, 1935, for the performance of functions of the Federal Emergency Administration of Public Works, are hereby reallocated for use by said departments and agencies, respectively, after June 30, 1935, for the purposes for which originally allocated thereto: Provided, That upon completion of the project or work any unexpended balances of the aforesaid reallocations shall be reported by the departments or agencies concerned to the Secretary of the Treasury who will cause such balances to be placed to the credit of the appropriations from which said allotments were made.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE
June 7, 1935.

[No. 7064]

APPENDIX C

STATE LEGISLATION

1

ALABAMA ACTS, EXTRA SESSION 1933, No. 107

AN ACT To authorize counties, municipal corporations, and cities within this State to acquire by purchase, construction, condemnation and/or otherwise electric-light plants, power plants, power lines, transmission lines and power distributing systems and to maintain, improve, extend, and operate public utilities and to borrow money for said purposes and to provide for the securing and repayment of such money with interest.

Be it enacted by the Legislature of Alabama:

SECTION 1. That any county, municipal corporation, city within this State is hereby authorized and empowered to acquire by purchase, construction, condemnation, and/or otherwise, and to maintain, extend, improve, and/or operate electric light plants, power plants, power lines, and electric distribution systems, together with the extension and the appurtenances thereto, and all of the property, tangible and intangible, and of like or different kind, to be used or useful in connection therewith, either within or without, or partly within and partly without, the corporate limits of such city or the boundaries of such county, under the provisions of this Act for the purpose of producing, obtaining, distributing, and/or furnishing an adequate supply of electricity for public, industrial, business, domestic, light, power, and/or other consumption within, or partly within and partly without the corporate limits of such city or the boundaries of such county. Franchise for the supply of said commodities, or any one or more of them, to other municipalities and/or to the inhabitants, indus-

tries, and/or businesses therein shall be included within the properties which any city or county may acquire under the provisions of this act, and such franchises may be acquired either from such other municipalities or from the owners of such franchises. All or any part of any existing electricity plant shall also be included in the properties which any city or county may acquire under the provisions of this act. Such city or county may acquire necessary or convenient rights-of-way within the city and without the city and within the County and without the County in order to reach any necessary or accessible source of power at a U. S. Government-owned Power Dam, or otherwise.

SECTION 1–A. Whenever any county, municipal corporation, or city, through its governing body, shall vote to take advantage of the authority herein granted, as a condition to the exercise of the authority herein granted it shall call an election, at which election the question of whether or not such county or municipality will enter upon the undertaking proposed by the governing body of the county or city will be voted upon. If the majority of the voters shall vote in the affirmative, then the county or municipal governing body shall proceed with the proposed undertaking in conformity with the provisions of this act and the law of the State pertinent thereto; but not otherwise. Such election shall be ordered, held, canvassed, and may be contested, in the same manner as is, or may be hereafter, provided by the law applicable to the authorization of municipal bonds.

SECTION 2. For the purpose of defraying the cost of acquiring such plants, or any one or more of

them, or any part or any part or parts thereof, and making improvements and extensions thereto, either by purchase, construction, condemnation, or otherwise, any such city may borrow money from the Reconstruction Finance Corporation, or from any other lender whomsoever, in such amount or amounts as the governing body of such city may deem necessary or expedient, but no such city that has reached or exceeded its constitutional debt limit which borrows money under the authority of this act shall bind its general credit, or incur any personal liability, or charge any general or special fund other than that herein authorized, or charge any property other than that herein authorized, for the repayment of such borrowed money, or the payment of interest thereon.

SECTION 3. Any such city which borrows money under the authority of this act may pledge, create a lien upon, and mortgage, any such plants, or any one or more of them, or any part or parts thereof, together with the extensions, improvements and appurtenances thereto and all other property, tangible or intangible, and of like or different kind, including franchises, acquired, constructed, or installed by means of money borrowed under the authority of this act, and also all or any part of the revenues derived from the operation of such plants, or any one or more of them, or any part or parts thereof, as security for the repayment of such borrowed money, with interest.

SECTION 4. In addition, and for the further security of the lender, any such city which has borrowed money under the authority of this act may enter into a contract, or contracts, with the lender binding itself for the proper application of money

borrowed from such lender, and for the operation and maintenance of any such plants, or any one or more of them, or any part or parts thereof, and for the imposition, collection, safeguarding, application, disposition and/or remittance or reasonable rates, electricity supply and service, and for the promulgation of reasonable regulations relating to rates and service, and for any other act, series of acts, duty or thing, not inconsistent with the provisions of this act, for the protection of the lender's loan and the assurance of a reasonable return upon the properties in which such loan is invested, out of which operating expenses and the principal and interest of such loan may be met. But no municipal corporation acquiring or constructing any electric light plant or electric distributing system under the provisions of this act, nor receiver of any such electric light plant or distributing system shall charge any rate for electric supply and service that is higher than the rate for similar electric supply and service that has been authorized and approved by the Alabama Public Service Commission for public utility companies operating in cities of approximately the same size in Alabama.

SECTION 5. Any such city which borrows money under the authority of this act may evidence the loan by an instrument, or instruments, in such form and of such tenor and maturity as may be agreed upon between lender and borrower, but no such instrument shall purport, or be effective, to impose upon the borrower, or the borrower's funds or property, any liability in excess of, or inconsistent with, the liability authorized to be assumed by this act.

SECTION 6. Neither this act, nor anything herein contained, shall be construed as a restriction or limitation upon any power or right which any such city may have in the absence thereof, but shall be construed as cumulative of any such power or right. Nor shall any enumeration of subjects herein be construed to exclude any subject which is embraced within any general language or this act.

SECTION 7. If, for any reason whatsoever any section or part of this act shall be declared invalid, the invalidity of such section or part shall not affect the validity of the remainder of this act.

SECTION 8. The provisions of this Act are to be considered cumulative and for the purpose of further enabling counties, cities, and municipal corporations in the State of Alabama to avail themselves either by purchase, construction, or condemnation of power-distributing systems and transmissions lines in acquiring power from the United States Government or other owned power stations such as that now located at Wilson Dam, Alabama, and for the purpose of borrowing money to defray the expenses of same and securing its repayment.

Approved April 6, 1933.

2

ACT NO. 299 OF THE 1933 ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA

AN ACT to Authorize Any County, Township, City or Incorporated Town of the State of South Carolina to Purchase or Construct a Waterworks System, Water Supply System, Sewer System, Sanitary Disposal Equipment and Appliances, Light Plant or System, Natural Gas System, Ice Plants, Power Plants and/or Distribution Systems, Gas Plants, Incinerator Plants, Hospitals, Piers, Docks, Terminals, Air Ports, Toll Bridges, Ferries, Drainage Systems, Public Markets, Public Recreation Parks, Swimming Pools, Golf Courses and Stadiums, and in Furtherance Thereof to Purchase or Construct

Any Necessary Part of Any Such System Either Within or Without the Limits of Such County, Township, City, or Incorporated Town, as the Case May Be: and to Authorize Any County, Township, City or Incorporated Town of the State of South Carolina Now or Hereafter Owning and Operating Any Such System or Plant to Improve, Enlarge, Extend or Repair the Same: and for Any Such Purpose or Purposes to Authorize Any Such County, Township, City, or Incorporated Town to Issue Revenue Bonds Payable Solely from the Revenues Derived from the Operation of Any Such System, Project, or Systems: to Regulate the Issuance, Sale, Retirement, and Refunding of Such Bonds and of Other Matters in Connection Therewith: to Regulate the Use of the Revenues of Such System or Systems When Such Bonds are Issued or Outstanding: to Provide for the Operation of Any Such System or Systems in Case of Deficiencies in Such Revenues, and for Other Purposes.

SECTION 1. Sub-Divisions of the State May Purchase, Construct, and/or Improve Waterworks Systems, Water Supply Systems, Sewer Systems, Sanitary Disposal Equipment, Light Plants, Natural Gas Systems, Ice Plants, Power Plants, Gas Plants, Incinerator Plants, Hospitals, Piers, Docks, Terminals, Air Ports, Toll Bridges, Ferries, Drainage Systems, Public Markets, Public Recreation Parks, Swimming Pools, Golf Courses, and Stadiums—"System" Defined.

Be it enacted by the General Assembly of the State of South Carolina: That any county, township, city, or incorporated town of the State of South Carolina is authorized to purchase or construct a waterworks system, water supply system, sewer system, sanitary disposal equipment, and appliances, light plant or system, natural gas system, ice plants, power plants and/or distribution systems, gas plants, incinerator plants, hospitals, piers, docks, terminals, air ports, toll bridges, ferries, drainage systems, public markets, public recreation parks, swimming pools, golf courses, and stadiums, and in furtherance thereof to purchase or construct any necessary part of any such system either within or without the limits of *such*

county, or the corporate limits of such city or incorporated town, and any county, township, city, or incorporated town of the State of South Carolina which may now or hereafter own and operate any such system is authorized to improve, enlarge, extend or repair the same. The work system as used in this Act shall include all of the projects and undertakings referred to in this section.

SECTION 2. Cumulative—Alternate Method.—This Act shall be construed as cumulative authority for the purposes named in Section 1 hereof, and as to the manner and form of issuing revenue bonds for any such purpose or purposes, and shall not be construed to repeal any existing laws with respect thereto, it being the purpose and intention of this Act to create an additional and alternate method for the purposes herein named.

SECTION 3. "Borrower" Defined.—The word "borrower" as used in this Act shall be construed to mean the county, township, city, or incorporated town as the case may be, operating under this Act.

SECTION 4. "Borrowing Body" Defined.—The term "governing body" as used in this Act shall be construed to mean, in the case of a county, the Board of County Commissioners, or other like governing body thereof, in the case of a city or incorporated town, the Board of Commissioners, the Mayor and Council, or other like governing body thereof, and in the case of a township the Board of County Commissioners, or the governing body of the County in which the township is located.

SECTION 5. Make Estimate of System.—Whenever the governing body of any borrower shall determine to purchase, construct, improve, enlarge, extend, or repair any system named in Section 1

under the provisions of this Act, it shall first cause an estimate to be made of the cost thereof, and the fact that such estimate has been made and the amount thereof shall appear in the ordinance authorizing and providing for the issuance of the bonds.

SECTION 6. Powers of Borrower—Ordinances—Resolutions.—For the purposes of this Act any borrower is authorized to adopt ordinances providing for the issuance of revenue bonds as herein stated, and any and all other appropriate ordinances and resolutions deemed necessary to effectuate the full intent and purpose of this Act, including the segregation of revenues derived from the operation of any project named in Section 1 hereof, the determination, fixation, and revision from time to time of rates to be charged for services, and any and all other necessary ordinances and resolutions to protect the properties, to provide for the adequate operation thereof, and to insure the security of the bonds. Provided, However, That in the case of counties and townships the style of any ordinance or resolution adopted under this Act shall be the same as is provided by the laws of the State in the case of cities, and the manner of adoption thereof shall be as is provided in the general laws of the State for cities. The amendment of such ordinances and resolutions of counties shall be as is provided by the general laws of the State for amendment of ordinances of cities. Such ordinances and resolutions of counties shall be recorded in the minutes of the governing body thereof as soon as practicable after their passage and shall be authenticated by the signature of the clerk of such governing body. Any such ordinances or

resolutions of counties may be published in a newspaper of general circulation in such county.

SECTION 7. May Borrow — Issue Bonds— Bonds—Payment.—For the purpose of defraying the cost of purchasing, constructing, improving, enlarging, extending, or repairing any such system or project, any borrower may borrow money and issue its negotiable serial bonds, provided that no such bonds shall be issued unless and until authorized by an ordinance which shall set forth a brief description of the contemplated improvement, the estimated cost thereof, the amount, maximum rate of interest, time and place of payment, and other details in connection with the issuance of the bonds. Such serial bonds shall bear interest at not more than six per cent (6%) per annum, payable semi-annually, and shall be payable at such times, not exceeding forty-five (45) years from their date, and at such places as shall be prescribed in the ordinance providing for their issuance. The bonds and the coupons shall be executed in such manner and shall be substantially in the form provided in the authorizing ordinance. Such bonds shall be sold in such manner and upon such terms as the governing body shall deem for the best interests of the borrower. In no event shall any of the bonds be sold on a basis to yield more than six per cent (6%) per annum from the date of sale to the date of average maturity of the bonds sold. Provided, however, That in any contract for the purchase or construction of any system or project named in Section 1, or for the improvement, enlargement, extension, or repair of any such system or project provision may be made that payment therefor shall be made in such bonds. Such bonds

and their coupons may be made payable in lawful money of the United States of America, or in gold coin of the standard weight and fineness existing on the date thereof. Such bonds shall mature annually, or semi-annually and the first installment thereof shall be made payable not more than five (5) years from the date of such bonds. No such installment shall be more than two and one-half times as great in amount as the smallest prior installment of the same issue. If all the bonds of an issue are not issued at the same time, the bonds at any one time outstanding shall mature as aforesaid. The principal of and interest upon such bonds shall be payable solely from the revenue derived from the operation of the system or project for the purchase, construction, improvement, enlargement, extension, or repair of which the same are issued; Provided, however, That where a borrower improves, enlarges, extends, or repairs any system or project named in Section 1 the principal of and interest upon such bonds may be made payable from the revenues derived from the operation of the entire system or project. No bond or coupon issued pursuant to this Act shall constitute an indebtedness of such borrower within the meaning of any State constitutional provision or statutory limitation. It shall be plainly stated on the face of each such bond and coupon that the same has been issued under the provisions of this Act and that it does not constitute an indebtedness of such borrower within any State constitutional provision or statutory limitation. Provided, however, That any municipality now or hereafter owning and operating a system or project named in Section 1, whether constructed under the provisions of

this Act or not, and desiring to improve, enlarge, extend or repair the same, may issue revenue bonds under the provisions of this Act to pay for such improvements, enlargements, extensions or repairs, payable from the net revenues to be derived from the operation of the existing system or project as improved, enlarged, extended or repaired, but nothing in this proviso shall be construed as authorizing any such municipality to impair or commit a breach of the obligation of any valid lien or contract created or entered into by it, the intention hereof being to authorize the pledging, setting aside and segregation of such revenues for the construction of such improvements, enlargements, extensions or repairs only where consistent with outstanding obligations of such municipality.

SECTION 8. Bond Holders Have Lien on System.—There shall be created in the authorizing ordinance a statutory lien upon any such system or project, and the appurtenances and extensions thereto so to be purchased, constructed, improved, enlarged, extended or repaired, to and in favor of the holders of said bonds and each of them, and to and in favor of the holders of the coupons of said bonds, and each of them. Provided, however, That where any borrower purchases, constructs, improves, enlarges, extends or repairs any system or project named in Section 1, said statutory lien may be created and declared to be upon the whole of such combined system or project with appurtenances and extensions thereto, if the governing body so determines.

SECTION 9. Enforcement of Lien of Bond Holders.—Such system project or combined system so

purchased, constructed, improved, enlarged, extended or repaired shall remain subject to said statutory lien until payment in full of the principal of and interest upon said bonds. Any holder of any said bonds or of any of the coupons representing interest accrued thereon, may, either at law or in equity, by suit, action, mandamus, or other proceedings, protect and enforce said statutory lien and may, by suit, action, mandamus or other proceedings, enforce and compel performance of all duties of the officials of the borrower, including the fixing of sufficient rates, the collection of revenues, the proper segregation of the revenues of the project or combined system, and the proper application thereof. Provided, however, That said statutory lien shall not be construed to give any such bond or coupon holder authority to compel the sale of such project or combined system or any part thereof.

SECTION 10. Receiver — Appointment — Duties and Powers.—If there be any default in the payment of the principal of or interest upon any of said bonds, any court having jurisdiction in any proper action may appoint a receiver to administer and operate the system, project, or combined system so encumbered on behalf of the borrower with power to fix and charge rates and collect revenues sufficient to provide for the payment of any bonds or other obligations outstanding against said systems or combined system and for the payment of the expenses of operating and maintaining the same and to apply the income and revenues of said system, project, or combined system in conformity with this act and the ordinance providing for the issuance of such bonds.

SECTION 11. Limitations of Bonds.—The bonds authorized hereunder shall not be subject to any limitations or provisions of the municipal bond code or the bond laws for counties as now in force or hereafter amended.

SECTION 12. Bonds Legal Investments.—Bonds issued under the provisions of this Act are legal investments for executors, administrators, trustees, and other fiduciaries and for savings banks and insurance companies organized under the laws of this State.

SECTION 13. Bonds Tax Exempted.—The bonds and interest coupons issued hereunder are hereby exempted from any and all State, County, municipal, and other taxation whatsoever under the laws of the State of South Carolina, and it shall be plainly stated on the face of each such bond as follows: "The principal of and interest on this bond are exempted from any and all State, county, and municipal and other taxation whatsoever under the laws of the State of South Carolina."

SECTION 14. Bonds Negotiable.—Such bonds shall have all the qualities of negotiable instruments under the law merchant and the negotiable instruments law.

SECTION 15. Deposit Proceeds from Bonds.—The governing body, where practicable, shall require that the proceeds of the sale of bonds issued under the provisions of this Act be deposited in a special account or accounts in a bank or banks which are members of the Federal Reserve System, and shall require, insofar as practicable, that each such deposit be secured by United States Government securities having an aggregate market value at least equal to the sum at the time on deposit, or

in any event, the proceeds shall be deposited in some bank or other depository, either within or without the State, which will secure such deposit satisfactorily to said governing body.

SECTION 16. Use of Proceeds from Bonds.—All moneys received from any such bonds shall be used solely for the purchase, construction, improvement, enlargement, extension or repair of the system, project, or combined system for which issued, including any engineering, legal and other expenses incident thereto: Provided, however, That such moneys may be used also to advance the payment of the interest on such bonds during the first three (3) years following the date of such bonds: Provided, That any unexpended balance of the proceeds of the sale of any such bonds remaining after the completion of the project for which issued shall be paid immediately into the Bond and Interest Redemption Fund for such bonds, and the same shall be used only for the payment of the principal of the bonds, or, in the alternative, to acquire outstanding bonds of the general issue from which the proceeds were derived, by purchase of such bonds at a price (exclusive of accrued interest) not exceeding the face amount thereof. Any bonds so acquired by purchase shall be cancelled and shall not be reissued.

SECTION 17. Undelivered Bonds Executed by Ex-officers Valid.—In case any of the officers whose signatures or counter-signatures appear on the bonds or coupons shall cease to be such officers before delivery of such bonds, such signatures or counter-signatures shall nevertheless be valid and sufficient for all purposes the same as if they had remained in office until such delivery.

SECTION 18. Payment for Service by Borrower.—No free service shall be furnished by any such system or combined system to the county, township, city or incorporated town or to any agency, instrumentality, person, firm or corporation. The reasonable cost and value of any service rendered to any such borrower by any such system, project, or combined system shall be charged against the borrower and shall be paid for monthly as the service accrues from the current funds, or from the proceeds of taxes which such borrower, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, and such funds, when so paid, shall be accounted for in the same manner as other revenues of such system or combined system.

SECTION 19. Additional Bonds.—Any borrower purchasing, constructing, improving, enlarging or repairing any such system, project or combined system pursuant to the provisions of this Act, may, at the time of the authorization of such bonds for any such purpose or purposes, provide in the authorizing ordinance for additional bonds for other extensions and permanent improvements, which additional bonds may be issued and be negotiated from time to time as such proceeds for such purpose may be necessary. Such bonds, when so negotiated, shall have equal standing with the bonds of the same issue.

SECTION 20. Revenue Refunding Bonds.—Where a borrower has outstanding any bonds issued under the provisions of this Act, it may thereafter issue and negotiate new bonds on such terms as the governing body shall deem advisable for the purpose of providing for the payment of any such outstanding

bonds. Such new bonds shall be designated "revenue refunding bonds," and shall be secured to the same extent and shall have the same source of payment as the bonds which have been thereby refunded.

SECTION 21. Rates for Service.—Rates for services furnished by any such system or combined system shall be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and the principal of all such bonds as and when the same become due and payable, to create a Bond and Interest Redemption Fund therefor, to provide for the payment of the expenses of administration and operation and such expenses for maintenance of the system or combined system necessary to preserve the same in good repair and working order, to build up a reserve for depreciation of the existing system, project or combined system, and to build up a reserve for improvements, betterments and extensions to the existing system, project, or combined system other than those necessary to maintain the same in good repair and working order as hereinbefore in this Section provided. Such rates shall be fixed and revised from time to time so as to produce these amounts, and the governing body shall covenant and agree in the ordinance authorizing the issuance of such bonds, and on the face of each bond at all times to maintain such rates for services furnished by such system, project or combined system as shall be sufficient to provide for the foregoing.

SECTION 22. Bond and Interest Redemption Fund—Operation and Maintenance Fund—Depreciation Fund—Contingent Fund.—In the author-

izing ordinance the governing body of the borrower shall set aside monthly (or oftener if deemed advisable) and shall pledge the gross revenues of the system, project, or combined system into separate and special funds as follows: Out of the gross revenues there shall be first set aside a sum sufficient to pay the principal of and the interest upon the bonds as and when the same become due and payable. In the event that the gross revenues of any calendar, operating, or fiscal year shall be insufficient to pay the principal of and interest on the bonds maturing in any such calendar, operating, or fiscal year, then an additional amount sufficient to pay the principal of and interest on such bonds outstanding and unpaid shall be set aside out of the gross revenues of the next succeeding calendar, operating, or fiscal year and applies to the payment of the principal of and interest on such outstanding and unpaid bonds. This fund shall be designated "Bond and Interest Redemption Fund." Out of the remaining gross revenues there shall be next set aside a sum sufficient to provide for the payment of all expenses of administration, operation, and such expenses for maintenance as may be necessary to preserve the system or combined system in good repair and working order. This fund shall be designated "Operation and Maintenance Fund." Out of the remaining gross revenues there shall be next set aside a sum sufficient to build up a reserve for depreciation of the existing system or combined system. This fund shall be designated "Depreciation Fund." Out of the remaining gross revenues there shall be next set aside a sum sufficient to build up a reserve for improvements, betterments, and extensions to the existing system, project, or com-

bined system other than those necessary to maintain the same in good repair and working order as hereinbefore provided for. This fund shall be designated "Contingent Fund." Any surplus revenues thereafter remaining shall be disposed of by the governing body of the borrower as it may determine from time to time to be for the best interest of the borrower. Provided, However, that in the segregation and separation of said gross revenues into the several funds in this Section stated, the governing body may prescribe a reasonable excess amount to be placed in the Bond and Interest Redemption Fund from time to time during the earlier years of maturities of such bonds as thereby to produce and provide a cushion fund to meet any possible deficiencies therein in maturities of future years, and in the event that such excess amounts are thus provided, provision may be made in the ordinance for the scaling down of the amounts of such future years in the event the surplus so provided in the earlier years may then be found to have been accumulated and to be available. Bonds issued under the provisions of this Act shall be payable solely from the revenues in said Bond and Interest Redemption Fund.

SECTION 23. Payment Expenses of Operation or Maintenance.—Nothing in this Act shall be construed to prohibit the borrower from appropriating and using any part of its available income or revenues derived from any source other than from the operation of such system, project or combined system in paying any immediate expenses of operation or maintenance of any such system, project or combined system, but nothing in this Act shall be construed to require the borrower to do so.

SECTION 24. Custodian of Gross Revenues—Trust Funds.—The governing body of the borrower shall designate as custodian of the gross revenues from the operation of the system or combined system a bank or trust company duly qualified and doing business within the State of South Carolina, which shall be satisfactory to the governing body of such borrower. The Bank or trust company shall signify its acceptance of such custodianship by a written instrument directed to the governing body of the borrower. All funds from time to time derived from the operation of such system, project, or combined system, or funds of the borrower supplemental to the Operation and Maintenance Fund, the Depreciation Fund and/or Contingent Fund shall be deposited by such borrower with such bank or trust company and be set apart by such bank or trust company pursuant to written instructions from such borrower into the appropriate fund or funds designated in Section 22 of this Act. Each and all of said designated funds from time to time held by such bank or trust company shall be impressed with a trust for the benefit of the person or persons entitled thereto.

SECTION 25. Year Basis.—The ordinance authorizing the issuance of such bonds shall definitely determine whether such system, project, or combined system shall be operated upon a calendar, operating, or fiscal year basis, and the dates of the beginning and ending of same.

SECTION 26. Surplus in Operation and Maintenance Fund—Disposition.—If any surplus shall be accumulated in the Operation and Maintenance Fund which shall be equal to the cost of operating and maintaining such system, project, or combined

system during the remainder of the calendar, operating, or fiscal year, as provided by the authorizing ordinance, and the cost of operating and maintaining such system, project, or combined system during the succeeding like calendar, operating, or fiscal year, any such surplus may be transferred at any time by the governing body to the Depreciation Fund, Contingent Fund, or to the Bond and Interest Redemption Fund.

SECTION 27. Surplus in Depreciation Fund—Disposition.—If any surplus shall be accumulated in the Depreciation Fund over and above that which the governing body shall find may be necessary therein during the then present calendar, operating, or fiscal year and the next ensuing calendar, operating, or fiscal year, any such excess may be transferred to the Contingent Fund or the Bond and Interest Redemption Fund.

SECTION 28. Surplus in Contingent Fund—Disposition.—If any surplus shall be accumulated in the Contingent Fund over and above that which the governing body shall find may be necessary for reasonable and proper improvements, betterments, and extensions to the existing system or combined system during the present calendar, operating, or fiscal year and the next ensuing calendar, operating, or fiscal year, any such excess may be transferred to the Bond and Interest Redemption Fund or may be applied, in so far as possible, in the purchase or retirement of outstanding bonds issued under the provisions of this Act, and for that purpose the governing body is authorized to purchase such bonds not due in the open market at not more than the fair market value thereof. Where such bonds are purchased for investment the income

from such investment shall be carried into the Contingent Fund.

SECTION 29. Regulation of Rates—Franchise—No Effect on State Board of Health.—Rates charged for services furnished by any system or combined system purchased, constructed, improved, enlarged, extended, or repaired under the provisions of this Act shall not be subject to supervision or regulation by any State bureau, board, commission, or other like instrumentality or agency thereof, and it shall not be necessary for any borrower operating under the provisions of this Act to obtain any franchise or other permit from any State bureau, board, commission, or other instrumentality thereof in order to construct, improve, enlarge, extend, or repair any system or combined system named in this Act. Provided, however, That the functions, powers, and duties of the State Board of Health shall remain unaffected by this Act.

SECTION 30. Books and Accounts—Annual Report—Inspection.—Any borrower issuing revenue bonds under the provisions of this Act shall install and maintain proper books of record and account (separate entirely from other records and accounts of such borrower) in which full and correct entries shall be made of all dealings or transactions of or in relation to the properties, business, and affairs of the system or combined system. The governing body of such borrower, not later than three months after the close of any calendar, operating, or fiscal year, shall cause to be prepared a balance sheet and an income and surplus account, showing, respectively, in reasonable detail the financial condition of the system or combined system at the

close of such preceding calendar, operating, or fiscal year and the financial operations thereof during such year. Said balance sheets and income and surplus accounts shall at all reasonable times during usual business hours be open to examination and inspection by any taxpayer, user of the services furnished by the system, or any holder of bonds issued under the provisions of this Act, or anyone acting for or on behalf of such taxpayer, user of the services of the system, or bondholder.

SECTION 31. Pay Bonds Before Maturities.—The governing body of the borrower authorizing bonds under the provisions of this Act may make provision for any of such bonds to be called for payment on any interest payment date before maturity, provided the borrower shall have on hand in its Bond and Interest Redemption Fund sufficient moneys not otherwise appropriated or pledged, in excess of the interest and principal requirements within the next two succeeding calendar, operating, or fiscal years.

SECTION 32. No effect on Existing Contracts and Liens.—Nothing in this Act shall be construed as authorizing any borrower to impair or commit a breach of the obligation of any valid lien or contract created or entered into by it, the intention hereof being to authorize the pledging, setting aside, and segregation of gross revenues only where consistent with outstanding obligations of such borrower.

SECTION 33. Issue Bonds without Election or Notice.—This Act shall be construed as authorizing the issuance of such bonds provided for herein without submitting the proposition for the approval of same to the voters of the borrower.

Where bonds are authorized under this Act it shall not be necessary to make publication of any ordinance, resolution, notice, or proceeding relating thereto. Provided, however, That nothing in this Act shall be construed to prohibit the governing body from making such publication as it may deem necessary in relation thereto.

SECTION 34. Construe Liberally.—This Act, being necessary for and to secure the public health, safety, convenience, and welfare of the counties, townships, cities and incorporated towns of the State of South Carolina, shall be liberally construed to effect the purposes hereof.

SECTION 35. State Bond Commissioner—Duties—Time to Test Validity of Bonds.—For the protection of purchasers of any bonds authorized pursuant to the provisions of this Act, the Attorney General is hereby made Ex-officio Bond Commissioner of the State of South Carolina. It shall be the duty of such Bond Commissioner to prepare uniform forms and prescribe a method of procedure under the laws of the State in all cases where it is desired to issue said bonds in any county, township, city, or incorporated town of the State of South Carolina; and it shall be the further duty of said Bond Commissioner to examine into and pass upon any of said bonds so issued, and said bonds, when declared by the certificate of said Bond Commissioner to be issued in accordance with this Act and the forms of procedure so provided, shall be incontestable in any court in the State of South Carolina unless suit thereon shall be brought in a court having jurisdiction of the same within thirty (30) days from the date of the approval of said bonds by the Bond Commissioner. No bond here-

after issued by any county, township, city, or incorporated town pursuant to this Act shall be valid without the certificate of said Bond Commissioner.

SECTION 35-A. State Sinking Fund Commission Approve Bonds.—All Bonds authorized pursuant to the provisions of this Act shall be subject to the approval of the Sinking Fund Commission of the State of South Carolina and no bonds issued under the provisions of this Act shall be valid without the certificate of approval of the Sinking Fund Commission.

SECTION 36. Saving Clause.—The invalidity of any section, sentence, clause, paragraph, or portion of this Act shall not affect the validity of the remainder of this Act.

3

ACT NO. 1095 OF THE 1934 ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA

AN ACT to Authorize and Empower the Finance Board for Greenwood County to Contract with the Public Works Administration; to Perform such Acts and Duties as may be Necessary and Incident to Securing a Loan, or Loans, for a Hydro-Electric Project; to Define and Limit its Duties and Powers; to Empower the said Board to Borrow Pursuant to Authority Conferred by any Other Statute for the Purposes Named Herein and Especially Under the Provisions of an Act Entitled "An Act to Authorize any County, Township, City or Incorporated Town, Etc." Designated as Act No. 299 of the Acts of the General Assembly of 1933.

SECTION 1. Finance Board, Greenwood County, Borrow for Hydro-Electric Plant.—*Be it enacted by the General Assembly of the State of South Carolina:* That the Finance Board of Greenwood County is authorized and empowered to borrow from the Public Works Administration, or any other agency or corporation, organized under the Federal Government or pursuant to any Act of the Congress of the United States, the proceeds of any

such loan to be used for the purpose of acquiring any necessary lands, easements and rights of way for a hydro-electric plant and for the construction thereof at a dam at or near "Buzzard Roost" on Saluda River and for the purchase of any and all necessary machinery or other equipment used in connection with the operation of any such plant, with the further right to construct and maintain power transmission lines.

SECTION 2. Powers of Board—Project Self Liquidating.—The said Finance Board of Greenwood County is authorized and empowered to do any and all acts necessary and incident to securing any such loans and to execute evidence of indebtedness therefor under such agreement as the said Board and the agency or the corporation from whom the loan is obtained may agree upon. They are empowered to pledge the property acquired as well as the income therefrom to the retirement of any such loan.

It is declared that this project is a self liquidating project and that any indebtedness or obligation created by the said Board shall not be a direct and primary obligation of the County of Greenwood; bonds or securities issued hereunder to be in accordance with the terms, conditions, and powers granted and given in Act No. 299 of the Acts of the General Assembly, 1933, including all amendments thereto.

SECTION 3. Keep Funds Separate.—All funds borrowed pursuant to the authority conferred in this Act, as well as in pursuance of the authority conferred by any other statute, to be used for the purposes named herein, shall be kept separate and distinct from other funds of Greenwood County

and not commingled or intermingled with the finances of the said County in any respect.

SECTION 4. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

SECTION 5. This Act shall take effect upon its approval by the Governor.

Approved the 12th day of April 1934.

APPENDIX D

LEGISLATIVE HISTORY

1

INTENT OF CONGRESS WITH RESPECT TO COMPETITIVE PROJECTS AS SHOWN BY LEGISLATIVE HISTORY OF EMERGENCY RELIEF APPROPRIATION ACT, 1935

In the debates on the Emergency Relief Appropriation Act of 1935, while that legislation was pending in Congress, the following amendment was introduced by Senator Austin:

> SECTION —. Public projects, Federal, State, or municipal, undertaken pursuant to this joint resolution, shall be selected and planned so that when completed they shall not complete with existing private enterprises.

Said amendment was voted down by the Senate. (79 Cong. Rec. 3972–3973.)

The debates in the Senate on the subject of that proposed amendment were as follows (79 Cong. Rec. 3972):

> Mr. AUSTIN. Mr. President, that amendment needs very little explanation. Everyone understands its scope, and everyone must recognize at once that it is in full sympathy with the purposes of the pending joint resolution.
>
> Of course, there is nothing which can return to active service or employment men and women who are not now employed so much as the revival of private enterprise. The Government cannot possibly employ so

many people as can private employers. Of course, too, as the second premise, there is nothing which will encourage private enterprise to start up so much as the removal of fear of competition by the Government and the restoration of confidence.

Therefore this amendment is intended to promote the objects of the joint resolution; and I hope it will receive favorable consideration.

Mr. GLASS. Mr. President, will the Senator yield?

Mr. AUSTIN. I yield to the Senator from Virginia.

Mr. GLASS. There is so much confusion in the Senate that I did not distinctly hear the amendment to the joint resolution proposed by the Senator from Vermont, as read. However, I think I gathered the substance of it; and I should like to ask the Senator from Vermont if he does not think it is covered by section 7 of the joint resolution?

Mr. AUSTIN. I think not. I think it is not covered by section 7 of the joint resolution.

Mr. GLASS. I desire that the clerk again read the amendment.

The VICE PRESIDENT. The amendment will be restated.

* * * * *

Mr. GLASS. Mr. President, section 7 of the joint resolution provides:

"Wherever practicable in the carrying out of the provisions of this joint resolution, full advantage shall be taken of the facilities of private enterprise."

Mr. AUSTIN. Mr. President, as I understand section 7, I do not believe it accomplishes the same objective as does my amendment. If the distinguished Senator in charge of the joint resolution believes they

mean the same thing, I should like to have my amendment agreed to, because I think it would remove from doubt the meaning of the joint resolution.

Mr. GLASS. I have r doubt of the meaning of that provision of the joint resolution.

Mr. JOHNSON. Mr. President, I ask the attention of the Senator from Virgina [Mr. Glass] for a moment.

I submit to the Senator from Virginia that the two provisions have diametrically different meanings. The purpose of the amendment presented by the Senator from Vermont is to prevent the ultimate construction of anything which may interfere with something which may have been done by private enterprise. That is not the purpose at all of section 7, as I understand. I presume our old friends, the power companies, come into the picture thus; and the Senator is afraid that some power plant may be erected in a municipality by funds which come from this source to provide work for men who need work in a particular municipality, and he does not want the funds used in that particular manner.

Mr. GLASS. Mr. President, the Senator from California was not explicit enough to suit me as to which Senator he had in mind when he said a Senator was proposing to protect the Power Trust.

Mr. JOHNSON. No, no; I was not speaking of the Senator from Virginia in that regard. The Senator referred to section 7, which conveys one idea. The other idea to which I referred was presented by the Senator from Vermont.

Mr. GLASS. I want to know which provision it is that protects the Power Trust. I do not think mine does.

Mr. JOHNSON. My remarks in that regard were perfectly plain, and the Senator from Virginia ought not to take umbrage at them at all.

Mr. BYRNES. Mr. President, will the Senator yield?

Mr. AUSTIN. I yield to the Senator from South Carolina.

Mr. BYRNES. If a request for money should be made for the development of a rural electrification project, the Senator's amendment, as I gather its purport, would prohibit expenditure for such a purpose. Is that true?

Mr. AUSTIN. Mr. President, I do not understand it to provide so at all.

Mr. BYRNES. Is not the language of the amendment that no funds shall be used for any project which, when completed, would compete with a private enterprise?

Mr. AUSTIN. The last sentence of the Senator from South Carolina was not included in his previous question.

Of course, the construction of an electrification project competing with private enterprise would come within the prohibition of the amendment, if the amendment were adopted.

Let me say, however, before I finish, that it is something of an assumption to say that the power companies are back of this amendment. The power companies had nothing at all to do with it.

Mr. BYRNES. Mr. President, will the Senator yield to me?

Mr. AUSTIN. I yield.

Mr. BYRNES. Of course, I did not make that statement. I was simply asking for the Senator's construction of his own amendment—whether or not it would prohibit the construction of a rural electrification project

if that project competed in any way with an existing enterprise?

Mr. AUSTIN. Yes, of course, it would. That is just the point. The waste of money in putting up a competing line of rural electrification is one of the things the amendment would prevent.

Mr. BYRNES. How about the construction of a housing project?

Mr. AUSTIN. It would depend upon where it was located and whether it would compete.

Mr. BYRNES. If a housing project were constructed at a place where other houses were rented, would the Senator say it was in competition with the landlords who owned the other houses?

Mr. AUSTIN. Not unless it competed with private enterprise.

Mr. BARKLEY. Mr. President, of course it would compete with private enterprise if people rented the houses which were constructed under a housing project. If they did not rent the houses constructed under the project they might be forced to rent some other houses. That would be competition; would it not?

Mr. AUSTIN. That does not necessarily follow. A housing project which was not in a place where houses were already in existence would not be in competition with other houses.

Mr. BARKLEY. A housing project is not going to be undertaken out in the middle of a vacant field. It would undoubtedly be in a city or town. It is difficult to see how a housing project in a thickly settled city might not, when completed, compete with some private houses already there.

Let us suppose that in some city, town, or village there is a water system, owned by a

private organization, which is inadequate to serve the citizens. Under the Senator's amendment it would be impossible for the municipality to install a water system which would serve the community because one was already there, although it was inadequate to serve the community.

Mr. AUSTIN. I grant that is a possibility. Of course, one can by a stretch of the imagination picture a situation for which the amendment would not be ideal, but I have in mind projects for manufacturing and retail businesses engaged in various activities which have been heretofore simply left to private enterprise—enterprise that provides the taxes which will go to pay the sums appropriated by this measure. It is to prevent an enormous amount of capital being thrown into competition with private capital that I offer the amendment. I ask for a vote.

In the foregoing debates, reference was made to Section 7, which was adopted by Congress but which, when the Bill was finally enacted, became Section 8. That section reads as follows: "Whenever practicable in the carrying out of the provisions of this joint resolution, full advantage shall be taken of the facilities of private enterprise." The following debate (79 Cong. Rec. 2396) clearly shows the meaning of that section:

Mr. MCCARRAN. * * * This amendment was suggested by those who had been engaged in the contracting business throughout the country. They feared that perchance the contractors, who have $1,600,000,000 invested in various lines of employment, might be entirely left out; so they sought a general amendment, which I offered in the committee, and it was adopted to the extent

and in the language stated, that, wherever practicable, the facilities of private enterprise should be resorted to. That simply means, as in the building of highways throughout the country today, we have highway-construction engineers or highway-construction groups, with their equipment, all ready to go to work, that, if the President wishes, and thinks it practicable, he may call upon them so far as their facilities permit.

That is the object of the amendment. I was not the author of it, but I did sponsor it, and I sponsor it now, in furtherance of giving to the contractors of the country an opportunity to employ labor they have carried, during the hours of depression, many of them keeping their equipment and labor contingent, on at a terrific loss. Wherever it is practicable, the amendment provides that their facilities shall be utilized.

That is the explanation of the amendment. If the Senator has any further questions, I shall be glad to answer them. I again apologize to the Senator. I was not giving attention to his question, and I am very sorry.

Mr. BONE. Mr. President, the Senator from Nevada owes me an apology. There was a great deal of confusion in the Chamber when I asked the question. I can understand why everyone would be confused; but I know that these words have meaning, and that some interpretation is going to be given them by those who will construe the joint resolution, especially by those in Washington, D. C., who are going to disburse this money.

Mr. MCCARRAN. That is true.

Mr. BONE. I want to be absolutely certain that these words are not misinterpreted to

the disadvantage of my State or any other State.

Mr. McCARRAN. That is the object and purpose, and that is the whole idea behind the amendment.

Mr. BONE. These words may be construed absolutely to prohibit force-account work wherever it is possible to let contracts. Is that the Senator's intention?

Mr. McCARRAN. That is the object.

Mr. GLASS. No; wherever it is practicable.

Mr. McCARRAN. Wherever practicable.

Mr. BONE. Very well, so long as we understand that. We desire to know what we are doing when we vote "yes" or "no."

The VICE PRESIDENT. The question is on agreeing to the committee amendment known as "section 7."

The amendment was agreed to.

2

INTERPRETATION OF THE WORDS "WORK UNDER EACH PARTICULAR PROJECT" IN THE 1935 ACT

While the conference report of March 28, 1935, on House Joint Resolution 117 (which was later enacted into law as the Emergency Relief Appropriation Act of 1935), was pending before the Senate, there was considerable discussion of the meaning of the words "direct work" which appear in subsection (g) of section 1 thereof, said section then reading as follows:

> (g) Loans or grants, or both, for projects of States, Territories, possessions, including subdivisions and agencies thereof, and self-liquidating projects of public bodies thereof, municipalities, and the District of Columbia; where not less than one-third

of the loan or the grant or the aggregate thereof is for expenditures for direct work, $900,000,000;

The position of Senator Glass, Chairman of the Senate Appropriations Committee and one of the managers on the part of the Senate in the conference, as to the meaning of these words, is indicated by the following colloquy between him and Senator Copeland on the floor of the Senate, which appears in the Congressional Record (79 Cong. Rec., 4746):

> Mr. GLASS. Mr. President, section 3 of the joint resolution, as it went to conference, was wholly an insertion by the Senate itself; no word of it was in the joint resolution as passed by the House; but the House conferees undertook to alter that provision of the joint resolution in various respects, and, with the assent of the Senate conferees, succeeded in doing so.
>
> At the last, having their attention drawn to the fact that under the section as it stood the entire amount of $900,000,000, with such addition as the President might please to make to the amount, in his discretion, under the 20 percent permission, might be expended without employing a single human being in addition to those already now employed, the Senate conferees undertook to write into the provision a requirement that this money should not be loaned to States, municipalities, and subdivisions of States or the District of Columbia unless the project for which the money was loaned involved the expenditure of one-third of the amount for labor.
>
> As I stated in my letter to the Secretary, he has fallen into the error, which has been spread broadcast in the Washington newspapers, of asserting that the measure re-

quires that one-third of the labor shall be done on the site of the project. There is not a word or sentence in the report of the conferees which justifies any such assumption. On the contrary, the conferees took the view that any work entering into a given project for which any part of the $900,000,000 should be loaned should be counted in estimating the one-third required to be expended on direct labor.

In order to make sure that that was a correct interpretation of the provision, the conferees asked the Comptroller General to come before them, to examine the provision, and to give his interpretation of it. He told us that the interpretation of the Senate conferees was his interpretation and that he should feel obliged so to rule in any matter that might come before him for decision.

Mr. COPELAND. Mr. President——

The PRESIDENT pro tempore. Does the Senator from Virginia yield to the Senator from New York?

Mr. GLASS. Certainly.

Mr. COPELAND. The Senator from Virginia might state also that, while it was proposed by someone in the conference that the language should be further restricted to require one-third of the work to be done at the site, the proposal was overwhelmingly "thrown out of the window."

Mr. GLASS. Yes. To show that the Senate conferees had not in mind in the text of their report or in the spirit of it to require that the one-third of the direct work should apply to the site of the project, that proposal was made and almost unanimously rejected by the conferees. The purpose of the conferees was to require that when any part of the $900,000,000, plus whatever might be

added to it, should be loaned to a State or community or subdivision of a State for a project, the project must involve enough work to consume one-third of the loan.

As I stated in my letter to the Secretary, for example, if a waterworks plant should be erected out of money loaned from the $900,000,000, not only must the work on the site make up a part of the one-third expenditure, but all the work on a motor be manufactured a thousand miles away or on other machinery manufactured far away, and all work involved in the transportation and the handling of the machinery that related itself to the particular project for which the amount should be loaned would be counted.

Because of the uncertainty as to the meaning of the words "direct work", the bill was sent back to conference. In conference subsection (g) of section 1 was changed to read as it now does, and Congressman Buchanan, Chairman of the House Appropriations Committee, and one of the managers on the part of the House in such conference, made the following official statement on the floor of the House as to the meaning of the words "work under each particular project" (79 Cong. Rec. 5145):

The expression "work under each particular project" includes not only work done at the site of the project but work which may properly be called "indirect" work, for example, the work which is created by the manufacturer and production of materials and in the transportation of such materials to the site of the project.

THE PROVISION RELATING TO THE PUBLIC WORKS ADMINISTRATION CONTAINED IN THE FIRST DEFICIENCY APPROPRIATION ACT, FISCAL YEAR 1936; DEBATES THEREON; AND STATEMENT BY THE CHAIRMAN OF THE HOUSE COMMITTEE ON APPROPRIATIONS IN EXPLANATION OF THE PROVISION

The following provision relating to the Public Works Administration is contained in Title II of the First Deficiency Appropriation Act, fiscal year 1936, and is the basis of the contemplated public works program:

> In order to increase employment by providing for useful public-works projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the President, use not to exceed $300,000,000 from funds on hand or to be received from the sale of securities, for the making of grants to aid in the financing of such projects: *Provided,* That no part of the sum made available by this paragraph shall be granted for any project unless, in the determination of the Administrator, the completion thereof can be substantially accomplished prior to July 1, 1938, and adequate provision has been made or is assured for financing such part of the entire cost thereof as is not to be supplied through the Federal Emergency Administration of Public Works: *Provided further,* That this limitation upon time shall

not apply to any project enjoined in any Federal or State court: *Provided further,* That in no case shall the amount of the grant exceed 45 percent of the cost of the project. Nothing herein shall be construed to increase the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered under existing law to issue and to have outstanding at any one time, and nothing herein shall be construed to limit or curtail in any way any powers which the Federal Emergency Administration of Public Works or the Administrator is now authorized to exercise.

Originally the bill contained a proviso that money should not be granted if the project could not be completed prior to July 1, 1937. That was amended to extend the period to July 1, 1938. Subsequently there was inserted the proviso that the limitation upon time should not apply to any project enjoined in any federal or state court. The following debates in the Senate with reference to those amendments show that there was clearly in mind competing municipal electric power projects:

Mr. NORRIS. Let me suggest to the Senator from Kentucky, when he modifies his amendment by inserting "1938" instead of "1937," that many of the projects are now held up by injunctions which are pending. As to some of them the injunctions will not be disposed of in time to enable them to avail themselves of the grant.

Mr. BARKLEY. I have in mind a city whose council called an election to vote bonds to comply with the requirements of the Government in order to build a waterworks plant. An injunction was obtained against

the election, and the election has not as yet been held because the case has not been decided. Certainly another year is not too much to ask in behalf of the community restricted in such a way.

Mr. Norris. I have in mind the case of Jacksonville, Ill. Bonds were voted after full discussion of the matter before the people, but in that case it was a question of constructing a municipal electric-light plant. The power interests obtained an injunction after the bonds had been voted (80 Cong. Rec. 8491.)

Mr. McKELLAR. Mr. President, immediately after the date "1938," I propose to insert the following:

"*Provided,* That this limitation shall not apply to any project that has been enjoined in any Federal or State court."

The reason for offering this limitation is that many injunctions have already been granted, and it would be unfair and unjust to deprive the particular communities where that has been done from receiving this relief.

The PRESIDING OFFICER. The Senator from Tennessee offers an amendment to come at the end of the amendment offered by the Senator from Colorado, which will be stated.

The CHIEF CLERK. It is proposed to insert the following after the amendment to the amendment just agreed to:

"*Provided,* That this limitation shall not apply to any project that has been enjoined in any Federal or State Court."

Mr. BORAH. Mr. President, what is the effect of the amendment?

Mr. McKellar. I will give an illustration. The city of Knoxville, Tenn., applied for a loan and a grant to build an electric light plant, and they were enjoined by a private company. If the limitation as carried in the bill shall continue in force—and it will be in force, of course, unless

the injunction is dissolved in time enough to permit them to build the plant—they cannot build the plant at all. It might be held up on appeal, so that Knoxville would be deprived entirely of the relief.

Mr. Glass. Has the plant been let to contract?

Mr. McKellar. No, the plant has not been let to contract; before that could be done, the injunction was issued. There are a number of such cases, and it seems to be manifestly fair and just that the limitation should not apply to cases of that kind.

Mr. BARKLEY Mr. President, the amendment simply limits the expiration of the time?

Mr. MCKELLAR. That is all. I ask for a vote on the amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Tennessee to the amendment of the committee.

The amendment to the amendment was agreed to. [Cong. Rec. 8499–8500.]

The following statement was submitted by the Chairman of the House Committee on Appropriations and read into the record by the Clerk of the House in explanation of the above-quoted provision relating to the Public Works Administration for the purpose of declaring the intention of the Congress in enacting such provision (Congressional Record, June 17, 1936, House of Representatives, page 9889) (80 Cong. Rec. 9791):

RE FIRST DEFICIENCY APPROPRIATION BILL, FISCAL YEAR 1936, INSOFAR AS IT RELATES TO THE PUBLIC WORKS ADMINISTRATION

The bill as it passed the House of Representatives contained no provision concerning the Public Works Administration. The Senate added a paragraph which authorized

the Federal Emergency Administrator of Public Works, upon the direction of the President, to use not to exceed $300,000,000 from funds on hand, or to be received from the sale of securities, for the making of grants to aid in the financing of projects capable of being substantially completed, in the determination of the Administrator, not later than June 30, 1938. The amount of grant which could be made for any project was limited to 45 percent.

The purpose of this provision is to permit the Federal Emergency Administrator of Public Works to use the cash and credits now in the Public Works Administration revolving fund for an additional public-works program to supplement the work-relief program to be carried on. Since, under existing law, the moneys in the Public Works Administration revolving fund are available only for loans, for the past year the Public Works Administration has been making loans from this revolving fund and grants from rescinded allotments made from the appropriations to carry out title II of the National Industrial Recovery Act and from the $345,000,000 allocated to the Public Works Administration by the President from the $4,880,000,000 appropriated to carry out the Emergency Relief Appropriation Act of 1935.

The provision added by the Senate is not intended to disturb the use of the revolving fund for such loans as are authorized under Public, No. 412, Seventy-third Congress, and under the Emergency Relief Appropriation Act of 1935, but it confers supplemental and additional powers upon the Administrator and does not curtail any of his present powers or functions.

The Senate amendment contemplates that the Public Works Administration will make loans for non-Federal public-works projects in the amount of 55 percent of the cost of the project out of its revolving loan fund and will supply the remaining 45 percent as an outright grant. In cases where applicants are able to provide their share of the cost of the projects from the sale of municipal bonds on the open market, only a grant will be made by the Public Works Administration.

The first change which the conferees have made to the Senate amendment has been the deletion in the first and second lines of superfluous language relative to relief and work relief so as to make perfectly clear that the purpose of the paragraph is to enable the Public Works Administration to follow a well-beaten path by providing aid in financing a non-Federal public-work program. This provision in the Senate amendment is also intended to serve as a standard for guiding the Administrator in the selection of types of projects to be financed under the amendment.

Another change made by the conferees in the Senate amendment has been to rephrase the limitation on the time within which it is estimated that a project will be completed in order that it may be eligible for a grant under the bill. The purpose of this change is to make clear that no part of the funds made available by this paragraph shall be granted for any project unless the Administrator has determined that the completion of the project can be substantially accomplished, in his opinion, prior to July 1, 1938, and also to prohibit the use of any funds

under this paragraph to finance any project unless, in the judgment of the Administrator, the applicant has on hand or is able to furnish satisfactory assurances that it will provide its share of the cost of the project.

It is expected that under this provision the Public Works Administration will be enabled to carry on a $600,000,000 non-Federal Public Works program. It is contemplated that this will be done by the Public Works Administration agreeing to make grants and loans from its unobligated funds on hand and against commitments from the Reconstruction Finance Corporation. The Public Works Administration will be able to enter into a contract to make a grant or to purchase municipal bonds in reliance upon a commitment by the Reconstruction Finance Corporation to purchase bonds from the Public Works Administration in a like amount.

Under existing law the only limitation is the limitation upon the amount of bonds purchased from the Public Works Administration which the Reconstruction Finance Corporation may hold at any one time. This amount is limited to $250,000,000 by Public, No. 412, Seventy-third Congress. It is anticipated that through the cooperation of the Reconstruction Finance Corporation it will be possible for the Public Works Administration to use from its revolving fund the $300,000,000 made available under this paragraph of the bill for grants and an additional amount of about $150,000,000 for loans, but the Senate amendment does not in any way restrict the present power of the Public Works Administration to resell on the open market bonds it has purchased.

To summarize: Under the Senate amendment, as modified by the conferees, the President is given power to authorize and direct the Federal Emergency Administrator of Public Works to use $300,000,000 from the revolving fund for the making of grants for projects selected by the Administrator, and to use funds on hand and funds to be received from the resale of bonds for the making of loans for such projects. It is anticipated that the Administrator will be empowered to make these grants and loans subject to such terms and conditions as he may prescribe in order to carry out the purposes of the Senate amendment. The Administrator will, of course, continue to exercise the functions which he has been heretofore authorized to perform under title II of the National Industrial Recovery Act and under the Emergency Relief Appropriation Act of 1935.

4

INCLUSION OF GENERATING PLANTS AND DISTRIBUTION SYSTEMS WITHIN THE MEANING OF TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT

During the discussion of the conference report on the National Industrial Recovery Act on the floor of the Senate, the following colloquy took place between Senator Norris and Senators Harrison (Chairman of the Senate Finance Commitee) and Wagner (who was one of the Senate Conferees). Congressional Record, Volume 77, part 6, pages 5853–5854.

The Senate resumed the consideration of the report of the committee of conference on

the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 5755) to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Mr. NORRIS. Mr. President, in the brief time which I shall occupy the floor I want first to call attention to an amendment agreed to in the Senate and which has gone out in conference. It is amendment numbered 44, found on page 19. The bill provided, in subsection (b) of section 202, as follows:

"(b) Conservation and development of natural resources, including control, utilization, and purification of water, construction of sewage-disposal plants, widening of streets, prevention of sewers and soil or coastal erosion, development of water power, transmission generation, transmission, and distribution of electrical energy."

An amendment was inserted on the floor of the Senate to add after the word "transmission" the words "generation and distribution." I supposed, when that addition was made, that there could be no possible objection to including those words. I do not yet see how anyone who would be willing to put in the word "transmission" would not also agree to having inserted the words "generation and distribution."

Mr. HARRISON. Mr. President——

The PRESIDING OFFICER (Mr. Barkley in the chair). Does the Senator from Nebraska yield to the Senator from Mississippi?

Mr. NORRIS. I yield.

Mr. HARRISON. I was in entire sympathy with the amendment offered by the Senator,

and tried to retain it as it was written in the bill, but the conference was told that that was included in the other provisions of the bill; that there was not the slightest doubt about the generation and distribution, as well as transmission, being taken care of under the general provisions of the bill.

Mr. NORRIS. Mr. President, of course, I accept the Senator's statement at 100 percent, but, as a matter of fact, while I think the position taken by the Senator's informant as to generation being included by construction may be tenable, there is absolute certainty, it seems to me, that distribution will be omitted from the terms of the bill. In the electrical world there are two distinct things that happen as to the electricity which is generated; first, there is the transmission; then there is the distribution. It is generally understood, so far as I know, without exception, by engineers that transmission does not include distribution. Transmission means the carrying of electricity from the place where it is generated to the place where it is distributed. That is transmission. For instance, if electricity were generated at Great Falls, and the electricity were brought to the city of Washington, the bringing of the electricity to the city would be transmission, but when it was furnished to the people within the city that would be distribution and would not be included in the term "transmission"; so that, as it now stands, I do not believe there would be any authority for a municipality which wished to distribute electricity to its own citizens to come under the terms of the bill.

Mr. HARRISON. May I say to the Senator that we inquired specifically of General Johnson, who was present, as to that, and he

said there was no question about it. That was the only reason why the word was stricken out. May I say to the Senator also that I was for including it in the bill because it was so plain.

Mr. NORRIS. I talked the matter over with the Senator from New York before I offered the amendment. It then had his full concurrence, and I have no doubt the Senator yet entertains the same view.

Mr. WAGNER. I will say to the Senator that I think the term should have remained in the bill as the Senator proposed it; but, after all, under a general provision of the bill I am sure any public project of a municipality, State, or any other political subdivision is included, and as the bill now stands there is certainly authority for the loan of money for the purpose of building transmission lines such as the Senator has in mind.

Mr. NORRIS. The building of a transmission line is an entirely different proposition from the building of a distribution line.

Mr. WAGNER. I mean there is ample authority also for the building of a distribution line. I refer to section 202.

Mr. GEORGE. May I call the Senator's attention to the language in section 202?

Mr. NORRIS. I yield to the Senator from Georgia.

Mr. GEORGE. In section 202, line 5, after describing public works, the language is:

"And any publicly owned instrumentalities and facilities."

Mr. NORRIS. Where is that language found?

Mr. WAGNER. That is the section I wanted to call the Senator's attention to.

Mr. GEORGE. It is section 202 of the bill, page 19, line 5.

Mr. NORRIS. The language of the bill, beginning in line 2, page 19, is as follows:

"(a) Construction, repair, and improvement of public highways and parkways, public buildings (including the remodeling of buildings hereby authorized to be purchased for Federal purposes), and any publicly owned instrumentalities and facilities."

Mr. WAGNER. I think that language covers it.

Mr. NORRIS. I do not believe that includes the distribution of electrical energy; and, Mr. President, even if it did, we should thereby lay the way open for an injunction, to start with, by privately owned power companies. I do not see any escape from it. Why not add the word "distribution"? "Transmission" is already in the bill. Why include transmission if it is already included under the general terms of the bill? And, if transmission be included, why not permit the electricity to be distributed after it has been transmitted?

Mr. WAGNER. Of course, my opinion always has been that these special provisions were unnecessary, in view of the general provision to which the Senator's attention has been called.

Mr. NORRIS. If the general provision applies, Mr. President, then none of this language should have been put in. It was put in by the other House; it was in the bill when it came to us, so far as transmission was concerned; and yet, if the Senator's theory is correct, it was already in in lines 5 and 6, and specific inclusion was absolutely unnecessary. The very fact that the word "transmission" was inserted and the word "distribution" was omitted, it seems to me when it comes to construing the proposed

act will be assigned as a reason to show that "distribution" was intentionally omitted.

Mr. WAGNER. Of course, I do not know what was in the minds of the conferees when the word was omitted, but I will say, as one who had a good deal to do with the legislation, that, so far as I am concerned, I feel very certain—and I do not see how any court or anyone construing the act can reach any other conclusion—that under the general terms "publicly owned instrumentalities and facilities" transmission and distribution lines are adequately covered.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

Nos. 84, 85.—October Term, 1937.

Alabama Power Company, Petitioner,
84 *vs.*
Harold L. Ickes, as Federal Emergency Administrator of Public Works, et al.

Alabama Power Company, Petitioner,
85 *vs.*
Harold L. Ickes, as Federal Emergency Administrator of Public Works, et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 3, 1938.]

Mr. Justice Sutherland delivered the opinion of the Court.

These cases involve certain "loan-and-grant agreements" made by the Federal Emergency Administrator of Public Works with four municipal corporations located in the State of Alabama. The bills of complaint sought to enjoin the execution of these agreements. Each agreement contemplates the construction of an electricity-distribution system by the designated municipality, and, to that end, the purchase, by the Administrator, of bonds to be issued by the municipality and secured by a first pledge of the revenues derived from the operation of the system. In No. 84 thirty and in No. 85 forty-five per cent. of the cost of the labor and materials used in the construction are to be donated outright. The authority relied upon for the loans and grants is that contained in Title II of the National Industrial Recovery Act[1] as modified and continued by the Emergency Relief Appropriation Act of 1935.[2] Title I of the former act has been declared unconstitutional by this court. *Schechter Corp.* v. *United States*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. But we are here concerned not with Title I but with Title II of the act. So far as material, that title provides:

"Sec. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works,

[1] C. 90, 48 Stat. 195, 200.
[2] C. 48, 49 Stat. 115, 119.

which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, . . . ; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, . . .

"Sec. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 [by later act 45] per centum of the cost of the labor and materials employed upon such project; . . ."

The bills of complaint challenge the validity of the loans and grants on the grounds, among others, that these statutory provisions purporting to authorize such loans and grants are unconstitutional; and that, in any event, the loans and grants do not come within the statutory provisions.

The injury which petitioner will suffer, it is contended, is the loss of its business as a result of the use of the loans and grants by the municipalities in setting up and maintaining rival and competing plants; a result, it is further contended, which will be directly caused by the unlawful act of the administrator in making and consummating the loan-and-grant agreements.

The suits were brought in the United States District Court for the District of Columbia. There, the respondents, in addition to defending the validity of the action of the administrator, con-

tended that petitioner was without legal standing to maintain the suits. After a full hearing, the district court held that petitioner had standing to challenge the administrator's action, but denied the injunctions and dismissed the bills of complaint upon the view that the statutory provisions were constitutional and that they conferred upon the administrator the power which he had exercised.

On appeal to the United States Court of Appeals for the District of Columbia, that court found it unnecessary to consider the validity of the loans and grants, and affirmed the decrees of the district court dismissing the bills on the ground that no legal or equitable right of the power company had been invaded, and the company, therefore, was without standing to challenge the validity of the administrator's acts. 91 F. (2d) 303. With that view we agree, and confine our consideration of the cases accordingly.

The trial court made elaborate findings, but for present purposes the following is all that need be stated. Petitioner is a corporation organized under the laws of Alabama, having its principal office and corporate domicile in that state. Respondent Ickes is the Administrator of the Federal Emergency Administration of Public Works, duly appointed by the President of the United States in pursuance of law. The other respondents are subordinate officers and agents of the same Emergency Administration, or officers connected with its operations.

Petitioner, under its charter, has the right to manufacture, supply and sell electrical energy throughout the State of Alabama. Among other communities served by its system are the four municipalities here involved, from each of which it has a non-exclusive franchise giving it the right to construct, maintain and operate within the municipality an electricity-distribution system. Petitioner is a taxpayer of each of the municipalities, of the counties in which they are located, and of the state, with respect to petitioner's properties and operations; and it also is a taxpayer of the United States with respect thereto.

Each of the municipalities is authorized under state law to construct and operate municipal electric plants and distribution systems, and to engage in competition with petitioner. Each is authorized to issue bonds for the purpose of financing the construction of such plants and to receive grants for that purpose; to mortgage its plant or any part of it and to pledge all or any part of the revenues derived from the operation of the plant as security for

the loan.[3] In each municipality an election was held prior to the making of the loan agreements, at which it was determined by a majority of the qualified voters that the municipality should engage in the electric business. The district court further found—

"Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the part of any of the defendants [respondents], their agents or subordinates. There was and is no conspiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to, nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regulate their rates or electric rates generally, or to foster municipal ownership of utilities.

"The expenditures under these statutes involve no purchase of, nor contract providing for, regulation by the United States. The failure of any city to apply for or receive loans or grants under those statutes will impose upon it no disadvantage or financial loss.

"The defendants have not reserved any right or power to influence or control rates to be charged by the proposed municipal power plants. . . .

"Neither the United States nor any of the defendants has reserved any right or power under the existing contracts, or in any other way, to require any of the municipalities to eliminate competition or to designate the person or agency from whom the municipality must purchase its power. . . .

"Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed. . . .

"Each of the projects herein involved is a part of a program of national scope, is designed to relieve unemployment, and promotes the general welfare of the United States."

These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. *Davis* v. *Schwartz*, 155 U. S. 631, 636-637; *Adamson* v. *Gilliland*, 242 U. S. 350, 353.

It, therefore, appears that each of the municipalities in question has authority to construct and operate its proposed plant and dis-

[3] See Oppenheim v. City of Florence, 229 Ala. 50.

tribution system in competition with petitioner, and to borrow money, issue bonds and receive grants for that purpose; that it determined to do so of its own free will, without solicitation or coercion; that there was no conspiracy between any of the respondents and any other person, or any effort or action motivated by a desire to cause injury or financial loss to petitioner, or any purpose to regulate rates or foster municipal ownership of utilities. It further appears that neither the United States nor any of the respondents has reserved any right or power to require an elimination of competition or designate any agency from which the municipality must purchase its power. Each municipality is left entirely free from federal control or direction in respect of the management and control of its plant and business. In short, the case for petitioner comes down to the contention that consummation of the loan-and-grant agreements should be enjoined on the sole and detached ground that the administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities have clear authority to take, will be used by the municipalities in lawful, albeit destructive, competition with petitioner

First. Unless a different conclusion is required from the mere fact that petitioner will sustain financial loss by reason of the lawful competition which will result from the use by the municipalities of the proposed loans and grants, it is clear that petitioner has no such interest and will sustain no such legal injury as enables it to maintain the present suits. Petitioner alleges that it is a taxpayer; but the interest of a taxpayer in the moneys of the federal treasury furnishes no basis for an appeal to the preventive powers of a court of equity. *Massachusetts* v. *Mellon*, 262 U. S. 447, 486 *et seq.* The principle established by the case just cited is that the courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." The term "direct injury" is there used in its legal sense, as meaning a wrong which directly results in the violation of a legal right. "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*,) does not

lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. . . . Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action." *Parker* v. *Griswold*, 17 Conn. 288, 302-303. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

Second. The only pertinent inquiry, then, is what enforcible legal right of petitioner do the alleged wrongful agreements invade or threaten? If conspiracy or fraud or malice or coercion were involved a different case would be presented, but in their absence, plainly enough, the *mere* consummation of the loans and grants will not constitute an actionable wrong. Nor will the subsequent application by the municipalities of the moneys derived therefrom give rise to an actionable wrong, since such application, being lawful, will invade no legal right of petitioner. The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria.* Stated in other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.

What petitioner anticipates, we emphasize, is damage to something it does not possess—namely, a right to be immune from lawful municipal competition. No other claim of right is involved. It is, in principle, as though an unauthorized loan were about to be made to enable the borrower to purchase a piece of property in respect of which he had a right, equally with a prospective complainant, to become the buyer. While the loan might frustrate complainant's hopes of a profitable investment, it would not violate any legal right; and he would have no standing to ask the aid of a court to stop the loan. What difference, in real substance, is there between the case supposed and the one in hand?

The ultimate question which, therefore, emerges is one of great breadth. Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results. And that question suggests another: Should

the loan be consummated, may such a one sue for damages? If so, upon what ground may he sue either the person making the loan or the person receiving it? Considered apart, the lender owes the sufferer no enforcible duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any lawful way the borrower may choose. If such a suit can be maintained, similar suits by innumerable persons are likewise admissible to determine whether money is being loaned without lawful authority for uses which, although hurtful to the complainants, are perfectly lawful. The supposition opens a vista of litigation hitherto unrevealed.

John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires*. The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted.

If there are conditions under which two distinct transactions, neither of which, apart, constitutes a judicially remediable wrong, may be so related to one another as to afford a basis for judicial relief, such conditions are not to be found in the circumstances of the present case.

What we have now said finds ample support in the decided cases. Among the decisions of this court, and directly in point, is *Railroad Co.* v. *Ellerman*, 105 U. S. 166. In that case, the railroad company was authorized by its charter, among other things, to obtain and afterwards manage, use and enjoy, wharves and the appurtenances thereto "in connection with its railroads." A Louisiana statute conferred upon the railroad the power to obtain and thereafter to own, maintain and use, suitable wharves, etc., "connected

with and incidental to said railroad." Pursuant to this authority, the railroad company acquired property which it used as a wharf and which, although limited by the statute and its charter to use for railroad purposes, it leased to certain persons for the mooring of vessels and the loading and unloading of cargoes upon and from all vessels of a kind designated. Ellerman operated certain public wharves under a contract with the city of New Orleans giving him the right to collect revenues derived therefrom. He brought suit to enjoin the execution of the lease of the railroad wharf. This court held that he was without legal standing to maintain the suit —his only interest being to prevent competition with himself as a wharfinger, which the more extensive and challenged use by the lessees of the railroad wharf would create, and his claim for relief resting only upon the allegation that the use proposed by the lease was beyond the corporate power of the railroad company to grant. "But if the competition in itself, however injurious," we said, pp. 173-174, "is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the

answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." Supporting cases are cited. See, also, *United States* v. *Dern*, 68 F. (2d) 773. Compare *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148; *Sprunt & Son* v. *United States*, 281 U. S. 249, 256-257; *Milwaukee Horse & Cow Comm. Co.* v. *Hill*, 207 Wis. 420, 423, 430-432.

The *Chicago Junction Case*, 264 U. S. 258, is not to the contrary. There, suit was brought by certain railroad companies to set aside an order of the Interstate Commerce Commission authorizing a competing company to acquire a terminal road. Answering the contention that complainants were without the legal interest necessary to entitle them to challenge the order, this court held that the right to sue arose in virtue of a special interest recognized by certain provisions contained in Transportation Act, 1920, and under § 212 of the Judicial Code which gave any party to a proceeding before the commission the right to become a party to any suit wherein the validity of an order made in the proceeding is involved. In this view, the *Ellerman* case was thought to be inapplicable. A reading of the case in connection with the dissenting opinion shows very clearly that, but for express statutory provision creating a different rule, the decision in the *Ellerman* case would have been controlling.

The precise question here involved was decided, in accordance with the view we have expressed, in *Duke Power Co.* v. *Greenwood County*, 91 F. (2d) 665, 676; same case, 81 F. (2d) 986, 997. Compare *Arkansas-Missouri Power Co.* v. *City of Kennett, Mo.*, 78 F. (2d) 911. See, also, *City of Allegan* v. *Consumers' Power Co.*, 71 F. (2d) 477. The *Greenwood County* case, *supra*, is now pending in this court upon certiorari, and will be determined upon the authority of our present decision.

Frost v. *Corporation Commission*, 278 U. S. 515, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making

similar valid grants to others, it was exclusive against an attempt to operate a competing gin without a permit or under a void permit. The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction against the commission and the Durant company. See *Corporation Commission* v. *Lowe*, 281 U. S. 431, 435. The difference between the *Frost* case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful.

We deem it unnecessary to review the many other cases cited by petitioner where suits against officials have been sustained. An examination of them will disclose the presence of fraud, coercion, malice, conspiracy, or some other element or condition of controlling force—none of which, as shown by the findings which we have accepted as unassailable, exists in the present case.

Decrees affirmed.

Mr. Justice BLACK concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.